



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL CASE NO 12 OF 2001**

**JOSEPH HINGA GATI ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK (K) LTD..... DEFENDANT**

**RULING**

The plaintiff herein Joseph Hinga Gati has filed this case against the defendant Barclays Bank of (K) Limited.

The averments in the plaint are that the plaintiff borrowed Kshs 1,000,000.00 from the defendant but he was advanced only Kshs 450,000.00; that the defendant charged interest on the amount which remained unutilized, which is illegal and unlawful; that the loan was for increasing stock in his business; that he has paid a substantial amount of what he utilized and his business dwindled when he was displaced from the premises he was using; that when he realized that his business was dwindling he approached the defendants with a view to sub-dividing the land to sell the same and pay off the loan; that he was given authority to sub-divide the same by the defendant which he has done and he only awaits for consent to be given; that the defendant has reneged on the agreement for sub-division and he has gone ahead to instruct auctioneers to sell the whole land title No UG/Kimumu/272 claiming the sum of over Kshs 2,300,000.00 which sum the plaintiff contends that it is exaggerated; that the defendant has been charging high interest rates and he has not tendered accounts; that the defendant has authorized the auctioneer to sell the land and yet no notice under the law has been served on the plaintiff and so the intended sale is illegal and the plaintiff seeks orders that the intended sale is illegal for lack of statutory notice and that the interest charged is unlawful and accounts to be taken and orders for permanent injunction to restrain the defendant from disposing land parcel No UG/ Kimumu/272 be given and that costs be provided for.

The plaint is accompanied by an application under order 39 rules 1, 2 ,3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking a temporary injunction to restrain the defendants, its agents employees and or servants from selling, alienating disposing and or in any other manner dealing with land parcel Uasin Gishu/Kimumu/272 pending hearing and disposal of the application and thereafter hearing of the main suit.

The grounds in support are those set out in the plaint namely that he applied for the loan and he was given only part of it; that the interest charged is illegal; the defendant has not been rendering account; he has been unable to pay because his business dwindled and he has also been paying heavy school fees; that when he encountered problems he approached the defendants with a view to having the property sub-divided and sold piece meal to pay off the debt which was granted and after the sub-division has been completed the defendants reneged on the agreement and that is the reason why he has come to Court to

seek redress, he maintains he was not served with the statutory notice; he was not supplied with accounts and the interest charged is illegal as he was not advanced the full amount.

While commenting on the replying affidavit counsel for the applicant stated that there is no evidence that Kshs 1,000,000.00 was disbursed, that although the defendant claims to have issued notice to the applicant the same was never posited or registered to him; that the advertisement for sale was in bad faith as the defendant allowed him to sub-divide and sell piecemeal, that there are triable issues which warrant the granting of an injunction.

The defendants have opposed that application on the ground that the applicant was granted the full loan, that he defaulted; that he has always been updated on the position of his accounts; they agree that the plaintiff approached them with a view to subdivide the land, sell it off and pay off the loan which consent was granted but he (plaintiff) failed to update them on the progress, that they later learned that the plaintiff had sold properties and failed to remit the proceeds to them; that due to this dishonesty on the part of the plaintiff they had no alternative but to advertise the property for sale; that they duly gave the statutory notice before advertisement and that is what prompted the applicant to come to the defendant to seek authority to subdivide the property, sell and pay off the loan; that the bank is entitled to issue only one notice and it was not obligated to issue another one after the negotiations failed; that the power to sell property crystallized and this court has no power to stop them from exercising the same; that the whole amount of the loan was disbursed; that disputes as to accounts cannot entitle a party to an injunction and that is settled in law; that a complaint on the manner the sale is being carried out is not a ground for granting of an injunction; that there is no bad faith on their part but it is failure of the applicant to update them on the progress of the sub-division and sale which prompted them to move to advertise the property; that the application should fail as there is no undertaking as to damages and also because an injunction is the only relief being sought by the applicant.

In reply counsel for the applicant stated that the alleged statutory notice is short of the 3 months notice envisaged by the law and no proof of postage has been given; that the amount disbursed is disputed and so the case has high chances of success; that the respondents' affidavit is not properly on record as they have not entered appearance and or filed defence and it should be struck out; that their application should be allowed as prayed as the case has high chances of success. The counsels referred the Court to authorities which I will also consider.

The case of *Trust Bank Limited –v- Eros Chemist Limited and White Stone Auctioneers (K) Limited* Nairobi CA 133/99 where it was held that in order for the right of sale to accrue the statute provided for a three months period to lapse after service of the notice and the notice of sale of the property must expressly state the sale shall take place after the three months period. To omit to say so or to state a period of less than three months for sale is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid.

The case of *Edith Njeri Magua – Versus – Johnson Mwaniki Magua and Betty Nyambura Munyoroka* Nairobi HCCC No 1167/96 where it was observed at page 4 of the judgment that the reason for requiring an undertaking is that an interlocutory injunction may have devastating effects on the person injured. He may suffer serious loss between the time it is granted and the date of trial. It is to take care of that contingency of probable injustice to the respondent that an undertaking to pay consequential damages should more often than not be insisted upon as the price for the remedy. Page 10 – the injunction was refused as the defendant had not given an undertaking as to damages.

The case of *Margaret Anyango -v- National Bank of Kenya Limited and 2 others* Nairobi CA 202/94 (94/94 LR) where at page 4 the Court found that the bank served the necessary statutory notice on both the applicant and the company and the indebtedness has not been disputed but the reason they seek an injunction is that the power of sale has been exercised fraudulently based on the contention that the suit premises was sold at an under value.

That if the applicant's complaint is that the statutory power of sale has been wrongly exercised she has a remedy in damages against the bank under section 77(3) of the Registered Land Act. As the debt is

admitted and the statutory notice was served on the applicants she is certainly not entitled to an injunction.

The applicant has not satisfied the Court that she has an arguable appeal, which if successful could be rendered nugatory if an injunction is not granted. The case of *Habib Bank of AG-Zurich –v Pop In (K) Limited and 3 others* Nairobi CA 147/89 were at page 5 the Court observed that there is clearly an admission of default and as I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee who has served a valid statutory notice can be restrained from exercising its statutory power of sale. The case of *J K Industries Limited –V- Kenya Commercial Bank Limited and East African Development Bank* [1982-88] 1KAR 1088 where it was held *inter alia* that questions of hardship caused to a party is not a ground for granting of an injunction. Lastly the Court was also referred to *Halsbury’s Laws of England* Volume 32 4th Edition paragraph 725 where it is stated

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however if the mortgagor pays the amount claimed into Court that is the amount which the mortgagee claims to be due to him unless on the terms of the mortgage the claim is excessive.”

Applying the foregoing principles of law on the facts of this application, the following factors are not in dispute:-

1. An undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue. Herein no undertakings has been given as to damages by the applicant.
2. The applicant complained in his reply to the defendant’s submission that their papers are invalid as they have not entered appearance and filed defence. Appearance and defence usually apply where summons to enter appearance have been taken out and served. I have looked at the record and find that there is a copy of a summon dated 19th January, 2001. There is a return of service dated 22nd January, 2001 filed the same day. It only talks of an application having been served. In the absence of service of the summons the defendants were not obligated to enter appearance and file defence. They were right in just filing a replying affidavit and for this reason their papers cannot be faulted.
3. It is trite law that a statutory notice shall be served before the onset of the realization of the statutory power of sale. Herein the applicant says it was not served and when one was exhibited it was contended that it was for less than 3 months. A copy was exhibited but none was on record as at the time of writing this ruling. It is stated that it is the defendants annexure 9 which is missing. It is enough to say that it has to be for 3 months and any notice which is less than 3 months is invalid. It also has to be served. Herein the applicant has also challenged service. Since I do not have annexure 9 I cannot say much about it. I have no alternative but to fall back on to the assertion of the defendant that this was served and it is the one which triggered off the negotiations for sub-division of the security and sale of the same. I tend to believe the defendant on this, as the plaintiff has not stated what prompted him to move into seeking authority to subdivide the land and sell it piece **Gati** meal. The conduct of the parties herein goes to show that statutory notice was served.
4. There has been complaint of failure to disburse the entire amount of 1 million but there is no letter exhibited from the applicant to the defendant that he had only been disbursed Kshs 450,000.00. I do agree that the bank statements have not been exhibited but the Court is of the view that if the total amount had not been disbursed the applicant could have raised complaint to that effect. The defendant has moved to realize security to cover the total amount for the entire loan and despite the applicant’s assertion on this aspect there is no counter claim for the amount he claims not to have been disbursed in the plaint presented.
5. The applicant has pleaded hardship in meeting the installments. The authorities show that the issue of hardship to individual and his family is never a consideration for granting of an injunction.

6. On the issue of failure to render accounts it is now trite law that this cannot form the basis for the granting of an injunction.

7. Lack of good faith on the part of the defendant(s) attributed to the fact of the defendants moving to advertise the sale of the whole property when they had given the applicant consent to sub-divide the same, the respondents have countered that by saying that indeed they gave that authority but they moved to advertise the whole property when the applicant failed to respond to their request to be updated on the progress of the sub-division and sale and secondly when they learnt that he had sold some portion of the said property but failed to remit the proceeds of sale to them. The proof has been exhibited by annexures to the replying affidavit.

The applicant did not put in an affidavit to counter these allegations. The applicant took a loan and undertook to pay. The authority to sub-divide and sell was for purposes of raising funds to repay the loan and his conduct of selling the property and failing to repay the loan shows that he was acting in bad faith and so he has not come to this Court with clean hands.

An injunction is an equitable remedy and the position in law is that it can only be granted to a person who comes to Court with clean hands. The conduct of the applicant herein shows that he has not come to Court with clean hands.

In view of the foregoing the Court is of the opinion that the defendant was entitled to move the way they did. The applicant is not entitled to the reliefs he is seeking as he has not shown *prima facie* case with a high probability of success.

1. The application dated 18th January 2001 be and is hereby dismissed with costs to the defendant/respondent.

2. The interim orders granted herein are vacated.

Dated and Delivered at Eldoret this 4<sup>th</sup> day of September 4, 2001

**R. N. NAMBUYE**

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**JUDGE**