



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL MISCELLANEOUS APPLICATION NO. 101 OF 2001**

**CEASAR NJAGI KUNGURU.....APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LTD.....RESPONDENT**

**RULING OF THE COURT**

The applicant, Ceasar Njagi Kunguru, borrowed a sum of Shs.1,380,000/= from the respondent, Kenya Commercial Bank Limited, during the year 1996 and his property known as L.R. BARAGWE/RAIMU/1164 was charged to the respondent as security for repayment of the loan. It is not in dispute that the applicant was unable to service the loan. He admitted in the plaint, he filed in the superior court, that he put the proceeds of the loan into a business of brewing which business collapsed. He later started a business of importing and selling motor vehicles and from the profits of that business he was able, somewhat, to service the loan. However, he still remained in arrears and the respondent in purported exercise of its statutory power of sale advertised the said property for sale by public auction. The auction which was scheduled at first for 11th April, 1997 was cancelled as the applicant made proposals for payment of the balance of the loan amount which proposals were acceptable to the respondent.

The applicant fell into arrears yet again and by its letter of 5th January, 2000 the respondent instructed its advocates M/s Mathenge & Muchemi to proceed to sell the said property for recovery of a sum of Shs.1,710,726/40. Such instructions were repeated by a letter of 5th May, 2000 addressed by the respondent to M/s Mathenge & Muchemi, the amount having increased to Shs.1,769,694/40. The applicant, on 29th August, 2000, filed suit against the respondent in the superior court seeking the following order: respondent/defendant do by themselves (sic), their servants or agents be restrained from interfering with the plaintiff's right or title to land reference BARAGWE/RAIMU/1164 until the hearing and determination of the suit.

(b)The court do order that an independent Accountant be appointed by the defendant and plaintiff to Audit the Accounts of the plaintiff in respect to the loan balance and apply reasonable interest rate.

(c)Any other relief that (sic) may deem fit to grant." It must be noted that the applicant did not plead that he had not received the requisite statutory notice under section 74 of the Registered Land Act, Cap.300, Laws of Kenya. He however raised that issue in the affidavit filed in support of the application for interim injunction to restrain the respondent from selling his property, which application was lodged simultaneously with the lodgment of the plaint. We note that the pleadings are not yet closed and the plaint may be amended if the applicant so wishes. The respondent in its replying affidavit, filed in response to applicant's affidavit in support of the application in the superior court, did not challenge the assertion by the applicant to the effect that he was not served with the requisite statutory notice. It depones, through its Kerugoya Branch Manager Mr. C.W.K. Njoroge, that it advertised the property for

sale by public auction.

So far as the debt due by the applicant to the respondent is concerned, we do not discern any arguable point to be canvassed at the time of the intended appeal. Any dispute as regards the amount due, when amount due, is no ground to stop the auction sale. It is, however, a statutory requirement that a three month notice be served on the chargor if default is made by him in payment of the principal sum or of any interest or any other periodical payment or any part thereof. This requirement is to enable the chargor to redeem his property. The statutory notice served on the applicant was the one served after the applicant filed suit in the superior court and it was served as a result, we are told, of some order made by P.J. Ransley Esq., Commissioner of Assize. It is at least arguable that a statutory notice served upon the chargor after he has filed suit may not be such notice as would entitle the chargee to say that he has served a proper notice before proceeding to advertise the property for sale. This issue renders the intended appeal not frivolous. The learned Judge (Ringera, J) in his ruling says that the applicant admits having been served with the statutory notice. It appears that the learned Judge made that observation rather hastily in view of what was before him.

As to whether the success in the intended appeal would be rendered nugatory, should an injunction not be granted by this Court, we do not have much to say. If the property is sold it would go out of the applicant's reach and the success in the intended appeal would be rendered nugatory. The respondent though served with the application has not filed a replying affidavit. It did not even appear at the hearing of this application to put forward its version of events. We allow this application and order that the respondent be and is hereby restrained from selling, disposing off, or in other manner dealing with property known as L.R. No. BARAGWE/RAIMU/1164 pending the hearing and determination of the intended appeal or until further orders. The costs of this application will be costs in the intended appeal.

**Dated and delivered at Nairobi this 27th day of April, 2001.**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

**M. KEIWUA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**