



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 72 OF 2012

ZACHARY N. NJERUPLAINTIFF/APPLICANT

VERSUS

CONSOLIDATED BANK LTDDEFENDANT/RESPONDENT

R U L I N G

1. The applicant filed an application dated 19/03/2013 seeking the following orders;
 - a. That the honourable court be pleased to issue temporary injunction barring the defendant/respondent/its agents/ auctioneers from selling by way of public auction L.R GATURI/GITHIMO/1852 pending hearing and determination of this application.
 - b. That the honourable court be pleased to order stay of sale by public auction of L.R Gaturi/Gathimu/1852 pending the verification of the actual amount of loan payable.
2. The application is grounded on the annexed affidavit of Zachary N. Njeru and on the following grounds;
 - a. The sale of L.R Gaturi/Gathimu/1852 by public auction is set for 22/3/13
 - b. The amount due has been inflated by the defendants/respondent
 - c. The plaintiff/applicant is ready to settle the amount in full once the verification is done.
 - d. The applicant should be granted a chance to redeem the mortgaged property.
3. The applicant in the supporting affidavit confirms that he owes the respondent money. However he alleges that there is a discrepancy on the amount due for payment and that to clear this discrepancy he forwarded the issue to the Interest Advisory Centre. He states that it is only fair and just that he be granted a chance to ascertain the actual amount payable and that he is willing to pay the actual amount once the same is verified. He urges the court to grant him a chance to redeem the mortgaged property by issuing the orders sought.
4. The applicant also filed a further supporting affidavit wherein he attached Re-calculation Statements from the Interest Rates Advisory Centre which indicated that the amount due was ksh.2,257,318/= as of 30/5/2012 and not ksh.2,627,541/= as alleged by the respondent. The amount in dispute was therefore Ksh.370,223/=. He urged the court to ascertain the amount payable.
5. The respondent in the replying affidavit states that the applicant does not deny being in default and that he has previously made proposals for payment which he has never honoured. The respondent confirms that the auctioneer under the instruction of the bank issued 45 days redemption notice on as

ordered by the honourable court. That the applicant has however not made any effort to settle the outstanding amount even after being issued with the redemption notice and that the outstanding amount still continues to attract interest and penalties as per the terms of the facility contained in the charge signed between the applicant and the respondent.

6. The respondent further states that the applicant can be adequately compensated by way of damages in the event that it is proved that the outstanding amount is less than what the respondent is claiming. She claims that the current application is *resjudicata* as the issues being raised currently were already canvassed in an application filed earlier by the applicant before this honourable court and ruling delivered.

7. Regarding the allegations by the applicant on payment of legal and auctioneers fees, the respondent claims that the applicant undertook to indemnify the respondent on all expenses relating to the security including its realisation and can therefore not be heard complaining that the auctioneer and legal fees should not be included in the outstanding amount. The respondent also alleged that the last payment made by the applicant to offset the outstanding amount was on 7/5/12 and that the applicant has not bothered to make any other payment since then. On the loss of property the respondent stated that the applicant had contemplated the same when he offered the property as security towards repayment of the loan.

8. UNDISPUTED FACTS

- a. That the applicant is indebted to the respondent.
- b. That the applicant was served with a redemption notice as ordered by court on 28/12/2012.
- c. That the applicant last made attempt to offset the outstanding amount on 7/5/12 when he made the last amount.
- d. That IRAC has provided a statement of the outstanding amount.

9. DISPUTED FACTS

- a. That the applicant owes the respondent ksh.2,257,318.25 and not ksh.2,627,541/=.
- b. That an injunction should be granted until the matter is resolved.

10. ISSUES FOR DETERMINATION

- i. Whether the court should grant an injunction stopping the respondent from exercising its statutory power of sale.
- ii. Whether the applicant has come to court with clean hands.

ISSUE NO.(i)

11. The applicant was granted interim orders pending hearing and determination of this application. The applicant engaged the services of The Interest Rates Advisory Centre (IRAC) to ascertain the same and later attached a Re-calculation Statement from the same institution in his further supporting affidavit. According to the applicant the outstanding amount as per the IRAC statements is ksh.2,257,318 and that the respondent has inflated the outstanding balance by ksh,370,223. It is worth noting that the applicant has repeatedly indicated that he is willing to clear the balance once the amount payable has been ascertained.

12. It is clear and undisputed that the applicant has been served with the redemption notice as ordered by the court on 28/12/2012. The issue of whether the plaintiff's case meets the requirements laid down in the case of **GIELLA VS CASSMAN BROWN** was already determined by this court in its ruling delivered on 28/12/13 and hence the same cannot be dealt with again as the facts of the case remain the same. It therefore remains *resjudicata*.

In **NAIROBI HCCC NO 527 OF 2013**, the court held that the bank has a right to exercise its power of sale under section 96(1) of the Land Act, 2012 which states as follows;

Section 96(1); ***"Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for rectification of the default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the land"***.

Section 96(2) "Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell the prescribed form and shall proceed to complete any contract for the sale of the charged land until at least forty days have lapsed from the date of service of such notice."

The court (quoting the case of ***BHARMAL KANJI SHAH & ANOTHER VS SHAH DEPAR DEVJI***) also held that a ***"court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage....."***. The court also quoted the case of ***FINA BANK LTD VS RONAK LTD (2001)1 EA 54*** where the Court of Appeal held that a dispute on accounts was no basis for grant of an injunction.

13. In view of the fact that the court had already dealt with the issue of whether the applicant's case meets the requirements provided in the case of ***GIELLA VS CASSMAN BROWN*** for granting an injunction and the fact that the court cannot stop a party from exercising the statutory power of sale, I find that the injunction sought should not be granted

ISSUE NO (ii)

14. It is undisputed that the applicant owes the respondent money and that he last made payments to offset the outstanding amount on 7/5/12. The applicant has repeatedly mentioned in his affidavits that he is willing to pay the owing amount once the same has been ascertained. The applicant however doesn't seem to have approached this court with clean hands. One wonders why he has not paid the amount that was ascertained by IRAC vide a letter dated 25/4/2013. In my opinion the applicant should have at least made effort to pay the ksh.2,257,318.25 already ascertained by IRAC as the outstanding amount. I find that the plaintiff has not come to this court with clean hands and therefore the court should not aid him by granting him the orders sought.

15. In the case of ***FRANCIS J.K ICHATHA –VS- HOUSING FINANCE COMPANY LTD (QUOTED IN NAIROBI HCCC 527 OF 2013*** the court held that;

"A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected by virtue of his own refusal to make repayments to the defendants a debt which he expressly undertook to pay"

16. Had the applicant been keen on settling what he owes the respondent he could have endeavoured to do so once he received the advice from the Interest rates Advisory Centre (IRAC). He has done nothing.

This outstanding amount continues to attract interest. The applicant has failed to demonstrate that if the respondent proceeds to realize the amount owing he will suffer irreparable loss/damage which cannot be compensated by the bank.

I therefore find no merit in this application which I dismiss with costs.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF JULY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

M/s Ndorongo for Mugambi for applicant

Kirong – C/c