



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL SUIT 184 OF 2006**

**JANE GAKII MARETE.....PLAINTIFF**

**VERSUS**

**SAVINGS & LOAN KENYA.....DEFENDANT**

**RULING**

Before me is an application for an interlocutory injunction under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules. The application is by the plaintiff against the defendant. The brief background is as follows: At the beginning of 2005, the plaintiff successfully applied for a loan of Kshs. 7,200,000/= from the defendant which sum was secured by a charge over LR No. 2545/1/MN Nyali Mombasa (hereinafter “the charged property”). The plaintiff defaulted in the repayment of the said loan and the defendant sought to realize the security. The plaintiff then instituted this suit and sought an order of injunction to restrain the defendant from, *inter alia*, selling the charged property in exercise of its statutory power of sale. That application was lodged on 30<sup>th</sup> August 2006 and after inter partes hearing, Maraga J on 25<sup>th</sup> May 2007 held as follows:-

**“In the circumstances, I allow this application and grant the injunction sought to restrain the defendant from selling the charged property but not until this suit is heard and determined as prayed. As the only meritorious ground I find in the application is one of failure to serve the statutory notice, I direct that the defendant is at liberty to sell the charged property after serving the plaintiff with that notice.”**

It appears as if the plaintiff did not challenge Maraga J’s order. The defendant therefore served the requisite notice upon the plaintiff. The plaintiff seems to have acknowledged that the said notice was proper and was served upon her. However, when the auctioneers commenced the process of sale the plaintiff sought to restrain the sale in her application lodged on 22<sup>nd</sup> January 2008. That is the application which came up before me for hearing on 11<sup>th</sup> March 2009. The primary order sought is for a temporary injunction restraining the defendant, among others, from advertising, selling by public auction or otherwise howsoever interfering with the charged property pending the hearing and determination of this suit or further orders of the court. There are two grounds in the body of the application namely that the defendant has not served the plaintiff with the 45 day redemption notice subsequent to the service of the Statutory Notice and that the plaintiff’s attempts to settle the loan have been frustrated by the defendant.

The application is supported by an affidavit sworn by the plaintiff in which it is deponed that the

defendant agreed to reschedule her loan repayment but subsequently, unilaterally, changed its mind and served a Statutory Notice of Sale. It is further deponed that contrary to the provisions of the Law, the plaintiff was not served with the 45 day redemption notice thereby rendering the defendant's action wrongful and illegal.

The application is opposed by the defendant. In this regard, the defendant has filed two affidavits. One affidavit is sworn by one Clement Kasena, the defendant's Mombasa Branch Manager and another is sworn by one Onesmus Macharia, the auctioneer who served the impugned auctioneer's notice. The defendant's Branch Manager has deponed that pursuant to the ruling of Maraga J, there was no requirement to serve the 45 day redemption notice and that in any event the defendant had previously served a valid redemption notice. Those averments notwithstanding, the Branch Manager has further sworn that a valid 45 day redemption notice was infact served upon the plaintiff. He also denies that the defendant entered into any agreement with the plaintiff regarding rescheduling the loan repayment. The Branch Manager has further sworn that the plaintiff has not endeavoured to make any payment to off-set the outstanding loan and her application has been brought in bad faith. The auctioneer, on his part, has deponed that he indeed served a fresh 45 day redemption notice although the same was not necessary.

I have considered the application, the affidavits filed and the submissions made to me by counsel. Having done so, I take the following view of the matter. The principles applicable for the grant of an interlocutory injunction are now settled. They were crystallized in the precedent setting case of **Giella – vs – Cassman Brown & Company Limited and Another [1973] EA 358**. They are: Firstly the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages. It must be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly the same will not be granted where it is shown that the applicant's conduct with respect to the matters pertinent to the suit does not meet the approval of a court of equity.

In the application at hand, the applicant does not dispute that she was served with the Statutory Notice of Sale as ordered by Maraga J. She also does not dispute that she is indebted to the defendant for a large sum of money and that she has been in default on the payment of the sum. Indeed she expressly acknowledges the same. It is therefore clear that the defendant's statutory power of sale has arisen and is exercisable. The plaintiff's principal complaint relates to the 45 day redemption notice which she denies receiving. On the material availed to the court, I find, prima facie, that the question of service of the 45 day redemption notice has neither been proved nor been disproved. Under the Evidence Act therefore the redemption notice is accordingly deemed not proved. But that issue is not of any moment now as the sale was stopped. Non-compliance with the Auctioneers' Rules is therefore now of mere academic interest. In any event, whether non-compliance with the Auctioneers' Rules per se would vitiate a chargee's statutory power of sale which has arisen and is exercisable is moot. Speaking for myself I would opine that such non-compliance would only be a mere irregularity which would not form the foundation for an order of temporary injunction. This is because the further period provided under the Auctioneers' Rules appear to accord a mortgagor or a chargor an additional period to redeem the charged property which in effect extends the statutory period provided under the Registered Land Act or the Transfer of Property Act. An extensive consideration of this issue is not necessary as the same was not canvassed before me by counsel.

The second ground for lodging this application is that the plaintiff's attempts to settle the loan have been frustrated by the defendant. The basis of that complaint is found in paragraphs 4 and 5 of the plaintiff's affidavit in support of the application. She depones that on 8<sup>th</sup> October 2007, she met a Mr. Ombuor, the defendant's Credit Analyst to whom she proposed to pay Kshs. 2,000,000/= by mid-December 2007 but contrary to the agreement between the plaintiff and the said Ombuor, her said proposal was declined. The defendant's Mombasa Branch Manager denies any such agreement in his replying affidavit. Indeed the plaintiff was advised of the defendant's position in its letter dated 2<sup>nd</sup> November 2007 which she has annexed to her supporting affidavit. Given those facts, it cannot be true that the plaintiff's attempts to settle the loan have been frustrated by the defendant.

In the premises, I am not persuaded that the plaintiff has established a prima facie case with a probability of success at the trial. Having come to that conclusion, I need not consider the other conditions for the grant of an interlocutory injunction. However, even if I were to consider the application under the condition that an injunction ought not to issue where damages would be an adequate remedy, I would still reject the plaintiff's application as the plaintiff in offering her property as a security gave it a value and if sold damages would adequately compensate her.

Even on balance of convenience, I would still reject the plaintiff's application as further delay in the realization of the security might diminish its value as a security for the repayment of the increasing indebtedness of the plaintiff to the defendant. Balance of convenience would therefore tilt in favour of the defendant.

As already stated, the conduct of the applicant with respect to matters pertinent to the suit is relevant as this is an interlocutory injunction application which is a discretionary equitable remedy. In that regard, I am of the prima facie view that the plaintiff's conduct is not deserving of the equitable relief sought. The plaintiff, on her own admission, owes a large sum of money to the defendant. Since the ruling of Maraga J on 25<sup>th</sup> May 2007, she has made no single payment towards her indebtedness to the defendant. She proposed to pay Kshs. 2,000,000/= by mid December 2007. She did not and instead shifts blame for her failure to settle the indebtedness upon the defendant. The plaintiff, in my view, has not done equity and is not entitled to equity.

The upshot of my above consideration of the plaintiff's application dated 22<sup>nd</sup> January 2009 is that the same is without merit and is dismissed with costs to the defendant.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF JUNE 2009**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Tindika for the Applicant and Mr. Wameyo for the Respondent.

**F. AZANGALALA**

**JUDGE**

**3<sup>RD</sup> JUNE 2009**