



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO 6 OF 2020

DAVID WABWENI WAFULA.....1ST PLAINTIFF/APPLICANT

SIMON ACHAYO ODUNDO.....2ND PLAINTIFF/APPLICANT

VERSES

SBM BANK LTD.....1ST DEFENDANT /RESPONDENT

GODFREY OMONDI T/A COLINET

AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated **15th June 2020** by the Plaintiffs/Applicants prays that this court does grant them temporary orders of injunction to restrain the Defendants from selling by way of public auction land Parcel number **KITALE MUNICIPALITY BLOCK 17 (BIDII) 260** pending the hearing and determination of this application and the main suit. The sale was scheduled to take place on the 18th June 2020.

2. The application is supported by the affidavit of the 1st Applicant sworn on the same date. He deponed inter alia, that he purchased a portion of the suit land from the registered owner one **PETER WAFULA KHAMALA** on the 24th March 2011 and he paid the entire purchase consideration and has been in occupation of the same.

3. The 2nd Applicant equally purchased a portion thereof for a total sum of Kshs 1,150,000 and has occupied since the year 2016. They exhibited photographs and other documents to that effect.

4. He went on to state that they discovered in the year 2017 that the above vendor had charged the title to the then **Chase Bank** which was later taken over by the 1st Defendant. They also realised that the valuation undertaken by Highland Valuers on behalf of the bank included the vendors house but not the portion they had purchased.

5. Their efforts to have the matter resolved through the area chief did not bear fruits and the 1st Defendant notified them that the matter had been referred to their Recovery unit. They also realised that the same had been advertised for sale through a public auction hence their coming to this court.

6. Their contention is that the portion which they purchased was not part of the area that a valuation was undertaken and thus it ought to be preserved. Should the Respondent proceed with the sale they stand to suffer irreparable harm and loss.

7. The 1st Respondent through the Replying Affidavit of one **PAUL WANYONYI** sworn on 14th July, 2020 has given a chronology of the transactions between it and the said **Peter Wafula Khamala** (hereinafter referred to as the chargor) the registered owner of the property advertised for sale through the 2nd Respondent. It shows that he was advanced a sum of Kshs 2.5 million on 22nd July 2015.

8. The said chargor provided land parcel number **Kitale Municipality block 17 (Bidii) 260** as a security. He defaulted in servicing the loan which has attracted interest and as at June 2020, the outstanding amount was Kshs. 3,993,367. There is no evidence that the chargor has attempted to settle the same. He did not swear any affidavit and therefore in the opinion of this court he seemed not to have paid the loan.

9. When this matter came up for trial the court directed the parties to file written submissions which they have complied and the court has perused the same as well as the mentioned authorities.

10. This court finds that the only and most important issue to determine is the question of *locus standi* by the Plaintiff's /Applicants in this matter. The other issue of whether they are entitled to the orders of injunction could come thereafter.

11. The Applicants as clearly explained by the respondent and by their own admission are not the registered owners of the land. They are only purchasers for value from the chargor. They purchased the portion from him separately and they seemed to have occupied.

12. They admitted that when they realised that the land had been charged they wrote to the local area chief to see whether they could be helped but it was not forthcoming.

13. They then went to the bank's branch but were notified that the same had been taken over by their recovery unit.

14. Their saviour however is this court. They have stated that they are in occupation of the portion sold to them by the chargor. Apparently the chargor did not show up despite the notices sent to him by the bank.

15. In terms of the contract between the chargor and the 1st Respondent, the chargee, the applicants are nowhere. They are not privy and as rightly put by the bank they are third parties. They have on the other hand cautioned the security, but that may not help them as the bank has priority over them by virtue of the charge.

16. The Black Law Dictionary 10th Edition has defined locus standi as "***the right to bring an action or to be heard in a given forum***".

17. To the extent that they are not part of the agreement between the chargee and the chargor and they are not the registered proprietors of the land, they have no locus. Their beef so to speak should be with whoever sold them the land. They should be able to recover whatever they paid to him as a purchase consideration as well as any other development.

18. What is curious of course is the absence of the chargor despite the various notices sent to him by the bank.

19. It is clear therefore that the applicants have no say in the charge contract. The bank cannot be stopped from exercising its statutory power of sale. In the absence of any response from the chargor to the contrary this court finds that he is indebted to the bank and that he did receive all the notices exhibited by the respondent.

20. For the above reasons this court does not find it necessary to venture into the other issues raised by the parties. The Applicants as a matter of abundant caution should have searched the register at the lands office and they would have noticed that the land had been charged way before they purchased it. Further they should have realised that the bank has a first interest over theirs and the caution may not be of much help to them at any rate.

21. In the premises, this court has said much to demonstrate that the application ought to fail for the simple reason that the applicants lack locus to institute the same against the defendants. Further that the absence of the chargor in the mix makes it difficult for them to obtain any meaningful orders from this court.

22. The same is hereby dismissed with costs to the Respondents and the earlier interim orders issued are hereby vacated.

Dated, signed and delivered at Kitale this 21st day of October 2020.

H. K. CHEMITEI

JUDGE

21/10/2020

In the presence of:-

Mr Wanyonyi for the Plaintiff

No appearance for the Defendant

Court Assistant – Kirong

Ruling read in open court.