



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 99 OF 2010

CHARLES OWAKA

OCHIENG'PLAINTIFF

VERSUS

**KENYA UNION OF SAVINGS & CREDIT CO-OPERATIVES LIMITED.....1ST
DEFENDANT**

WATTS ENTERPRISES.....2ND DEFENDANT

RULING

The Plaintiff/Applicant in the Chamber Summons dated 16th February 2010, which is brought under **Order XXXIX Rules 1(b) 2, 3 and 9** of the **Civil Procedure Rules** (2009 revised Edition) and **Section 3A** of the **Civil Procedure Act**, seeks an order for a temporary injunction, pending the hearing of his suit, restraining the Respondents, either by themselves, their respective officers, servants and/or agents from disposing of, alienating, transferring, selling and/or otherwise interfering with the Applicants title, ownership and/or possession of the land parcel No. known as plot No. 118/247 (a portion of LR No. 31 Ruaraka).

The application is based on the grounds that the Respondents have threatened to sell the above-stated property either by private treaty or public auction in execution of a non-existent and/or invalid mortgagee's power of sale and without issuing any valid notices, in contravention **Section 69A** of the **Indian Transfer of Property Act** and **Section 74** of the **Registered Land Act** (Cap 300 of the Laws of Kenya). The application is supported by the Plaintiff/Applicant's affidavit sworn on 14th February 2010, in which he admits, *inter alia*, that he had entered a loan agreement with the 1st Respondent on 15th December 2003, vide which the 1st Respondent loaned to him a sum of Kshs. 300,000/= payable in 3 years by way of monthly instalments of Kshs. 10,400/= each. That the loan was applied towards the purchase of the suit property which was to be charged to the 1st Respondent as security, in addition to the transfer of the Applicant's shares in Lucky Summer Estate Company Limited by way of a pledge. The charge and pledge instruments were however not executed.

The Applicant depones that he made some payments towards repaying the loan but defaulted when he lost his employment and could no longer service the loan, hence the threat by the Respondents to dispose of the property. He depones further that he has developed the plot by erecting thereon a 3 bed roomed house and would therefore wish that he be given an opportunity and time to repay the remainder of the loan.

Despite the above admissions and offer, the Applicant nonetheless challenges the intention of the 1st Respondent to sell the property to recover its loan, stating that the notice served on him by the 2nd Defendant, (annexed to the supporting affidavit as annexure "COO3") is neither valid as a notice issued in exercise of the Statutory Power of Sale as by law provided or as is prescribed under **Rule 15 (d)** of the **Auctioneers Rules**.

After being served with a replying affidavit filed in opposition to the application the Applicant filed what is referred to as "*Supplementary Supporting Affidavit*" (Further Affidavit) to buttress his depositions in the supporting affidavit, particularly as relates to the repayments made, which he claims to be Kshs. 190,700/= and not Kshs. 124,500/= as stated by the Respondent; and to annex documents to confirm that he had developed the suit property, thereby enhancing its value.

As earlier stated the application is opposed on the strength of the Respondent's replying affidavit of 16th March 2010, in which it is deponed that the agreed repayment period expired in 2007 and that the Applicant, having admitted his indebtedness and conceded his inability to pay the debt, due to unemployment and lack of regular income, the application, as well as the suit are misconceived, premature and otherwise an abuse of the process of the court.

Written submissions were filed in the application and have been duly considered. The Applicant has proceeded on the basis that the provisions of **Section 69A** of the **Indian Transfer of Property Act** and the **Auctioneers Rules** have not been complied with in that an appropriate notice, in exercise of the chargee's Statutory Power of Sale ought to have been served. Two authorities to support that position were cited in addition to **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] E.A. 358**.

Learned counsel for the Respondents submitted and rightly so, in my view, that the provisions of the **Indian Transfer of Property Act** did not apply in the absence of a charge, and that the law applicable, therefore, is the law of contract. He agreed with learned counsel for the Applicant that the discretionary power of the court to grant an injunction or not is to be exercised judiciously, but submitted that the Applicant has not established a prima facie case with a probability of success, or that he would suffer irreparable loss if the orders were not granted or that the balance of convenience favoured him. Counsel submitted further that the notice issued by the 2nd Respondent on behalf of the 1st Respondent was sent merely to inform the Applicant that the 2nd Respondent had been instructed by the 1st Respondent to commence the process of disposing the plot to recover the debt due.

That the Applicant borrowed money from the 1st Respondent to finance the purchase of the suit property is not disputed. Neither is the fact that the loan was to be repaid in full within three years and that the Applicant has defaulted in so doing. By his own admission, he is unable to repay the loan. That no change was registered does not extinguish the 1st Respondent's rights under the contract, which in my view, only entitles the Respondent to commence recovery action, the intended security having not been registered to confer upon the 1st Respondent the rights of a mortgagee/chargee. The Applicant, being in clear breach of the agreement between himself and the 1st Respondent has no basis upon which his action against the 1st Respondent can be maintained. I find that he has not established a prima facie case against either of the Respondents given the circumstances of the case. He has not demonstrated any irreparable loss in the context of **GIELLA –VS- CASSMAN BROWN & CO. LTD** (Supra) and the balance of convenience does not tilt in his favour at all. Moreover, the applicant has not made any attempt to demonstrate his readiness/intention to clear the outstandings, despite the reprieve he has enjoyed for a whole year since he

obtained interim orders herein on 22nd February, 2010. It is clear that the applicant has not approached the court with clean hands and cannot expect to benefit from an equitable remedy in the circumstances.

For the above reasons, the orders sought cannot issue and the application dated 16th February 2010, is hereby dismissed with costs to the Respondents. Accordingly, the interim order issued by the court on 22nd February, 2010 is vacated.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST day of MARCH, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Jaoko

No appearance

For the Applicant

For the Respondent