



REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 212 of 2011

GETRUDE ANYANGO OWINYPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

KEYSIAN AUCTIONNERS.....2ND DEFENDANT

RULING

The plaintiff application dated 21st November 2011, prays that this court grants a temporary injunction so as to stop the respondent from selling land parcel number Kisumu / Municipality Block 4/356 pending the hearing and determination of the main suit. The application is supported by the affidavit of the applicant sworn on 21st November 2011. It must be noted that when this matter came up exparte the applicant was granted a temporary injunction which she has been enjoying since then.

The affidavit does not basically deny that she entered into a loan agreement with the 1st defendant. She however veinly contents that she has paid off and the sum of Kshs. 421,101.56 which is being demanded has been paid too.

Her further argument is that she was never served with a statutory notice as envisaged under Section 74 of the now repealed Registration of Land Act Chapter 300 Laws of Kenya.

The applicant however admits that she received a letter or a Notice from the 2nd respondent on 14th November 2011 indicating that her property would be sold on 30th November 2011 and nothing more.

She further contents that should the security be sold she stands to suffer loss and damage.

The respondent on the other hand did not file any replying affidavit save for the grounds of opposition dated 6th June 2012. The substance of the said grounds is that the application is fatally defective and is founded on repealed grounds.

I have carefully gone through the application as well as written submissions by the parties herein. What is not in dispute is that the loan facility was advanced to the applicant. Through numerous correspondences which are attached to her affidavit she has admitted being indebted but she has all along requested for the rescheduling of the loan. Her major reasons has been deaths which have

occurred in her family as well as her ill health.

It is unfortunate that the defendants chose not to file any replying affidavit which perhaps would have shed more light on the issues deposed by the applicant.

What is important though is to determine whether she was served with the statutory notice as per the relevant auctioneer rules.

The Auctioneers Rules 1997, Rule (c) (d) (e) states that:-

“15. Upon receipt of a court warrant or letter of instructions the auctioneer shall in the case of immovable property

- a)
- b)
- c) **Locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification the auctioneers shall sign a certificate to that effect,**
- d) **Give in writing, to the owner of the property a notice of not less than 45 days with which the owner may redeem properly by payment of the amount set forth in the court warrant or letter of instructions**
- e) **On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement”.**

I have not been shown any newspaper advertisement in this application. However there is a notice dated 20th September 2011 which is apparently admitted by the applicant although she said that she received the same on 14th November 2011, which was over two months after it was written.

What is not clear however is how the letter was delivered. The letter was not registered obviously as I have not been shown any evidence. The requirement as per the aforesaid rule is that it has to be served personally or upon an adult member of his family residing with him. It would then appear that the notice was served by post which was not one of the anticipated procedures.

In the light of the above observations and the fact that there was no rejoinder from the defendants, I take it that there was no proper service of the notice.

Where then does that leave the parties" The loan could still be outstanding going by the applicants annexures. Issuing an injunction shall deny the 1st defendant recovery of its facility.

The principles for grant of a temporary injunction are now well settled. The same shall be granted if the applicant has shown a prima facie case, if the applicant shall suffer irreparable loss which cannot be compensated and on a balance of probabilities see **Giella =vs= Cassman Brown & Co Ltd (1973) E. A. 358**

I believe that the applicant has shown a prima facie case. However with the plethora of correspondences between her and the first respondent dating back almost twenty (20) years ago I

shall allow the application on the following terms:-

a) That a temporary grant of injunction is hereby issued against the defendants jointly and severally from disposing off the plaintiff's land parcel number Kisumu Municipality Block 4/356 in exercise of its statutory power of sale until such a time as the 1st defendant will have issued a fresh statutory notice and cause to be issued a notification of sale and a redemption notice in compliance with the relevant law,

(b) Costs of this application to the plaintiff / applicant.

Dated, signed and delivered at Kisumu this 14th day of November 2012.

H.K. CHEMITEI
JUDGE

In the presence of:

Sejele for the defendant

Odhiambo for Odhiambo Owiti for the respondent

HKC/aao



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