

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 122 of 2009

JAMES OYUGI MANGLA.....PLAINTIFF

VERSUS

BARCLAYS BANK

LTD.....DEFENDANT

RULING

Sometimes in May, 2004, the plaintiff obtained a loan of Kshs. 2,500,000/= from the defendant. The loan was secured by a charge over the plaintiff's parcels of land known as GEM/ KAJULU/_1180 and GEM/ KAJULU/ 1255 which were said to be valued at Kshs. 500,000/= and Kshs. 900,000/= respectively. The plaintiff was to pay the loan together with the interest thereon within a period of 48 months from May 2004. The plaintiff admitted that he had been unable to service the loan as scheduled.

As a result to the plaintiff's default, the defendant decided to exercise its statutory power of sale of the charged properties. The sale is scheduled to take place on 2nd July, 2009. According to a demand letter dated 20th November, 2008 from the defendant's Advocates, M/s Muriu Mungai & Company, the outstanding sum as at that date was Kshs. 2,612,647.45. However, the Notification of sale served upon the plaintiff by M/s Garam Auctioneers showed that the outstanding sum as at 20th November, 2008 was Kshs. 8,095,990.31. The difference between the two figures is big and unjustified, the plaintiff averred.

In paragraphs 11 and 12 of his affidavit, the plaintiff deposed as hereunder:

"10. That the respondent/ defendant have not indicated to me the value they wish to sell my securities at considering that the value placed on the list of securities and the value on terms and conditions of offer are all different as per annexure marked JOM5.

12. That consequently, I wish to swear this affidavit in support of my application for orders temporarily staying sale of my securities pending the fixing of a reserve price based on actual value of my securities"

From the foregoing, it is clear that the default on the part of the plaintiff is not denied. There is also no denial that the appropriate statutory notice and Notification of sale were duly served upon the defendant. The only argument relates to the actual outstanding sum and what the reserve price of the two properties ought to be.

In HABIB BANK AG ZURICH VS POP-IN (K) LTD & OTHERS, Civil Appeal No. 147 of 1989, the Court of Appeal held that a dispute as to the exact amount under the mortgage is not a ground upon which a mortgagee who has served a valid statutory notice can be restrained from exercising his statutory powers of sale.

The issue relating to the actual outstanding sum is one which ought to have been discussed and/ or worked out between the parties right from the time when the plaintiff received the bank's demand letter and the Notification of sale.

As regards the issue of the reserve price, I believe the bank instructed a valuer to value the charged

properties and determine the market value as well as the forced sales value. The plaintiff has not shown any valuation report done by himself. And in any event, this is not a factor that can cause a court to stop an otherwise merited sale. In the event that the sale goes on and the plaintiff proves that the properties were sold fraudulently, he can sue for damages.

In my view, the plaintiff has not demonstrated a **prima facie** case with good chances of success to warrant the issue of an injunction in his favour. He has also not demonstrated that he will suffer irreparable loss unless the orders sought are granted.

Lastly, the plaintiff was well aware of the intended sale since April, 2009 or even earlier. Why did he have to wait until the last two days before the intended sale to seek these orders? In my view, the move reeks of bad faith and an intent to frustrate the defendant's efforts of recovering public money. If a party believes that he has a good case that warrants grant of an injunction, he should demonstrate good faith in every action that he takes and that includes moving to court in good time to seek the desired orders. I find no merit in this application and dismiss the same. There will be no order as to costs since the defendant is yet to be served.

Dated at Kisii this 1st day of July, 2009.

D. MUSINGA

JUDGE.