



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CIVIL CASE NO. 2544 OF 1996

LEWIS NGUYAI NGANGA.....PLAINTIFF

VERSUS

MADISON INSURANCE COMPANY LIMITED.....DEFENDANT

RULING

By a consent letter dated 2nd and filed in court on 5th December, 1997, both learned counsel agreed that the issue to be determined by the court on the application dated 14th October, 1996 should be:

“was the defendant’s foreclosure notice properly issued?”

Both learned counsel have addressed the court on the application, relating the same to the pleadings and the authorities cited.

The plaintiff was an employee of the defendant. in his pleadings he says he was wrongfully terminated. The terms under which the plaintiffs’ employment with the defendant operated are found in the Personnel Procedure Manual which is part of the record before me. Section 15 thereof provides for House mortgage Benefit which applied to the plaintiff.

In the exercise of that benefit the plaintiff was advanced a loan to purchase a house. This is L.R. No. 13767/137. The loan applied for was Khs. 2, 680,000/-.

After termination of the plaintiff’s employment with the defendant the defendant gave the plaintiff notice for the realisation of the security for breach of the terms of the Charge which had been registered against the property in favour of the defendant. In so doing, the defendant was exercising its statutory power of sale under the charge.

The application before me is therefore to restrain the defendant by way of an order of injunction from disposing of the plaintiff’s premises pending the determination of this suit. In this suit he has claimed among other things damages for wrongful dismissal benefits e.t.c.

The application is strenuously resisted.

Clause 1.9 of Section 15 of the manual referred to above provides as follows

“ 1.9 If the employee is in breach of the terms of the mortgage/charge, the company will be entitled to call in the loan or exercise any other of the remedies reserved in the mortgage document.”

The termination of the services of an employee of the defendant does not end the mortgage facility save that the company reserves the right to match the interest rates with applicable commercial rates in the market for the same.(See 15 clause 1.6)

As I have observed a charge was created over the suit property. The same was registered as required by law and in executing the same the parties bound themselves to the terms and conditions therein.

Although the mortgage scheme was pegged to the service contract, the execution of the charge created a separate contract independent of any other save for the provisions therein. I have only, therefore, to look at the charge, the provisions therein, compliance or otherwise and the law relating thereto.

The defendant retained the statutory Power of Sale under the charge. Where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively. (See C.A NO. 13 OF 1987 Godfrey Ngumo Nyaga -v- Housing Finance Company of Kenya Limited.)

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute. (See C. Appn. No. 14 of 1995 J.L. Lavuma & Others - v- Civil Servants Housing Co. Limited & Savings and Loan Kenya Limited.)

In the instant case it has not been denied that the plaintiff has made only one payment in respect of repayment of the loan under the charge. This payment was forKshs. 53,060/40 on 18/9/96. He has banked a lot on his claim against the defendant based on his service contract. That is a contested issue and the only admission made by the defendant is in the sum of Kshs. 616,647/-. It is also the defendant's case that the plaintiff resigned from employment and the defendant had all the right to accept the same.

In any case I said the contract of service is separate from the mortgage. The plaintiff does not deny receipt of the statutory notice. I have found that he defaulted in repayment. The defendant was duty bound to protect its interest under the charge. I find the notice was properly issued.

In the end I see no prima facie case with a probability of success. The application for injunction must fail as the order cannot be given without resultant injustice on the part of the defendant. Accordingly the same is dismissed with costs to the defendant. Order accordingly.

Dated and delivered at Nairobi this 21st day of January, 1998.

A. MBOGHOLI MSAGHA

JUDGE