



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 287 of 2009

**SAMSON NGUGI ICHUNGWA T/A GRENAIR.....
..... PLAINTIFF**

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LTD.....DEFENDANT

RULING

The basis of the plaintiff's suit as contained in his plaint is, *inter alia*, that the defendant ought to be permanently restrained from selling the parcels of land known as Kikuyu/Kikuyu Block 1/48 and Kikuyu/Kikuyu Block 1/55 (*hereinafter referred to as the suit properties*) on account of the fact that the defendant had acted unconstitutionally in attempting to sell the suit properties by public auction at a price that was undervalued. The plaintiff complained that the defendant had failed to take into consideration its plea to have the repayment of the loan rescheduled. The plaintiff averred that the defendant was unreasonably purporting to exercise its statutory power of sale without taking into consideration the fact that the plaintiff had made a reasonable proposal to repay the debt. The plaintiff therefore urged the court to issue a declaration that the intended sale of the suit properties at a price that is grossly undervalued is illegal and unfair to the plaintiff.

Contemporaneous with filing suit, the plaintiff filed an application pursuant to the provisions of **Order XXXIX Rule 2** of the **Civil Procedure Rules** seeking orders of temporary injunction to restrain the defendant either by itself or through its agents or servants from proceeding with the intended sale or interfering, alienating or otherwise howsoever dealing with the suit properties pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. Henry Maina, the legal counsel and manager- legal of the defendant's debt recovery unit swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Miss Kamende on behalf of the plaintiff and by Miss Karanja for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The facts of this case are more or less not in dispute. The plaintiff is the proprietor of a business known as Grenair World Trade Frontiers. In May 2007, the plaintiff applied for a loan from the defendant to facilitate the working capital of the business. The defendant responded favourably to the plaintiff's application. The plaintiff was granted an overdraft facility of Kshs.8 million and a hire purchase loan of Kshs.254,000/=. The plaintiff secured the said loan by charging the suit properties which were valued at Kshs.17.5 million at the time the loan was advanced. A legal charge was registered in respect of the two properties. Subsequently thereafter, the terms of the loan were renegotiated. The overdraft element of the

loan was reduced to Kshs.2 million. The Kshs.6 million overdraft was converted to a term loan. It was apparent from the time the loan was disbursed that the plaintiff was unable to keep up with the repayment schedule so that about a year later, the plaintiff was already in arrears. Although the plaintiff deponed that his financial troubles were caused by deterioration of the economic environment caused by post-election violence, it was clear to the court that even if that fact was taken into account, the plaintiff's capacity to repay the loan was put in doubt long before the occurrence of the said event.

I have perused the bank statements in respect of the loan account. It was evident that the plaintiff sporadically repaid the loan resulting in the escalation of the outstanding amount once the interest element was charged on the loan amount. The defendant severally wrote to the plaintiff with a view to securing his cooperation in the reduction of the arrears that were outstanding in respect of the said loan. The negotiations did not yield any fruit hence the defendant's decision to realize the securities. The defendant first attempted to sell the charged property in 2008. On 8th February 2008, the defendant issued statutory notice to the plaintiff intimating its intention to sell the suit properties in exercise of its statutory power of sale. The plaintiff filed suit challenging the said notice. The suit is **Nairobi HCCC No.592 of 2008 Samson Ngugi Ichungwa t/a Grenair vs National Industrial Credit Bank Ltd.** The plaintiff and the defendant compromised the suit. According to the defendant, it was moved to compromise the suit when it realized that the statutory notice it had issued was defective. A consent was recorded in court on 14th October 2008 by which the offending statutory notice was withdrawn. The parties further agreed for the public auction slated for the 14th October 2008 and which was scheduled on the basis of the defective statutory notice be cancelled.

It is the plaintiff's case that subsequently thereafter, he made proposals to the defendant with a view to liquidating the outstanding loan amount. To this effect, the plaintiff wrote to the defendant a letter dated 26th March 2009 by which he proposed to liquidate the loan by paying an equivalent sum of Ksh.1 million per month for three months (April, May, June 2009) and thereafter to pay Kshs.300,000/= per month until payment in full of the outstanding loan. It was apparent that the plaintiff was constrained to make the said proposal after he was served with another statutory notice (this time a valid one) by the defendant. The statutory notice was issued on 24th October 2008. The defendant responded promptly by its letter dated 1st April 2009. The defendant declined to accept the plaintiff's proposal in light of the plaintiff's past promises which were not honoured. The defendant notified the plaintiff that it would proceed with the sale by public auction as scheduled. It was the defendant's rejection of the plaintiff's proposal that prompted the plaintiff to file the present suit.

For the plaintiff to prevail in its application, it must establish a prima facie case that will likely to succeed during the full hearing. The plaintiff must also establish that he would suffer irreparable harm that will not be compensated by an award of damages if the injunction sought is not granted. If the court will be in doubt, it will determine the application on a balance of convenience (see **Giella vs Cassman Brown [1973] EA 358**). The plaintiff's complaints in this application are threefold: the first complaint is that he was unreasonably denied by the defendant an opportunity to repay the loan. The plaintiff predicates this plea on the repayment proposal that was made but was rejected by the defendant. It was clear to the court that this reason cannot be upheld by this court. If indeed the plaintiff intended to repay the outstanding amount as indicated in his said letter of 25th March 2009, nothing would have been easier than for the plaintiff to pay the said sum of Kshs.3 million during the three month period after this suit was filed.

There is nothing in law that prevented the plaintiff from fulfilling its legal obligation of repaying back the loan. I may be wrong, I stand to be corrected, but I am of the view that the pendency of a suit in court does not discharge a borrower from his legal responsibility to repay back the outstanding loan amount together with any interest that may have accrued. As a sign of good faith, and its intention to abide by the proposal made, if the plaintiff had made payments to the defendant in accordance with his proposal, this court would have been inclined to give consider favourably the plaintiff's application. As it were, it was evident that the plaintiff's proposal was made in bad faith. The plaintiff had no intention, as per his previous conduct, of not repaying the outstanding amount in accordance with the proposal made. I hold that this reason is not sufficient ground to restrain the defendant from exercising its legal and statutory

right to recover the outstanding amount by realizing the securities charged to it.

The second complaint of the plaintiff relates to the valuation reports that have been prepared by the defendant in anticipation of the sale of the suit properties in a public auction. According to the plaintiff, the said valuation reports that sets out the forced sale values of the suit properties, constitutes a gross undervaluation of the suit properties. It is the plaintiff's case that the suit properties are worth more than the values in the valuation reports prepared on the defendant's instructions. The plaintiff argued that the suit properties were worth more than Kshs.26 million whilst the defendant was proposing to sell the suit properties at a forced sale value of Kshs.14 million. The plaintiff was of the view that the intended sale by public auction would constitute a breach of his constitutional right to own property. The plaintiff in particular cited **Section 75** of the **Constitution** in support of his case. The plaintiff argued that by seeking to sell the suit property at a price that is a gross undervaluation, the defendant would be committing fraud on the plaintiff. In response to this argument, it was the defendant's case that it will exercise due diligence in the sale of the suit properties so as to secure the best possible price in the circumstances. The defendant submitted that it would rely on a valuation report that will have been prepared at least a year before the scheduled auction date.

I have evaluated the arguments made by the parties in this regard. I noted that although the plaintiff submitted that he was apprehensive that the suit properties would be fraudulently sold by the defendant in exercise of its statutory power of sale, the plaintiff did not plead fraud in his plaint. Neither did the plaintiff set out the particulars of fraud. It is evident that the plaintiff raised the issue of fraud in his submissions without any foundation or basis in his pleadings. Further, I am inclined to agree with the submissions made by the defendant that the plaintiff cannot argue that the suit properties will be sold at a price that will be below the market price or the forced sale value before the sale has even been undertaken. The plaintiff's apprehension that the suit properties would be sold at a price that is undervalued is based on fear and not on an actual event that has taken place.

This court cannot restrain the defendant from exercising its statutory power of sale on the basis of speculation. The plaintiff must establish grounds which, *prima facie*, persuade this court that the defendant will act or has acted unlawfully in exercise of its statutory power of sale. It seems to the court that the plaintiff is suggesting that the suit properties are likely to attract a higher price than the forced sale value in the valuation reports. Nothing in law prevents or prohibits the plaintiff from securing a buyer for the suit properties at a price that he deems suitable and then presenting such a buyer to the defendant for appropriate contract to be entered into. It would be to the advantage of the plaintiff if he is able to secure such a buyer for the suit properties before the defendant is compelled to sell the same by public auction. The plaintiff did not allude to having secured a buyer for the suit properties. It was therefore manifest that the plaintiff's speculation that the suit properties will be sold at a price that is undervalued is not based on reality. This court holds that the ground has no merit. The defendant is not breaching the plaintiff's constitutional right to own property. The defendant is in fact enforcing its constitutional right to property. There is nothing unlawful in a chargee exercising its statutory power of sale pursuant to a valid and legal instrument of charge.

Has the plaintiff established a *prima facie* case to entitle this court grant him the interlocutory injunction sought? I do not think so. The undisputed facts of this application are that the plaintiff borrowed money from the defendant; secured the same by charging the suit properties; defaulted in repaying the said loan; failed to redeem the properties when he was issued with a valid statutory notice; and, has so far made no effort to repay the outstanding amount together with the accrued interest. I hold that the defendant cannot be denied its statutory right to redeem the suit properties. In the event that the defendant fails to discharge the obligation placed on it to secure the best possible price for the suit properties during the sale by public auction, damages will be an adequate remedy for the plaintiff as provided under **Section 77(3)** of the **Registered Land Act**. The balance of convenience tilts in favour of the defendant which is being kept out of its money.

The upshot of the above reasons is that the plaintiff's application dated 27th April 2009 lacks merit and is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2009.

L. KIMARU

JUDGE