



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 371 OF 2018

SAMUEL OCHIENG OKETCH.....PLAINTIFF

-VERSUS-

HFC LTD.....DEFENDANT

RULING

1. **Samuel Ochieng Oketch**, the Plaintiff, does not deny, in this action, that he charged his property **L.R. No. 209/14990/9**, to the Defendant, **HFC Ltd.**, for Kshs. 11 million. That charge is dated **27th October 2011**. The Plaintiff does not also deny that he fell into arrears in his repayment of his said loan.
2. The Plaintiff, by his Plaint, admitted that in April 2017 the Defendant served upon him, in view of his default to repay his loan, with a notice to pay his arrears and in default, the Defendant stated it would exercise its Statutory Power of Sale.
3. The Plaintiff further pleaded that he met with the Defendant and agreed that he would clear his arrears and that the Defendant would suspend the Redemption Notice and Notification of Sale.
4. The Plaintiff stated that in furtherance to that agreement, he paid the Defendant Kshs. 1,615,000. That despite that payment the Defendant demanded an arrears of Kshs. 1,011,825.50, on 22nd January 2018. That subsequently on 19th February 2018 the Defendant demanded payment of Kshs. 10,925,701.30 within 14 days.
5. That Letter of Demand and Defendant's threat to exercise its Power of Sale over the property was termed by the Plaintiff as being in bad faith and illegal.
6. The Defendant by its Affidavit, of Eunice Kamau its Legal Officer, deponed that the agreement that the Plaintiff clears the arrears did not exonerate the Plaintiff from making the monthly payment towards his loan. That the Plaintiff had admitted to being indebted to the Defendant.
7. It is on the basis of the above facts that the Plaintiff, by his Chamber Summons dated 2nd March 2018, seeks injunction to restrain the Defendant from selling the charged property in exercise of its Statutory Power of Sale.
8. When the said Chamber Summons came up for mention on 31st October 2018, the Learned Advocate for the Plaintiff stated that she had no further instructions on proceeding with the application and further that the Plaintiff had lost contact with the said Advocate.
9. It is then that I directed that the Chamber Summons be decided on the basis of the Affidavit evidence on record.
10. The Court of Appeal in the case **CHARTER HOUSE INVESTMENTS LTD VS SIMON K. SANG AND OTHERS, CIVIL APPEAL NO. 315 OF 2004** had this to say on injunction:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella Case (Supra), the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

11. The Plaintiff in this case failed to demonstrate a prima facie case with probability of success. This is because the Plaintiff admitted being indebted to the Defendant. Having admitted that indebtedness, the Defendant has a right to exercise its Power of Sale under the charge.

12. The Plaintiff also failed to show that he stands to suffer irreparable damage which cannot be compensated. The value of the charged property, undoubtedly, is ascertainable and accordingly compensation can be identified, if the Defendant's exercise of its Statutory Power of Sale of the charged property, is eventually, found to have been illegal. Since I find that I have no doubt in the first two principles of **GIELLA VS CASSMAN BROWN & CO. LTD. [1973] EA 358**, I will not proceed to consider where the balance of convenience, in this case lies.

13. It is for the above reason that I find the Plaintiff's Chamber Summons dated 2nd March 2018 is devoid of merit and is dismissed. The costs of the application shall follow the event.

14. The order of the Court, therefore are:

- a) **The Chamber Summons dated 2nd March 2018 is dismissed;**
- b) **The costs of the Chamber Summons are awarded to the Defendant; and**
- c) **At the reading of this Ruling, parties will be given a date to appear before the Deputy Registrar for purpose of confirming compliance with Case Management.**

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**