



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Case 290 of 2011

FRANCIS ODONGO ODIYO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS.....2ND DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....3RD DEFENDANT

RULING

In a Notice of Motion dated 10th October 2011 and filed on 12th October 2011 and filed on 12th October 2011, the Applicant sought the following orders -

- (1) that this application be certified as urgent and its service be dispensed with on a priority basis,**
- (2) that pending the hearing and the determination of this application, this honourable court be pleased to issue an order of injunction restraining the 3rd Defendant by himself, his employees, agents and or any other person acting under his authority from registering L.R. NO. NAKURU MUNICIPALITY/BLOCK 15/417 KANYI (KABACHIA) NAKURU in the name of any 3rd party,**
- (3) that pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of injunction restraining the 3rd Defendant by himself, his employees, agents and or any other person acting under his authority from registering L.R. NO. NAKURU MUNICIPALITY/BLOCK 15/417 KANYI (KABACHIA) NAKURU in the name of any 3rd party,**
- (4) that the cost of the Application be borne by the Defendants/Respondents.**

The Application was based upon the grounds on the face thereof and the Supporting Affidavit of the Applicant sworn on 10th October, 2011.

It was opposed by the Replying Affidavit of Migui Mungai, the Respondent's Legal Manager, Litigation sworn on 28th October 2011 and filed on 31st October 2011. The Motion was argued before me on 21st March 2012. The respective arguments for and against the grant of an injunction against the

registration of the suit property will appear in the subsequent passages of this Ruling.

Issues of fact are not in dispute. The Applicant is the registered proprietor of all that parcel of land known as Title Number Nakuru Municipality/Block 15/417 KANYI (KABACHIA) NAKURU (*the suit property*). The suit property was charged to the 1st Respondent HFCK to secure credit facilities or loan from the HFCK. The Applicant defaulted in the repayment of the loan. By a letter dated 22nd February 2007, HFCK gave the Applicant the 90 days Statutory Notice required under Section 74 of the Registered Land Act, (*Cap. 300, Laws of Kenya*) requiring the Applicant to redeem the loan account then standing at shs 7,980,075.90.

Upon receipt of that notice, the Applicant entered into negotiations with the 1st Respondent from that period ending with the 1st Respondent's letter dated 11th May 2011 accepting the Applicants offer to pay Kshs 5,050,088/= by 12th August 2011, and in default, the 1st Respondent would reclaim the full debt then outstanding at shs 7,464,310.90 plus interest and reiterating its right to exercise its statutory powers of sale pursuant to the statutory notices already sent to the Applicant, and that it shall not be required to issue any other realization notice. The offer was to lapse on 12th August, 2011.

In the event the Applicant defaulted and offer lapsed, and the 1st Respondent proceeded to instruct Garam Investments Auctioneers to realize the security by sale of the suit property. The suit property has been sold by public auction, and the transfer is pending registration.

In order for the Applicant to obtain such an order, the Applicant must satisfy the principles which are now accepted in Kenyan jurisprudence for grant of such orders -

- (i) ***the applicant must show he has a prima facie case with a probability of success,***
- (ii) ***that the loss he will suffer if injunctive orders are not granted will be so great that he will not adequately be compensated in damages,***
- (iii) ***that in any event, the balance of convenience is in his favour if the court has any doubt.***

As judges have often said, in order to show a prima facie case, with a probability of success, the Applicant must prove or show some irregular or illegal act on the part of the Respondent. For the proposition that he cannot be adequately compensated in damages, an applicant should show that the Respondent is a person or entity of straw, and will not, if the Applicant is successful in his suit, be in a position to adequately compensate him in damages, and because the applicant is able to establish the two principles for granting injunctions, it will also assist in persuading the court that the balance of convenience lies with the Applicant.

The question however is, has the Applicant established that he has a prima facie case with a probability of success? Or that the Respondent is not in a position to compensate him in damages should he ultimately succeed in his suit against the Respondent, or that the balance of convenience lies with the Applicant?

The Applicant received the requisite statutory notice of 90 days required under Section 74 of the Registered Land Act. The Respondent indulged him from February 2007 to November 2011 when the suit property was sold to the highest bidder, over and above the Reserver Price. The requirements of notice having been complied with both by the Respondents, the Applicant has no basis for pleading illegality or other procedural irregularity. Although Section 74 does not require the giving of double notices, **RICHARD WANJIRU GUTU VS. CO-OPERATIVE BANK OF KENYA LTD. AND ANOTHER [2004] eKLR** there may, in my view, where a borrower has shown consistent performance in repayment of the loan over a period of at least one or more years, after the expiry of the initial notice, be prudent to serve such a borrower with an additional notice. In this case, the Applicant was reminded at all material time that the statutory notice of February 2007 was still valid, and that the only variable, was the amount due, and of which the Applicant was aware, and in any event the applicant defaulted from

time to time. There was therefore no reason to send another statutory notice to the Appellant.

If there was any illegality and I hold there was none, the Applicant's remedy is an action for damages under Section 77(3) of the Registered Land - **BOMET BEER DISTRIBUTORS LTD & ANOTHER VS. KENYA COMMERCIAL BANK LTD & OTHERS [2005] eKLR** - that the remedy for irregular exercise of statutory power by a chargee is in damages and not an injunction.

The question of punitive interest rates had been considered and determined by the Hon. Maraga J (*as he then was, now Judge of Appeal*) in Nakuru HCCC No. 226 of 2008 between the same parties, for similar orders, and was dismissed in a Ruling delivered by the learned judge on 7th May 2009, and indeed any argument on the aspect of interest rates is *res judicata*.

Finally, as the property has been sold and is pending registration, the balance of convenience lies with the Respondents. The Applicant claims that the property was sold at an undervaluation. Prime valuers gave him current open market value of Ksh 13,300,000/= (*shs 1.5 million for the land, and 11.8 million for improvements*). Prime Valuers did not give what the price would be upon a forced sale. This is however a good ground for seeking damages from the Respondents, but not an injunction.

I need not remind the Applicant that a property once charged becomes a commodity for sale and sell it, before it becomes a subject of a forced sale.

For those reasons the Applicant's Notice of Motion first referred to above, fails and is dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered at Nakuru this 6th day of July, 2012

M. J. ANYARA EMUKULE
JUDGE