REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 61 of 1998

JAMES KUNGU MBUTI …….. 1ST PLAINTIFF

EVANSON KAMANDE MUNJUA ……. 2ND PLAINTIFF

VERSUS

TRANS NATIONAL BANK LIMITED ……. DEFENDANT

R U L I N G

The plaintiff between 1994 and 1997 or thereabouts borrowed various sums of money from the defendant and offered a motor vehicle Reg. No. KAC 650 B, KAC 279 B and land parcel LR. NO. KAKAMEGA/NZOIA/10/69 and LR. NO. KIMININI/KAPKOI/124. Consequently the defendant alleging default in servicing the loan realized the security by selling the motor vehicle Reg. No. KAC 279 B at Shs. 1.1 million without notice to him. The plaintiff contended that the value of the said motor vehicle was Shs. 4,200,000/= and the second motor vehilcle was sold at Shs. 250,000/= while its market value was Shs. 928,000/=. In addition to the sale of the said motor vehicles, the defendant further threatened to sell land parcel LR. NO. KAKAMEGA/NZOIA/10/69 and KIMININI/KAPKOI/124.

The plaintiff filed a suit claiming various prayers. Simultaneously with the Plaint, the plaintiff filed an application by

way of Chamber Summons dated 20.3.88 seeking injunctive orders to restrain the defendant from alienating, selling, disposing or dealing in any manner howsoever and whatsoever with land parcel LR. NO. KAKAMEGA/NZOIA/10/69 & LR.NO. KIMININI/KAPKOI/124 pending the hearing and determination of the application inter parties. The plaintiff obtained a temporary injunction which was to be in force until 30th March, 1998 when the application could be heard inter parties. Before the application could be heard inter parties the file went missing. The interim orders obtained by the plaintiff on 30th March 1998 went with the lost file.

When the skeleton file was opened the parties appeared before Etyang, Judge in Chambers who directed that the parties go for the hearing of the main suit and in the meantime ordered that status quo be maintained. For one reason or another this has not been done.

Mr. Machio Counsel appearing for the plaintiff submitted that the defendant has started its march to the realization of the securities once again.

The plaintiff moved to Court to prevent the realization of the security. The defendant was served but did not appear and the application proceeded ex parte.

Mr. Machio submitted that his quarrel is the statutory notice issued by the bank dated 21st October 1997. The said statutory notice reads in part:-

“You are to specifically take notice that unless we receive in our offices the outstanding sum of Shs. 9,774,690.85 plus interest accruals as stated above plus other incidental charges within three (3) months from the date thereto, our instructions are to make arrangements for the sale of the said security by public auction pursuant to our client’s statutory power of sale.”

Mr. Machio learned Counsel for the applicant submitted that such a notice is invalid. He submitted that a statutory notice which gives three (3) months notice from the date thereto has no legal validity. In support of that contention he referred the Court to the case of **TRUST BANK LTD V. EROS CHEMISTS LTD [2000] 2 EA 550 at P. 551** where the Court held:-

"There is a positive and mandatory requirement that a valid notice of sale of charged property has to expressly state that the sale is to take place after a three (3) months period following service of notice has lapsed."

He also referred the Court to the case of **TRUST BANK LIMITED V. OKOTH [2000] 1 EA 274 at P. 275** where the Court held:-

"Section 69A of the ITPA conferred a statutory power of sale upon a mortgagee. However that power could not be exercised unless and until notice requiring payment of the mortgage money had been served on the mortgagor and default has been made in payment thereof for three (3) months after service."

From the above it is clear that the object of a statutory notice under the Act is to protect the rights of the mortgagor, and that notice may be in the form of demand for immediate payment with an intention that if the mortgage money is not paid before the expiration of the three (3) months from the date of service the mortgagee will proceed to sell the mortgage property.

From the above reasons I find that the statutory notice issued to the mortgagee which stated that if payment is not received within three (3) months from the date hereof is invalid and I am persuaded that this is a proper case for the exercise of the equitable discretion to grant an interlocutory injunction as prayed.

There will therefore be an order in terms of prayer 2 of the plaintiff's Chamber Summons dated 20th March 1998.

The costs of the application shall be in the cause.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF MARCH 2010.

J. L. A. OSIEMO

JUDGE

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer