



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. 057 OF 2020

EQUITY BANK (KENYA) LIMITED..... PLAINTIFF/APPLICANT

VERSUS

ALICE MUTHONI WAHOME.....1ST DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR..... 2ND DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL..... 3RD DEFENDANT/RESPONDENT

AND

CHARLES PASSPORTOUT MBAE RUCHA.....THE INTERESTED PARTY

RULING

1. The Plaintiff/Applicant (“the Bank”) approached the Court by a Plaint accompanied by a Notice of Motion dated 26/10/2020. In the Motion, the Bank sought an order that pending the hearing and determination of the suit, an order of injunction do issue to restrain the 1st defendant her agents, representatives or servants from selling, offering for sale, alienating or otherwise interfering and/or dealing in any way with the parcel of land known as **LR. No. 9725/147** (“the suit property”).
2. The application is supported by the affidavit of **Kariuki King’ori** sworn on 26/10/2020. The application was also supported by the interested party who swore his affidavit on 23/11/2020. On her part, the defendant opposed the application vide her affidavit sworn on 11/11/2020. The application was canvassed by way of written submissions with the parties advancing their respective positions.
3. The facts leading to the dispute are contained in the depositions of the respective parties. Sometimes in the year 1998, the Bank, then *Equity Building Society* offered the 1st defendant a facility of Kshs. 1,400,000/- which was secured by a Charge dated 28/7/1998 over the suit property. The Bank claims that the 1st defendant defaulted in repaying the facility and it therefore initiated the process of exercising its statutory power of sale which culminated in the sale of the suit property by private treaty to the interested party on 15/7/2005 for a sum of Kshs. 800,000/-.
4. Supporting the application, the interested party contended that he saw the property advertised for sale in one of the dailies in 1998. He engaged the Bank when the suit property could not fetch adequate bid. This culminated in his purchasing the suit property through private treaty. The documentation for the discharge and transfer were forwarded to the Bank for registration. He took possession of the suit property and has substantially developed the same
5. On her part, the 1st defendant denied that the suit property was ever sold as alleged. She contended that she had repaid all the sums due to the Bank and was in the process of discharging the suit property when the Bank informed her that it had misplaced the title to the suit property. She contended that the bank was using underhand attempts to dispossess her of the suit property even though the same is still registered in her name. She denied ever receiving any statutory notices or the suit property having been sold to the interested party.
6. The Bank submitted that the application met the threshold required for the grant of an injunction. That it had established a prima facie case with a probability of success as it had been able to show that the 1st defendant was in default of her obligations. That as at the time of issuing the statutory notices, she had an outstanding debt of Kshs. 1,904,035/45. That the right to exercise its statutory power of sale had crystalized and it had issued and served the requisite statutory notices under the law.
7. That the 1st defendant only requested to pay the outstanding debt whilst she had full knowledge that the suit property had been sold and

her equitable right of redemption extinguished. That the Interested Party was the bona fide purchaser for value and he should therefore be allowed to enjoy peaceful occupation of the suit property.

8. That the interested party stands to suffer irreparable loss that cannot be compensated by way of damages if the suit property is to be disposed of by the 1st defendant. That the Interested Party has carried out substantial developments on the property for over 12 years with no disturbance or interruption from the 1st defendant. That the Bank had already refunded the 1st defendant the sum of Kshs. 1,400,000/- which had been received mistakenly as a condition to secure the release and discharge of the suit property.

9. For the 1st defendant, it was submitted that although the 1st defendant fell into arrears at some point, she was never served with any statutory notices by the Bank. She denied receiving the same by registered post as alleged by the Bank. That in the premises, the Bank's statutory power of sale had not crystallized and that any action taken by the Bank was marred with gross illegalities.

10. That there was no explanation why the records at the Lands Office had not been changed as late as 2019 yet it was alleged that the property had been sold through private treaty in July, 2015. That the 1st defendant had paid the demanded sum of Kshs. 1,400,000/- for the release of the discharge of charge. That the Bank lacked locus standi to sue over the property and that the foundation of the claim was time barred.

11. It was further submitted that if at all the Interested Party bought the suit property in 2005, his interest or any claim is statute barred by dint of **Section 7 of the Limitation of Actions Act**. That the Bank has no interest in the property. That neither the Bank nor the interested party have ever been registered as owners of the suit property. That there was a binding agreement between the Bank and the defendant from which the Bank cannot be allowed to escape. The Bank having no interest in the suit property, it had not established any prima facie case against the defendants neither can it suffer irreparable loss and damage.

12. For the interested party, it was submitted that there is no evidence of any payment of the mortgage debt in the period between 28/7/1998 and 15/7/2005 when the suit property was sold by private treaty. That there was statutory protection to the interested party under **section 69(3) of the Transfer of Property Act and section 99(3) of the Land Act, 2012**. That the 1st defendant's remedy lies in damages. It was further submitted that there was evidence of sale of the suit property, delivery of conveyance documents to the interested party and receipt of the same at the Lands Offices.

13. I have gone through the rival depositions and submissions of the parties. The 1st defendant has raised preliminary issues of locus standi and limitation. On locus standi, while it is admitted that the Bank has never been registered as the owner of the suit property, it is common knowledge that it held a valid Charge over the same. It has alleged that, through a mistake, whether negligent, deliberate or genuine, it wrongly caused the suit property to be discharged to the 1st defendant which it had allegedly been sold to the interested party.

14. Although the most important declarations regarding the actions that led to the suit are missing from the prayers in the plaint, the prayers sought in the suit still gives the Bank locus standi.

15. As regards limitation, the time the wrongful actions are alleged to have occurred is in 2018. Time started to run against the bank and interested party, the moment the 1st defendant sought to redeem the suit property in 2018 and not in 2005 as submitted by the 1st defendant. It has not escaped this Court's attention that the interested party averred that he entered the suit property and has been in occupation thereof and has substantially developed the same. Accordingly, the plea of limitation fails.

16. This is an injunction application. In **Nguruman Limited v Jane Bonde Nielsen and 2 Others [2014] eKLR**, the Court of Appeal reiterated the settled principles in **Giella v Cassman Brown [1973] EA 358** thus: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially”.

17. As to what constitutes a prima facie case, the Court of Appeal explained it in **Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR** to be a case in which on the material presented, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by one party to call for an explanation from the opposite party.

18. The dispute rotates on whether the suit property was ever sold to the interested party or not. It is the Bank's contention that the suit property was sold to the interested party by way of Private Treaty in a sale dated 15/7/2005. The interested party produced documents to show his dealings with the bank way back in 2005 that culminated in his paying the bank KShs. 800,000/- allegedly for the purchase of the suit property.

19. The 1st defendant denies any knowledge of the sale as she had never received any statutory notices that would have led to the sale. She is

still the registered owner of the suit property. That there was no evidence of any attempts to register the interested party's interests in the suit property or a credible explanation as to why the sale was not registered against the title for 14 years.

20. There is no dispute that the 1st defendant is still the registered owner of the suit property. It is also not disputed that she had taken a loan from the Bank on the security of the suit property. The question is whether there was a sale of that property in 2005 as alleged or at all, and if there was, whether it was valid.

21. The record shows that between 1998 and 2018, the 1st defendant did nothing about her property which she had charged to the Bank. There is evidence that the interested party made payment of Kshs. 800,000/- to the Bank in 2005, which it is alleged to be the purchase price for the suit property. Service of the requisite notices is disputed. The questions that arise are; was the 1st defendant indebted to the Bank in 2005? If so, was she served with the requisite notices? Was the property sold to the interested party as alleged?

22. There is evidence that all seemed to be quiet until 2018. The interested party alleges that he presented his documents for registration at the Lands Office in 2017/2018. Whilst the defendant had been quiet on her mortgaged property ever since 1998, she suddenly realized that she owed the Bank in November, 2018, 20 years later. It is then that she demanded to know what her outstanding was. Why did it take the 1st defendant 20 years to remember that she owed the Bank and needed to redeem the property?

23. The interested party deposed, and it was not denied that, after purchase of the suit property, he took possession and substantially developed the same. The property was marshy. He has since developed a residential house thereon and he produced photographs to prove the same. When the developments were being undertaken, was the 1st defendant unaware of the same?

24. While the Bank is the custodian of the records of any lending's to its clients, how was it that the sale of the suit property to the interested party escaped it and ended discharging the same in favour of the 1st defendant? Why did the 2nd defendant, a public officer fail to act on documents presented to him in favour of the interested party from 2017 until 2018?

25. To this Court's mind, the aforesaid questions cannot be answered through depositions. They require explanation. In the meantime, there is nothing to prevent the 1st defendant from dealing with the suit property as she may wish. On the other hand, the interested party is greatly exposed. The question is, having not filed his own suit, can he ride on the Bank's suit?

26. The view the Court takes is that, the Bank may have been negligent in its dealing with both the 1st defendant and the interested party. It cannot seek to benefit from its own negligence. It entered into a contract with the 1st defendant for the discharge of the suit property. However, the Court notes that it has since returned the amount of Kshs. 1,400,000/- which it had received from the 1st defendant for the discharge.

27. The suit property is still in the name of the 1st defendant. The Court entertains doubt as to whether any prima facie case with a probability of success has been established and or whether there will be any irreparable loss to be suffered.

28. Because of the aforesaid doubt and considering the pertinent questions the Court has raised above, I consider the balance of convenience to be in favour of taking the route of the least risk of an injustice. To maintain the status quo obtaining now until the hearing and determination of the suit.

29. Accordingly, I will grant prayer number 2 of the Motion. The suit must be prosecuted within 12 months failing of which the said order shall remain discharged without any requirement for an order to that effect.

It is so ordered.

DATED and DELIVERED at Nairobi this 21st day of January, 2021.

A. MABEYA, FCI Arb

JUDGE