



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 56 OF 1998

NANAK BODY BUILDERS LTD.....1ST PLAINTIFF

ISIK LTD.....2ND PLAINTIFF

VERSUS

AKIBA LTD.....DEFENDANT

R U L I N G

The facts of this case are brief and straightforward. The first plaintiff was granted loan facilities by the defendant. As security for the said loan a charge was created over the property owned by the second plaintiff known as L.R. 3734/740.

There was default in the payment of the said loan under the terms of the charge and so the defendant moved to realise the security to recover the loan.

It is the plaintiff's case that illegal charges and penalties have been loaded on the account and the defendant has refused to give any accounts to the plaintiffs. Despite this, the defendant has gone ahead and served a demand for the outstanding sum without any breakdown. An auctioneer was then instructed to advertise the charged property for sale but the property advertised is not the charged property as the description thereof including the L.R. Number and location does not tally with the same.

The plaintiffs have asked for a permanent injunction to restrain the defendant from disposing of the suit property until the determination of the suit. Alongside the plaint the plaintiffs filed an application by way of chamber summons for injunction orders under Order 39 Rules 1,2,3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

On 12th January, 1998, Okubasu J. granted interim orders in terms of the injunction application which orders have remained in place to date.

The present ruling follows the hearing inter partes. The defendant's position is that indebtedness to the defendant is admitted, a proper notice in law was given, there has been no undertaking as to damages and the error in the description of the property was typographical which in any case does not prevent the defendant from exercising its statutory power of sale. Further, the plaintiffs have not established a cause of action against the defendant, there is no prima facie case with a probability of success, there is no undertaking as to damages that has been given, the balance of convenience tilts in favour of the defendant and that the application is an abuse of the process of the court.

The statutory notice was issued on 20th June, 1997 by the defendant through its advocates. It stated

the correct number of the charged property as L.R. NO. 3734/740. For all intents and purposes it complied with the provisions of section 69A of the Transfer of Property Act, 1882 which also requires that the notice must be for 3 months.

Two decisions have been cited in support of the defendant's case. These are H.C.C.C. NO. 1112 of 1996 Commercial Exchange Limited & Another -v- Barclays Bank of Kenya Ltd. and Civil Appeal NO. 147 of 1989 Habib Bank A.G. Zurich -v- POP -IN (Kenya) Ltd and others.

To support the plaintiffs case, learned counsel cited Civil Application No. NAI 24 of 1998 (11/98 UR) Lakeland Motors Limited -v- Harbhajan Singh Sembi.

I have had occasion to go through all the material before me including the cited cases and submissions by both learned counsel.

For a long time now, it has been held that a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale. See Bharma Kanji Shah and Another -v- Shah Depar Devji (1965) E.A. 91 This case also addressed the issue that an interlocutory injunction restraining the defendant from exercising the power for sale should be granted on the usual undertaking as to damages and on imposition of additional terms. See also J.L. Luvuna & others -v- Civil Servants Housing Co. Ltd. Civil Application NO. NAI 14/95.

In the Habib Bank case (supra) Kwach J.A. citing his own ruling in the Lavuna case said:

“ Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of the statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage”

With respect I agree with the learned judge and above all that is a decision that is binding on this court. And so, applying those principles of law to the instant case, the plaintiffs application is bound to fail.

I have considered the misdescription of the property in the advertisement and found that the plaintiffs would have no doubt whatsoever about which property was targeted for sale. An amendment in the advertisement would easily cure the error but that the said error does not call for the issue of an injunction order.

Finally, as the main prayer in the plaint is a mandatory injunction the plaintiffs were duty bound to show that such an order was most likely to be issued at the end of the main trial for them to be entitled to an interim mandatory order.

In the end I find that the plaintiffs application must fail. The interim order is hereby vacated and application dismissed with costs. Order accordingly.

Dated at Nairobi this 25th day of November, 1998.

A. MBOGHOLI MSAGHA

JUDGE



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