



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC.COMM. 4 OF 2016**

**CAMPUS HOSTELS LTD.....APPLICANT**

**VERSUS**

**1. HOUSING FINANCE CO. LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**2. TAIFA AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Plaintiff filed the plaint herein simultaneously with a Notice of Motion dated 13th January 2016, under Certificate of Urgency, and sought orders that:-

**i) THAT this application be certified urgent and be heard *ex-parte* in the first instance.**

**ii) THAT pending the hearing and determination of this Application inter-parties, the Defendants by themselves or through their agents or servants be restrained by way of a temporary injunction from selling by public auction or otherwise, disposing, selling, transferring, alienating, charging or in any other way dealing with the parcel of land known as MOMBASA/BLOCK XVII/1585.**

**iii) THAT the Defendants by themselves or through their agents or servants be restrained by way of an injunction from selling by public auction or otherwise, disposing, selling, transferring, alienating, charging or in any other way dealing with the parcel of land known as MOMBASA/BLOCK XVII/1585 pending the hearing and determination of this suit.**

2. Pursuant to the orders granted on 14.01.2016, prayer 2 was granted *ex-parte* and therefore what pends determination by the court is prayer 3 and of course prayer 4 which would be dependent upon outcome of prayer 3 and upon the courts discretion.

3. In considering that prayer, I will give consideration to the pleadings filed by either sides as well as the decisions cited and the principles of law applicable to grant of temporary injunction as now well settled.

4. However prior to the merits, there has arisen, the question of whether or not this court is seized of jurisdiction to entertain and determine this matter on the Constitutional provisions at **Articles 162(2)** and **165(5)** 5 of the constitution of Kenya 2010 and the enactments pursuant to **Article 162(3)**.

5. I have given due consideration to the law cited and the decided cases to which the court was referred.

In particular, the celebrated case in **RE, OWNERS OF MOTOR VESSEL Lilian 'S" vs CALTEX OIL (KENYA) LTD [1989] KLR 1** on how jurisdiction is vested cannot be overlooked. However, this court has in the past held and has not changed its view that a dispute between a chargee and a charger on the right to realize the security offered is a commercial transaction that may very well fall for determination by either the Environment and Land Court or high court. In **PETER NJOROGE VS COOPERATIVE BANK** the court said:

“ “

6. Like in the present case the defendant has not sought to use, occupy or have titles to land. It has merely sought to realize its security or collateral in order to get back the debt owed. To this court, therefore, the dispute is not over Environment and the use and occupation of and title to land. The point taken that this court lacks jurisdiction is therefore unmerited and is dismissed.

7. That determination leave the court with the need to determine merits of the application.

The Applicant/Plaintiff has founded his application on the facts that:-

**a) The defendants have unlawfully advertised the property for sale on 15/01/2016.**

**b) The 2nd defendant has placed an advert in the Daily Nation issue of Tuesday 12.01.2015 and intends to sell the suit property by public auction on Friday 15.01.2016 a mere (2) two days contrary to the Auctioneer Rules and the express, provisions of the Notification of sale dated 30.10.2015 and issued by the second defendant.**

**c) The first defendant has failed to issue the mandatory three months statutory notice as required by the provisions of section 90 of Land Act 2012.**

**d) Any notices issued by the 1<sup>st</sup> defendant, if any are defective null and void.**

**e) The legal charge dated 09/12/2010 over Mombasa Block XVII/1585 has todate never been lodged for registration and or registered at the companies registry by the first Defendant as required by law.**

**f) The plaintiff has in fact confirmed to the 1st defendant that the mortgage debt shall be fully settled by the Plaintiff or on before 30/01/2016.**

8. Those positions were supported and grounded on the pleadings in the plant itself at paragraph 8, 9, 10, 13 & 18 where it is averred as follows:

**Paragraph 8: The Plaintiff, in spite of falling in arrears, kept in touch with the First Defendant and carried out negotiations and gave proposals for the payment of the mortgage debt.**

**Paragraph 9: The Plaintiff informed the Defendant of the difficulty of making the monthly loan repayments and thus proposed to liquidate the full mortgage debt by selling the Plaintiff's director's other properties.**

**Paragraph 10: The Plaintiff went ahead and offered the parcels of land known as L.R No. 6485/1/MN and L.R No. 4667/III/MN valued at Kshs.20 million respectively. The two sale transactions are in the final stages of completion.**

**Paragraph 13: On or about 10th December 2015 the Plaintiff through its advocates issued a letter to the First Defendant assuring them that the mortgage debt would be paid not later than 30th January, 2016 since the proceeds of sale of the mentioned properties would have been received. The Plaintiff requeabout:startpagedest the First Defendant not to take any**

**precipitate action.**

**Paragraph 18: The Plaintiff reiterates that the mortgage debt shall be fully paid by 30th January 2016. The First Defendant has received this information and indeed the evidence of the sale of the two properties proceeds of which will be utilized to pay the said mortgage debt.**

9. The Pleadings suggest and can only suggest that default is admitted, the debt is not contested and that the only goal sought to be achieved by the suit was the time within which to pay. Even the time limit is given as 31/01/2016.

10. However, at *paragraphs 21, 22 and 23* the Plaintiff attacks the 1st defendant right to realize the security and alleges that no Notices have been served; that if any Notices were issued, the same were defective and that the charge was in any event not registered with the Registrar of Companies with the consequence that the law was not complied with.

The Plaintiff then alleges irreparable loss and assets that it stands to lose a property worth some Kshs.70,000,000/-.

11. To the plaintiff pleadings the defendant filed statements of defence dated 28/01/2016 and filed in court on same day as well as a replying affidavit sworn by one MARTIN MACHIRA before Justine Kaburu on 22/01/2016.

12. The statements of defense besides asserting the service of due notices, the 1st defendant assert that the plaintiff indeed sold the property known as LR No. 4667/111/MN on 24/09/2015 but did not pay to it proceeds therefrom as promised. On advertisement alleged to have been inadequate the defendants plead that prior to the advert of 12/1/2016, there had been an advert on the 30/12/2016. On compliance with section 97, Companies Act, the 1<sup>st</sup> defendant pleads it was the plaintiff's duty to have the charge noted in the Register of Companies and not the defendant's duty.

13. In the replying affidavit the Defendants have exhibited documents being bank statements showing that as at 01/12/2016, the debt stood at Kshs.21,287,130.77; and Statutory Notice dated 30/1/2015 issued pursuant to section 90(3) of Land Act giving to the plaintiff a period of three(3) months to pay the debt or the defendant would exercise the statutory rights of sale after expiring of notice. That Notice was acknowledged by the plaintiff by a letter of 13/4/2016 enclosing a sale agreement by which the plaintiff was selling another property at Kshs.25,000,000 and the letter thus sought a period of 90days to conclude the sale. A further notice was issued on 17/5/2015 and acknowledged by the plaintiff's letter of 03/6/2016 still requesting for indulgence upto 18/7/2015. Equally exhibited in a valuation report dated 14/8/2015 putting the forced sale value at Kshs.37,500,000/-.

14. I have considered the pleadings filed and documents exhibited in extensio not to look at the merits of the case in finality but to interrogate the question of whether or not a prima facia case has been demonstrated.

15. Prima facia case is a case that may not necessarily succeed but that which is arguable. Put it in context of the matter before court, I find that the debt is admitted, extension of time has been sought and granted atleast twice and requisite notices have been shown to have been served and acknowledged. In those circumstances, I have posed the question as to what would be the dispute between the parties regarding an infringement of the plaintiffs rights that deserve protection by an order of injunction?

16. Without going to the merits I am afraid none has been born out. What is born out is that the plaintiff owes a debt, it says it is due for payment and for that purpose it was selling another asset to offset the debt. Infact, it is repeated twice in the papers filed that by end of January 2016, the debt would have been paid in full. If that was the purpose of coming to court, I am in no doubt that time was given to the plaintiff when in court on 14/01/2016 granted to the plaintiff an exparte interim order which cushioned it to the desired date. There is therefore as of today no dispute to disclose a prima facia case.

17. The requirement for grant of a temporary injunction as set by the Court of Appeal in *GIELLA VS CASMAN BROSON & CO. LTD* [1973] EA, 358 and confirmed by subsequent judicial pronouncements by the superior courts of this country are cumulative and must go together and not a single one will suffice.

18. In *Nguruman Limited vs Jan Bonde Nielsen & 2 others* the Court of Appeal said :-

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of prima facie case does not permit “leap frogging” by the applicant to injunction directly without crossing the other hardles in between”.***

22. With the debt being accepted, payment having been promised by the 31/1/2016, now past, I am convinced that the plaintiffs case is not arguable at all on the facts pleaded and concession made by the plaintiff. Having so found there is no prima facie case disclosed and I will not take time in considering the second question of irreparable injury.

Finally, I am in no doubt or uncertainty on the two issues hence no need to consider balance of convenience.

23. The upshot is that the application is misconceived, bad in law and is ordered dismissed with costs.

Dated delivered in open court in the presence of:-

No appearance for plaintiff/applicant

Mr Korgere for the defendant/respondent

this 5th day of September 2016.

**HON P.J.O. OTIENO**

**JUDGE**

**5.09.2016**