



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 34 OF 2018

ARKAY INDUSTRIES LIMITED.....PLAINTIFF

-VERSUS-

DIAMOND TRUST BANK.....1ST DEFENDANT

DALALI TRADERS AUCTIONEERS.....2ND DEFENDANT

MEGA WHOLESALERS LIMITED.....PROPOSED 3RD DEFENDANT

Coram: Hon. Justice R. Nyakundi

Sagana, Biriq & CO. Advocates for the 3rd proposed respondent

Kamau Chege & Kagunyi & CO. Advocates for the plaintiff

Jackson Muema Kisinga C/O Madhani Advocates LLP for the 1st defendant

RULING

BACKGROUND

1. The Plaintiff/ Applicant filed a Notice of Motion Application dated 16th August, 2021 seek the following order *inter alia*:

i. THAT pending the hearing and determination of this application the Defendants and the proposed 3rd Defendant be are hereby restrained by themselves or their agents, servants, employees, accomplices, or through any other person acting on behalf or on instructions of the Defendants and/or the 3rd Defendant or claiming under them from invading, entering upon, trespassing, encroaching, alienating, selling, threatening or actuating violence, intimidating, harassing the Plaintiff's agents and/or employees and / or evicting the tenants of the Plaintiff or in any other manner/ way from interfering with the Plaintiff/ Applicant's peaceful and quiet enjoyment of the property known as Eldoret Municipality Block 10/38.

ii. THAT the proposed 3rd Defendant be and is hereby enjoined as a 3rd Defendant in this suit; and

iii. THAT the directors of the 1st Defendant be committed to civil jail for a period not exceeding six months or such other term as the court may deem just for disobedience of the orders of the court issued on 27th July, 2021.

2. The 1st Defendant filed a Replying Affidavit by **STEPHEN KODUMBE** sworn on 27th August, 2021.

3. The proposed 3rd Defendant filed a Replying Affidavit by **ABDI MOHAMED ALI** sworn on 30th August, 2021.

4. Although this Court directed the parties to this claim to canvass this Application herein by Written Submission, none of the parties complied with the aforesaid directions.

BRIEF FACTS

5. The Plaintiff/Applicant borrowed several financial facilities from the 1st Defendant amounting to a sum of Kenya Shillings Two Hundred and Fourteen Million, Eight Hundred and Fifty Thousand (Kshs. 214,850,000.00).
6. The Plaintiff/ Applicant failed to repay the aforementioned loan amount such that as at 14th August, 2018 the Plaintiff/ Applicant was in arrears to the tune of Kshs. 420,593,081.64.
7. The 1st Defendant sought to exercise its statutory powers of sale to recover the aforementioned amount from the Plaintiff/ Applicant.
8. Subsequently, the Plaintiff/ Applicant filed a Notice of Motion Application dated 6th August, 2018 seeking orders of injunction to stop the 1st Defendant from exercising its statutory powers of sale.
9. In an attempt to compromise the aforementioned Application, on 12th September, 2018 the Plaintiff/ Applicant and the 1st Defendant caused a consent to be adopted and endorsed by this Court wherein the Plaintiff would be given a grace period of Eight (8) months from 21st November, 2018 to get a buyer for the suit property herein failing which the 1st Defendant would be at liberty to exercise its statutory right of sale by auction.
10. The Plaintiff/ Applicant attempted to set aside the aforementioned consent vide an Application dated 8th August, 2019 but the Application was dismissed by this Court vide its ruling dated 2nd December, 2020.
11. The Plaintiff/ Applicant filed an Application dated 16th December, 2020 seeking orders of stay of execution but the said Application was dismissed vide a ruling dated 8th June, 2021.
12. On 11th June, 2021 the 1st Defendant caused the suit property herein to be advertised for an auction scheduled to take place on 28th June, 2021. According to the valuation report dated 14th June, 2021 prepared by the firm of Ms Chrisca Real Estate, the market value of the suit property was Kshs. 270,000,000.00 while the forced sale value was Kshs. 202,500,000.00.
13. Prior to the aforementioned auction, the proposed 3rd Defendant paid a reserve fee of Kshs. 1,000,000.00 and it was given a bidding number.
14. On 28th June, 2021 the suit property was sold in a public auction for Kshs. 209, 500,000.00 to the proposed 3rd Defendant and a Memorandum of Sale dated 28th June, 2021 was prepared to that effect.
15. On 27th July, 2021 the 3rd Defendant paid Kshs. 8,500,000.00 to the 1st Defendant vide a cheque and in accordance with the terms of the Memorandum of Sale, the proposed 3rd Defendant paid the outstanding balance on the purchase price after taking out a loan facility with the 1st Defendant within the stipulated 90 days period.
16. The proposed 3rd Defendant conducted the due process required for the transfer of the suit property herein including the payment of stamp duty, the rent and the rates. The proposed 3rd Defendant caused the duly executed transfer document to be filled.
17. On 7th July, 2021 the proposed 3rd Defendant was issued with a title deed over the suit property herein as he was the registered proprietor.
18. The Plaintiff/ Applicant filed the instant claim aggrieved by the fact that the proposed 3rd Defendant issued a notice to the tenants in occupation of the suit property notifying them of the change of ownership over the suit property. The order sought in the Application here in are as stated in paragraph 1 herein above.

ANALYSIS AND DETERMINATION

19. I have read the Notice of Motion Application herein together with the Replying Affidavits filed in opposition thereto and I find that the following issues are due for determination by this Court:

- i. Whether the proposed 3rd Defendant ought to be enjoined to this suit;
- ii. Whether an injunction ought to be issued against the proposed 3rd Defendant; and
- iii. Whether the 1st Defendant is in contempt of the order issued on 27th July, 2021.

WHETHER THE PROPOSED 3RD DEFENDANT OUGHT TO BE ENJOINED TO THIS SUIT;

20. Order 1 Rule 10 (2) of the Civil Procedure Rules, 2012 provides that Courts can enjoin a party whose presence before the Court may be necessary to enable the Court to effectually and completely adjudicate upon and settle the questions in the suit.

21. To be successful in an Application for joinder one must demonstrate that the party they wish to enjoin has an identifiable interest in the

subject matter of the litigation and that the said party is a necessary party whose presence is required to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit.

22. In **LUCY NUNGARI NGIGI & 128 OTHERS V NATIONAL BANK OF KENYA LIMITED & ANOTHER [2015] eKLR** the Court stated as follows when considering whether to grant leave to enjoin a party:

Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

23. Noting that orders of joinder are discretionary, this Court is not persuaded that it is necessary to enjoin the proposed 3rd Defendant to this suit. This Court takes cognizance of the fact that the proposed 3rd Party obtained the suit property herein in good faith and for value therefore he is entitled to the protection provided in Section 99 of the Land Act, 2012.

24. In addition to the foregoing, a decision to enjoin the proposed 3rd Defendant would lead to practical problems in handling this claim and it would result to unnecessary inconvenience on the part of the proposed 3rd Defendant noting that he is protected by statute from such inconveniences.

25. This Court finds that the order seeking to enjoin the proposed 3rd Defendant has no merit and the same stands declined.

WHETHER AN INJUNCTION OUGHT TO BE ISSUED AGAINST THE PROPOSED 3RD DEFENDANT;

26. The suit property herein once belonged to the Plaintiff/ Applicant but its ownership has since changed following the sale that took place at the public auction on 28th June, 2021. At the fall of the hammer, the proposed 3rd Defendant emerged as the successful bidder and a Memorandum of Sale was prepared in its favour. Subsequently, the proposed 3rd Defendant paid the outstanding consideration price and all the statutorily mandated fees and the suit property was duly transferred to the proposed 3rd Defendant.

27. It is prudent at this juncture to outline the provisions of Section 99 of the Land Act, 2012 as they are applicable in the circumstances:

99. Protection of purchaser

(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

28. This Court takes note of the fact that the proposed 3rd Defendant is an innocent purchaser for a value consideration who is entitled to the protection afforded by Section 99 of the Land Act, 2012.

29. In **BEATRICE ATIENO ONYANGO V HOUSING FINANCE COMPANY LIMITED & 3 OTHERS [2020] eKLR** the Court made the following observation concerning Section 99 of the Land Act:

The purpose of the aforesaid provision is to extinguish the chargor's equity of redemption and protect the purchaser from any action to set aside the sale.

30. This Court declines to grant an order of injunction as such an order would interfere with the rights of enjoyment of the suit property that the proposed 3rd Defendant is entitled to as the lawful registered proprietor of the suit property herein.

31. This Court finds that the remedy available to the Plaintiff/ Applicant in the prevailing circumstances may lie in damages against the 1st Defendant in the event that the 1st Defendant acted in bad faith during the sale of the suit property herein to the detriment of the Plaintiff/ Applicant.

20. In **FRANCIS NGARAMA KIRATU V EQUITY BANK [2019] eKLR**, the Court cited the Court of Appeal decision in **Joyce Wairimu Karanja v James Mburu CA.118/2017** as follows:

“Our case law has been consistent in holding this position. The appellant cited many cases whose holdings I need not rehash here. Some of the cases the appellant relied on include: Simon Njoroge Mburu v Consolidated bank of Kenya Ltd (2014) eKLR, Nancy Kahoya Amadiva v Expert Credit Ltd & another (2015) eKLR and Lawrence Mukiri v Attorney General & 4 others (2013) eKLR; Twin Buffalo Safaris Ltd. v Business Partners International Ltd (2015) eKLR. Suffice it to cite two cases. Justice J.B. Havelock had this to say about Section 99 and the position of purchaser in Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd (2014) eKLR:

That Section [99] now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff's remedy lies in this case. In this regard, the plaintiff would do well to note the powers of the court in respect of remedies and reliefs set out in under Section 104 of the Land Act, 2012...

What is clear is once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages....”

21. This Court declines to grant an order of injunction against the proposed 3rd Defendant as to do so would amount to a contravention of the protection guaranteed by Section 99 of the Land Act, 2012.

WHETHER THE 1ST DEFENDANT IS IN CONTEMPT OF THE ORDER ISSUED ON 27TH JULY, 2021

22. In **SHEILA CASSATT ISSENBERG & ANOTHER V ANTONY MACHATHA KINYANJUI [2021] eKLR** the Court observed as follows:

The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.

23. The Plaintiff/ Applicant seeks to have the 1st Defendant cited for being in contempt of the Court order issued on 27th July, 2021. The aforementioned order was issued following the filing of the Plaintiff/ Applicant's Application dated 12th July, 2021. The aforementioned order directed that the status quo be maintained pending the hearing and the determination of the aforementioned Application dated 12th July, 2021.

24. To successfully advance a contempt of Court claim, the Plaintiff/ Applicant must show that there was a Court order directed at the 1st Defendant and the 1st Defendant disobeyed the said order.

25. I find that the Plaintiff/ Applicant has not demonstrated how the 1st Defendant violated the status quo order.

26. In any event, at the point when the aforementioned status quo order was issued, the suit property herein had already been transferred to the proposed 3rd Defendant. This Court is aware that the title deed to the suit land was issued to the proposed 3rd Defendant on 7th July, 2021 therefore at the point when the status quo orders were issued the suit land belonged to the proposed 3rd Defendant.

27. In **SILVERSE LISAMULA ANAMI V JUSTUS KIZITO MUGALI & 2 OTHERS [2017] eKLR** the Court cited with approval the holding in **Peter K Yego & others v Pauline Wekesa Kode, Acc no. 194 of 2014** as follows:

“It must be proved that one had actually disobeyed the court order before being cited to contempt.”

28. This Court find that the Plaintiff/ Applicant failed to prove contempt on the part of the 1st Defendant.

CONCLUSION

29. The Plaintiff/ Applicant has conducted itself in a very dishonourable manner throughout the subsistence of this claim. The Plaintiff/ Applicant filed an Application in which it sought an order of injunction to stop the 1st Defendant from exercising its statutory power of sale over the suit property herein. This Application aforesaid was compromised by the filing of a consent which gave the Plaintiff/ Applicant a grace period of Eight (8) months to get a purchaser for the suit property herein. Subsequently, the Plaintiff/ Applicant sought to set aside the consent aforementioned vide an Application dated 8th August, 2019 that was dismissed vide a ruling of the Court delivered on 2nd December, 2020. If the foregoing was not enough the Plaintiff/ Applicant filed an Application dated 16th December, 2020 in which it sought stay orders but the aforesaid Application was dismissed vide the ruling of the Court issued on 8th June, 2021. The instant Application seems to be another attempt by the Plaintiff/ Applicant to steal a match from the 1st Defendant yet the Plaintiff/ Applicant had not made good the loan that the 1st Defendant advanced to it in good faith.

30. The Notice of Motion dated 16th June, 2021 is now dismissed with costs to the 1st Defendant and the proposed 3rd Defendant.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 23RD DAY OF FEBRUARY, 2022.

.....

R. NYAKUNDI

JUDGE