



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 229 OF 2016**

**HON. S. O. ARAMA.....PLAINTIFF**

**VERSUS**

**FAMILY BANK LTD.....DEFENDANT**

**RULING**

***(An application for interlocutory injunction; plaintiff alleging that no valid statutory notices were served and that the defendant has not complied with section 44 of the Banking Act leading to escalation of amount owing; defendant showing proof of service of notices; application dismissed)***

1. This ruling is in respect of Notice of Motion dated 27<sup>th</sup> June 2016 wherein the plaintiff seeks the following orders:

1. *Spent.*

2. *Spent.*

3. *THAT pending the hearing and determination of this suit, this Honourable Court be pleased to grant an injunction restraining the defendant herein either by themselves, their agents, employees and/or servants from attaching, selling, disposing off and/or in other manner interfering with the parcel of land known as NAKURU/MUNICIPALITY/BLOCK 21/889.*

4. *THAT costs be provided for.*

2. The application is brought under Order 40 rules 1 and 2 of the Civil Procedure Rules and is supported by the affidavit of the plaintiff wherein he deposes that he and his wife charged the property known as Nakuru/Municipality/Block 21/889 in favour of the defendant to secure a loan advanced to him and his wife by the defendant. That due to poor business and hard economic times they faced difficulties in repayments leading to escalation of interests to the tune of Ksh.9,131,052.22 as at 8<sup>th</sup> June 2016. That in view of the situation the defendant instructed an auctioneer who served upon the plaintiff a Notification of Sale stating that the property would be sold by public auction on 12<sup>th</sup> August 2016. The auctioneer also served the plaintiff with a 45 days redemption notice. The plaintiff contends that the notification of sale is illegal.

3. The application is opposed by the defendant through the replying affidavit of Antony Ouma. The defendant contends that a loan was advanced to the plaintiff as aforesaid and was secured by a charge over the suit property whose registered owner is the plaintiff's wife. That upon defaulting in his repayment obligations the defendant issued a statutory notice under section 90 of Land Act 2012 to the

plaintiff's wife on 30<sup>th</sup> June 2014 through registered post to her address as per the charge document and another notice on 30<sup>th</sup> September 2014. Certificate of postage was exhibited. That the plaintiff and his wife failed to exercise the right of redemption. That through a letter dated 19<sup>th</sup> August 2016, the plaintiff requested the defendant to restructure the mode of repayment. That ultimately, the plaintiff and his wife failed to pay the amount owing and as a result, a notice of sale was served upon the plaintiff and his wife on 12<sup>th</sup> August 2016 and a 45 days redemption notice on 10<sup>th</sup> June 2016.

4. Parties agreed to dispose of the application by way of written submissions. The defendant's submissions dated 9<sup>th</sup> February 2017 were filed on 10<sup>th</sup> February 2017 while the plaintiff's written submissions dated 29<sup>th</sup> May 2017 were filed on 6<sup>th</sup> June 2017.

5. The plaintiff submits that the defendant has not been forthright on the true amount that is owing. Regarding the issue of statutory notices, the plaintiff submits that the defendant has not shown proof of service of the notices. The plaintiff also argues that the defendant has not complied with section 44 of the Banking Act and that there is no valid reason why the initial amount owing has risen from KShs 3,000,000 to KShs 9,131,052.22.

The plaintiff thus submits that he has established a prima facie case and that the application ought to be allowed.

6. In an application for an interlocutory injunction the applicant must satisfy the test laid down in **Giella vs Cassman Brown 1973 EA 358**. The first limb of the test is that there must be a prima facie case with a probability of success. I have reviewed the evidence put before the court by the parties. The plaintiff maintains that he was not served at all or validly with statutory notices. I have however noted from the replying affidavit that statutory notice under section 90 of Land Act 2012 was served upon the chargor by registered post through the address used both in the letter of offer and the charge document. All in all, I am persuaded that the plaintiff and the chargor were served with notices.

7. The plaintiff has also complained that there is no valid reason why the initial amount owing has risen from KShs 3,000,000 to KShs 9,131,052.22. This is despite the fact that he admits that he was unable to fully honour the repayment obligations due to hard economic times. The law is clear that dispute on the amount owing alone cannot be a basis for granting an injunction to restrain a chargee from exercising power of sale. In **St Elizabeth Academy- Karen Limited v Housing Finance Co of Kenya Limited [2013] eKLR** Kamau J. stated as follows:

**37. A legal position has been taken that a Mortgagee will not be restrained from exercising its power of sale because the amount was in dispute. I wish to reiterate the position espoused in the Halsbury's Laws of England 4<sup>th</sup> Edition Vol 32 at page 725 cited in HCCC No 10 of 2010 Scholastica Nyaguthii Muturi vs Housing Finance Co of Kenya Limited on page 8 that-**

**"The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount into court, that is, the amount the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive."**

8. I have said enough to make it clear that I do not see any prima facie case with a probability of success. In such circumstances, I need not look into whether the other limbs of the test in **Giella** have been established. In the end, Notice of Motion dated 27<sup>th</sup> June 2016 is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of July 2017.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Mwangi holding brief for Mr. Juma for the plaintiff/applicant

Mr. Bore holding brief for Mr. Ogolla for the defendant/respondent

Court Assistant: Gichaba