



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 1336 OF 2020**

**BETWEEN**

**DOMINIC WANJIHIA KAHUMBU AND**

**PAULA KAHUMBU Suing as personal representatives of the Estate of**

**ROSALINE MARY KAHUMBU (DECEASED).....PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiffs (“the Applicants”) are the holders of Letters of Administration *ad Litem* for the Estate of Rosaline Mary Kahumbu (“the Deceased”). The Deceased was the Plaintiff in this suit. They have moved the court by a Notice of Motion dated 19<sup>th</sup> December 2019 seeking the following reliefs:

*[1] Spent.*

*[2] Spent.*

*[3] Spent.*

*[4] That an order for injunction do issue restraining the defendant/respondent by itself, its servants, agents or any one of them from interfering with the property known as L.R. No. 7583/41 and L.R. No. 7583/19 either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the settlement of the terms of the decree;*

*[5] That, the honourable court be pleased to issue terms upon which the decree is to be settled.*

*[6] That the honourable court do issue directions on the settlement of the terms of the decree, such directions to include time lines and the amounts due and owing under the Mortgage and further mortgage.*

*[7] That the honourable court do direct the defendant/respondent do supply the decree holder/applicant with requisite statements of accounts for the mortgage and further mortgage to facilitate the settlement of the decree.*

*[8] That the honourable court be pleased to make such further orders or other orders as justice of the matter may require.*

*[9] That costs of and occasioned by the application be in the cause.*

2. The application is supported by the affidavit of Dominic Kahumbu sworn on 19<sup>th</sup> December 2019. It is opposed by the Defendant (“the Bank”) through Grounds of Opposition dated 12<sup>th</sup> June 2020. The parties filed written submissions in support of their respective positions.

3. Before I deal with the issues raised in the application, I will set out the background facts, which appear in the Judgment delivered by Ochieng' J., on 23<sup>rd</sup> March 2017 ("the Judgment") and which are common ground.

4. In her suit, the Deceased claimed a matrimonial interest in the properties known as LR No. 7583/41 and LR No. 7583/19 ("the suit properties") which were charged to the Bank to secure advances to Schemes Limited and its director, the late John Francis Kahumbu. Following default, the Bank proceeded to issue statutory notices in exercise of its statutory power of sale. The Deceased filed the suit seeking an injunction to restrain the Bank from exercising its statutory power of sale claiming that the Mortgages and Further Mortgages were invalid, wrongful, unlawful, ineffective and unenforceable due to the fact of her equitable interest in the suit properties.

5. In the Judgment, the learned Judge held that the Mortgage and Further Mortgage on the suit properties were valid. As regards the Deceased's interest, the learned Judge held that:

*[64] In effect the Defendant holds a valid security, in the form of the mortgage and further mortgage, but it cannot ignore nor override the plaintiff's prevailing equitable rights in the suit property. To that extent the Plaintiff's suit is successful.*

6. The Bank has now issued statutory notices evincing its intention to sell the suit properties by public auction in exercise of its statutory power of sale. It is this action that has precipitated the application.

7. In the grounds set out on the face of the application, the Applicants contend that settlement of the decree includes and is not limited to confirming the amount due to the Bank under the Mortgage and Further Mortgage and that in breach of the Judgment, the Bank served the Applicants with a notification of sale from Garam Auctioneers fixing the auction for the suit property on the 28<sup>th</sup> of January 2020.

8. The Applicants argue that the Bank does not have the right to sell the suit properties based on the finding in the Judgment that the Bank's rights cannot override the Plaintiff's interest in the suit properties. In their view, any disposition of the properties would amount to "overriding" the Deceased's right contrary to the Judgment.

9. The Applicants complain that the statutory notice issued by the Bank under **section 90(2)** of the **Land Act** was defective as it did not comply with the provisions of the law by failing to set out the nature and extent of default by the debtor. The Applicants further complain that the Bank has claimed KES 228,322,012.00 which is grossly inaccurate and exaggerated and in fact contrary to **section 44** of the **Banking Act**. In addition, the Applicants contend that the amount includes unconscionable interest rates which should not be charged. They further contend the Bank has not furnished them with full statements of account.

10. The Bank objects to the application on the ground that it is incurably defective as it does not relate to execution as no decree capable of execution has been extracted hence execution cannot take place. It further assails the application on the ground that the Applicants ought to have applied for substitution of the Plaintiff as **Order 24 rule 10** of the **Civil Procedure Rules** is not applicable.

11. The Bank submits that since the Judgment declined the Deceased's invitation to annul the securities and declined to grant the injunction to restrain the Bank from exercising its statutory power of sale, it was entitled to exercise its rights over the suit properties as these were not affected by the Judgment. The Bank adds that despite giving the Applicants an opportunity to redeem the property, they have failed to do so. The Bank contends that the Statutory Notice issued by the Bank is valid and issued in accordance with the law. It maintains that it has at all times provided the Deceased and the Applicants with statements hence the claim that they do not have a statement of account lacks any basis. The Bank urges the court to dismiss the application on the ground that the Applicants have not established a basis for grant of equitable relief.

## **Determination**

12. Although the parties, in their submissions, have raised broad issues regarding the Bank's exercise of its statutory power of sale, the issue for resolution is rather narrow. From the prayers set out in the application, the Applicants seek injunctive relief pending settlement of the decree in this matter. It is common ground that since the Judgment was delivered in 2017, the decree has not been issued. A Judgment differs from a decree as **section 2** of the **Civil Procedure Act** defines a "decree" as follows:

*"Decree" means the formal expression of an adjudication which so far as regard the Court expressing it, conclusively determines the rights of parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final;*

13. In **Rubo Kipngetch arap Cheruiyot v Peter Kiprop Rotich ELD HCCC No. 133 of 1993[2006] eKLR**, the court correctly observed that, *"It is the decree as a legal instrument which is executable and not the judgment by itself"* and that, *"no execution of any decree can take place without such a decree coming into existence i.e. drawn, approved and signed and sealed by the Court."*

14. The manner of preparation of decree and orders in the High Court is governed by **Order 21 rule 8** of the **Civil Procedure Rules** which provides as follows;

**[Order 21, rule 8.] Preparation and, dating of decrees and orders.**

8. (1) A decree shall bear the date of the day on which the judgment was delivered.

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree

accordingly.

*(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.*

*(4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.*

*(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.*

*(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in manner as a decree.*

*(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.*

15. A reading of the **Order 21 rule 8** aforesaid shows that the process of preparing the decree in the High Court is entirely in the hands of the parties. It is only upon disagreement between the parties that the draft is forwarded to the judge by the registrar for settlement. In this case, there is nothing on record to show that the Applicants’ counsel prepared a draft decree for approval by their counterpart. In short, the plea for settlement of the decree in the application is premature.

16. The result of this finding is that there is no basis for to grant an injunction. It is therefore not necessary to deal with the other issues raised by the parties.

#### **Disposition**

17. The Notice of Motion dated 18<sup>th</sup> June 2020 is now dismissed with costs to the Defendant. The interim orders in place are discharged forthwith.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of JANUARY 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Ms Misere instructed by Olouch-Olunya and Associates Advocates for the Plaintiffs.

Mr Wanjohi instructed by Michael, Daud and Company Advocates for the Defendant.