**Aberdare Investments Ltd v Housing Finance Co of Kenya Ltd and another**

**JUDGMENT**

**OMOLO, SHAH AND OWUOR JJA:**

On 7 July 1998 the appellant, Aberdare Investments Limited, filed suit in the superior Court, against the two respondents Housing Finance Company of Kenya Limited (HFCK) and Kariuki D Gichanga trading as Watts Enterprises (the Auctioneers) seeking the following reliefs:

“(*a*) Declaration that first defendant is not entitled to exercise its powers of sale without exhausting the other remedies available in the mortgage.

(*b*) That permanent injunction do issue to restrain the first and second defendant from disposing of and in any other manner alienating the suit premises.

(*c*) Cost of the suit.”

At the time of filing of the plaint, the appellant also took out a chamber summons under Order XXXIX, rules 1, 2, 3 and 9 of the Civil Procedure Rules seeking a temporary injunction to restrain the respondents their respective servants or agents from selling, alienating or in any way disposing of the appellant’s property known as land registration number 209/2389/104, Pangani, Nairobi until the determination of the suit in the superior Court or until further orders of that court.

The learned Judge (Ole Keiwua J) dismissed the appellant’s application for the temporary injunction on the grounds that it appeared to him that the appellant was seeking an interim declaration under the guise of seeking an interim injunction. He ruled that an interim injunction could not be founded upon a declaration as the effect would be to declare the rights of the parties in the interim whether by showing a *prima facie* case or otherwise. There is no animal as an “interim declaration” the learned Judge said, following upon what was said by Upjohn LJ in the English case of *International General Electric Co of New York Ltd and another v Commissoner of Customs and Excise* [1962] 2 All ER 390. Without going into the merits or demerits of the interim injunction, the learned Judge made short shrift of it. The learned Judge, in so dismissing the application, clearly erred. Order XXXIX, rule 1 clearly provides:

“1. Where in any suit it is proved by affidavit or otherwise:

( *a*) That any property in dispute is in danger of being wasted, damaged, alienated by any party to the suit, or wrongfully sold in execution of a decree; or

( *b*) … the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale,

removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

It is stated in the *AIR Commentaries on the Code of Civil Procedure* (5 ed) Volume III at 3182 as follows:

“Apart from this rule (Order XXXIX, rule 1), the Court has power to grant a temporary injunction under rule 2 also. But rule 2 only applies where the suit itself is for an injunction. This rule (rule 1) is not so limited.”

The declaration the appellant was seeking entitled him to seek a temporary injunction and in any event there was a prayer for a permanent injunction in the plaint. The appellant was not seeking an interim declaration.

The learned Judge having refused to hear the appellant on the merits, our choice, in the circumstances of this case, is either to remit the hearing of the application to the superior Court for hearing on merits or to hear it ourselves. To avoid further expense and delay to the parties, we have opted for the latter choice pursuant to powers given in section 3(2) of the Appellate Jurisdiction Act (Chapter 9) Laws of Kenya, as there is no real dispute as to facts and as the respondent has lodged a notice of grounds for affirming the decision of the superior Court.

By a charge dated 7 April 1994 the appellant charged the suit property to the first respondent to secure an advance of KShs15 500 000 made to it by the first respondent. The appellant has developed the property which consists of a six storey residential-cum-commercial building. The appellant was unable to service the loan and the first respondent served on the appellant a notice to exercise its statutory power of sale. The amount in arrears was KShs26 592 677-50 with interest thereon at 26% per annum from 21 September 1996 until payment in full. This statutory notice was dated 24 September 1996.

The appellant, through its managing director, Mr John Nyaaga Wango by its letter dated 26 August 1996 had given the reasons why it could not service the loan; the main grounds being that major and inevitable variations to the original design of the building on the suit property escalated the costs thereof; that there was a major increase in interest rates upwards: that it took a long time to let the building to tenants. Up to now the building is not yet fully let.

The appellant had proposed that it would sell its three other properties to pay off the mortgage debt.

Several letters were written by the appellant to the first respondent. By its letter of 3 July 1998 the first respondent informed the appellant as follows:

“We acknowledge receipt of your letter dated 2 July 1998. Your proposal is not acceptable and Kenya Building Society is not authorised to proceed with the proposed transaction.

The company may, however grant you further indulgence to service the mortgage provided the arrears of KShs24 201 515-25 are paid before 8 July 1998 together with related legal costs of about KShs500 000.” The reference to Kenya Building Society came as a result of the appellant proposing that it would sell its upper Loresho Project to Kenya Building Society and that the moneys from such sale be paid to the first respondent in reduction of the mortgage debt.

The end result of all this was that the first respondent was not willing to accommodate the appellant any further. The appellant then filed suit in the superior Court.

Mr *Githinji*’s main argument in support of the injunction application was that as redemption was progressing by agreement of the first respondent the proposed auction was premature. His other argument was that the charge provided other remedies like appointment of a receiver to enter upon the premises and to collect rent. He relied on section 69F (1) of the Transfer of Property Act which reads:

“A mortgagee shall, subject to the provisions of this section, by virtue of this Act, have power, when the mortgage money has, within the meaning of subsection (1) of section 69 of this Act become due, to appoint a receiver of the income, rents and profits, of the mortgaged property, or any part thereof.”

This power given to the mortgagee is in addition to his statutory power of sale. He is not obliged to use this power first. The choice of a remedy for the recovery of an unpaid loan under a mortgage is that of the mortgagee, and the mortgagor cannot tell the mortgagee to take such action as may suit the mortgagor. It was pointed out by Kwach JA in the case of *Lavuna and others v Civil Servants housing Co Ltd and another* [1995] LLR 3021 (CAK) as follows:

“Notwithstanding the stand taken by Mr Nagpal, in the ultimate analysis this is a suit brought by chargers 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 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 dispute as to the amount due under the mortgage. The legal position on this point is that to be found in

*Halsbury’s Laws of England* (4 ed) Volume 32 at paragraph 725:

‘725 *When mortgagee may be restrained from exercising his power of sale*

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged’.’’

In this case it is admitted that the chargee’s power has arisen but it is urged that the chargee ought to use other remedies given to it under the instrument of charge. The charge gives the right to the chargee to appoint a receiver to receive and apply the rent recovered towards the reduction of the loan. But the instrument of charge does not make the appointment of a receiver a condition precedent to the statutory power of sale. In fact clause 8 of the said instrument authorises the chargee to:

“8(ii) Exercise all statutory powers conferred on the chargee by the Indian Transfer of Property Act of 1882 and any Act amending or replacing the same.”

Mr *Githinji* argued that when the chargee itself says that the property is unlikely to fetch a good price the Court ought to order that the chargee to first exercise its power to appoint a receiver to collect rent towards reduction of the loan amount. But as already pointed out, the choice of the remedy is in the hands of the chargee, and the Court cannot direct the chargee to choose a remedy which is more convenient to the charger. The rental of the suit property (KShs200 000 per month) is not enough to cover even a monthly repayment.

It would be unconscionable and oppressive to the charger, if the suit property is auctioned when redemption is offered by sale of other properties, urges Mr *Githinji*. In order that redemption could be used to stop a sale there must be full payment offered. A chargee can be restrained from selling if the charger pays the amount claimed into court or to the chargee. An offer of redemption based upon probable or possible future sales of other properties is no redemption offer.

The appellant, we are afraid, does not have a *prima facie* case with a probability of success.

The upshot of all this is that this appeal is dismissed but not on the basis as ordered by the learned Judge but on the notice of grounds for affirming the decision, being grounds 1, 2, 4 and 5 thereof. As the appellant has had some measure of success, namely that the learned Judge’s decision to dismiss the application for injunction as it was in the ‘guise’ of an interlocutory declaration was wrong, and as the appeal is dismissed on some of the grounds canvassed by Mr *Waweru*, we make no order as to costs.

For the appellant:

*Mr Githinji*

For the respondent:

Mr *Waweru*