



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT MALINDI**

**civ app 342 of 2000**

**GIRO COMMERCIAL BANK LIMITED .....APPELLANT**

**AND**

**HALID HAMAD MUTESI .....RESPONDENT**

**JUDGMENT OF THE COURT**

This is an interlocutory appeal from a ruling and order of the superior court (Mrs. Khaminwa, Commissioner of Assize) whereby that court granted an injunction restraining the defendant (the appellant before us) from selling by auction or private treaty the plaintiff's (the respondent here) Plot No. L.R. 3156, Section 1, M.N. Mombasa (the suit property) until the hearing and determination of Mombasa H.C.C.C. NO. 205 of 2000. The respondent had borrowed money from the appellant on the security of the suit property and at this stage we see no need to go into what happened between the parties as regards sale of the respondent's property known as L.R. NO. 1613/V/M.N. Mombasa as it is not relevant. After the sale of that property the suit property remained charged to the appellant for the loan which the respondent still had and was to get from the appellant.

The respondent requested the appellant to increase his loan facility and agreed to charge another property to secure the further facility he was to get. That charge never came into existence as the bank with which that property was charged declined to give a discharge of the charge until it was paid the sum due to it and secured by the charge. As at 18th March, 1999 the respondent was indebted to the appellant in the sum of Shs.9,134,486/65 and was not servicing the loan. It is not in dispute that the appellant gave the requisite notice to the respondent calling upon him to pay up the debt with a warning to him that the suit property would be put up for auction unless he paid the debt. It is common ground that the notice was pursuant to the provisions of Section 69(1)(a) of the Transfer of Property Act. It is also not in dispute that after the expiry of that notice the appellant's agents Yusuf Dato & Associates issued a notice advertising sale of the suit property after giving the appellant a 45 day notice to redeem the property.

The only dispute really raised by the respondent was that the appellant had not carried out a proper valuation of the suit property prior to putting up the property for sale and that the notification of sale did not contain the true value of the suit property. Whereas the respondent had the suit property valued at Shs.13,000,000/= the auctioneer had put the same, for a forced sale, at Sh,11,000,000/= . The respondent had complained that the property was not properly described. The alleged misdescription was that it was not stated that the construction of the building on the property was complete. It was on these complaints that the learned Commissioner of Assize granted the injunction which is now the subject matter of this appeal. It has been held time and again that a mortgagee cannot be restrained from exercising his power

of sale because the amount due is in dispute, or that the mortgagor has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. See Halsbury's Laws of England, Volume 32, paragraph 725.

In view of the admitted facts, and in view of the fact that the debt was admittedly due and further that the loan was not being serviced, the superior court should not have granted the injunction. The first principle as laid down in *Giella v. Cassman Brown* guidance was not satisfied, that is to say, the respondent had not made out a prima facie case with a probability of success. The learned Commissioner of Assize therefore erred in granting the injunction. In the circumstances this appeal is allowed. The order of injunction made on 30th May, 2000, is hereby set aside; the respondent's application dated 24th April, 2000 filed on 25th April, 2000 is dismissed with costs. The appellant will also have the costs of this appeal.

**Dated and delivered at Mombasa this 18th of January, 2002.**

**R.O. KWACH**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**M. Ole KEIWU A**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**