



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 223 OF 2012**

**JUSTUS WAMBUA KAVYU.....PLAINTIFF/  
APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/  
RESPONDENT**

**R U L I N G**

By a Summons dated 17th April 2012, the Plaintiff has applied under Order 40 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for an order restraining the Defendant from realizing its security known as LR No. NBI/Block 127/347, Saika Estate Nairobi (hereinafter “the suit property”). Alternatively, that pending the hearing and determination of Industrial Court Case No. 194 of 2012, the Defendant be restrained from exercising its statutory power of sale in respect of the suit property.

The Motion was supported by the Affidavits of the Plaintiff sworn on 17<sup>th</sup> April, 2012 and 24<sup>th</sup> May, 2012 respectively. In those Affidavits, the Plaintiff contended that he was in the Defendant’s employment since 2<sup>nd</sup> October, 1985 until he was wrongfully terminated on 18<sup>th</sup> February, 2012, that he had challenged the said termination in the Industrial Court Case No. 194 of 2012 seeking reinstatement with full benefits, that on 22<sup>nd</sup> March, 2012 he received a redemption Notice by Baseline Auctioneers, that if he is re-instated in the said Industrial Court Case, he will be entitled to recover all his benefits and there would have been no default as the Defendant would recover all the past arrears through his salary as had been the case before his termination. The Plaintiff further contended that the suit property had been charged on the understanding that the loan will be serviced from his salary on the employment with the Defendant, that he has been regularly paying the loan ever since July, 2007, that the Defendant had not served any proper statutory notice.

Mr. Nyabena, learned Counsel for the Plaintiff submitted that the statutory notice served was defective since it combined the unsecured sums with the amount secured by the charge, that the amount demanded is disputed, that the Defendant had not shown how it arrived at the outstanding sum of Kshs.1.8 million yet the amount that had been borrowed was Kshs.1.9 million. Counsel urged the Court to allow the application.

In opposition, the Defendant filed a Replying Affidavit sworn by David Muthika on 15<sup>th</sup> May, 2012. The Defendant contended that under Clause 9 of the Letter of Offer dated 13<sup>th</sup> June, 2007 one of the grounds for default was the Plaintiff ceasing to be an employee of the Defendant which had occurred, that a breach had occurred under Clause 1 and 6 of the Charge, that the dispute in the Industrial Court had no relevance

to the dispute before this court, that under the Charge the Plaintiff was still obligated to observe his contractual obligations even after leaving his employment with the Defendant.

Mr. Bundotich, learned Counsel for the Defendant submitted that the statutory notice had been properly issued, that there was an amount of Kshs. 1.8 million outstanding which had not been disputed, that the issue before this court is whether there has been any default as opposed to the issue before the Industrial Court and that there has been no prima facie case established within the meaning of **Giella –vs- Cassman Brown Case** to warrant the granting of the orders sought. Counsel urged that the application be dismissed.

I have considered the Affidavits on record and the submissions of Counsel.

This is an injunction application and the principles to be considered are well known. As enunciated in the case of **Giella –vs Cassman Brown (1973) EA 359** the applicant must establish a prima facie case with a probability of success, that an injunction will not normally issue unless the Applicant will suffer damage that cannot be compensated by an award of damage and that if the court is in doubt it will decide the matter on a balance of convenience.

From the Affidavits on record, the loan is not disputed, default is not denied, the security is also not in dispute. The issues raised are that since the loan was tied to the Plaintiff's employment with the Defendant, the Defendant should not exercise its statutory power of sale until the dispute pending before the Industrial Court is determined, that the redemption Notice by Baseline Auctioneers and the Statutory Notice by the Defendant are defective.

I have considered the Letter of Offer dated 13<sup>th</sup> June, 2007. Under clause 9 thereof, one of the events of default set out is the Plaintiff's ceasing to be an employee of the Defendant. Can it then be said that until the issue of the Plaintiff's employment is decided, the Defendant cannot exercise its rights under the law? I do not think so. Whilst the letter of offer may have tied the transaction to the Plaintiff's employment, under the Charge which is the document from which the exercise of the statutory power of sale arises, the Plaintiff is obligated to service the loan and failure to do so amounts to a default. My view is that, whilst the dispute before the Industrial Court is whether or not the Plaintiff's employment was legally terminated, the dispute before this court is whether the Plaintiff has defaulted in his obligations under the Charge. I am of the further view that whilst default may have occurred by the Plaintiff's termination of employment under Clause 9.5 of the Letter of Offer, there would have been no default if the Plaintiff would have continued to service the loan under the Charge. Indeed in the termination letter itself, the Defendant informed the Plaintiff that what had happened was to convert his loans to public terms from 1<sup>st</sup> March, 2011 and that he was required to give proposals on how to settle the same. My view therefore is that, the dispute in the Industrial Court has little, if any, relevance to this suit.

On the issue of the defectiveness of the redemption notice, I have looked at that notice dated 22<sup>nd</sup> March, 2012, in my view it does satisfy the requirements of the law. In any event, the Plaintiff did not specify what the alleged defects are.

As regards the statutory notice, the Plaintiff has contended that it is defective for having combined secured and unsecured loans. However, the Plaintiff did not show that the Charge document did not allow such a consolidation. In any event, my reading of Clause 9(i) of the Charge dated 9<sup>th</sup> July, 2007 is to the effect that the Defendant was entitled to consolidate the Plaintiff's indebtedness to it. Therefore, looking at the Statutory Notice dated 7<sup>th</sup> November, 2011 by the Defendant, I see nothing wrong with it.

Accordingly, my view is that the Plaintiff has not established any prima facie case with any probability of success.

Having come to that conclusion, I do not think that I need to address the other limbs of **Giella –vs- Cassman Brown**. However, if my views are required, they are also not in favour of the Plaintiff. Nowhere in the Affidavit filed by the Plaintiff has he stated that he will suffer loss or damage

that cannot be compensated by an award of damage if the injunction is not granted. In any event, on my part, I see none.

Finally, I believe that the balance of convenience tilts in favour of allowing the Defendant recoup its outlay.

Accordingly, I find that the Plaintiff's application dated 17<sup>th</sup> April, 2012 to be without merit and I dismiss the same with costs.

**DATED** and **Delivered** at Nairobi this 13<sup>th</sup> day of July, 2012.

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**A. MABEYA**  
**JUDGE**