



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 86 OF 2019

FAMILY BANK LIMITED.....APPELLANT

=VRS=

1. DR. JOSEPH MUGWE GITAU.....1ST RESPONDENT

2. VIEWLINE AUCTIONEERS.....2ND RESPONDENT

{Being an appeal against the Ruling of Hon. Z. W. Gichana – SRM Kikuyu dated and delivered on the 22nd day of May 2019 in the original Kikuyu Senior Principal Magistrate’s Court ELC No. 84 of 2018}

JUDGEMENT

This appeal pertains to a ruling dated 22nd May 2019 in which the trial court issued a temporary injunction “**restraining the appellant and the 2nd respondent herein by themselves, their servants, agents, or any other person claiming under them from taking possession, advertising for sale, selling by way of Public Auction and/or private treaties or in any other way whatsoever dealing with land parcels No. LR Muguga/Kanyariri/3014 and 3015**” registered in the name of the plaintiff (now the 1st respondent) pending hearing and determination of his suit.

The gist of the Notice of Motion which gave rise to the impugned order was that the requisite statutory notice had not been issued to the 1st respondent and hence the proclamation, subsequent advertisement, attachment and intended sale were unlawful. It was his contention that the address to which the notice was purportedly sent by the bank was not his. After hearing submissions from both sides the trial Magistrate while agreeing that a notice was sent by the appellant found that there was a dispute as to whether the address it was sent to belonged to the 1st respondent. It was her finding that that being the gravamen of the 1st respondent’s suit and because that was an issue to be tried by the court the 1st respondent had demonstrated a prima facie case and was therefore entitled to the orders sought. In its memorandum of appeal filed on 3rd June 2019 the appellant contends that: -

“1. The Honourable Magistrate erred in Law and Fact by holding that the Plaintiff had established a *prima facie* case with a high chance of success when the evidence on record was clear that there was no such *prima facie* case since the Statutory Notices of Sale for the suit property that were the only issue for determination in the suit had been sent to the Plaintiff through the same postal address as provided by the Plaintiff in the Letter of Offer and Charge Instrument both of which were duly executed by the Plaintiff.

2. The Learned Magistrate erred in Law and Fact in failing to hold that the Plaintiff had established or proved that he would suffer any harm if the injunction was granted as the Plaintiff had admitted being indebted to the 1st Defendant.

3. The Learned Magistrate erred in Law and Fact by failing to hold that the Plaintiff could be adequately compensated by damages.”

4. The Learned Magistrate erred in Law and Fact by proceeding with the determination of the Application which was filed under certificate of urgency yet the Plaintiff had failed to extract and serve Summons to Enter Appearance in the suit.

5. The Learned Magistrate erred in Law by proceeding with the Application for injunction dated 13th December 2018 yet the 2nd Defendant, VIEWLINE AUCTIONEERS had not been served with the Application or any other Pleadings.”

By this appeal this court is urged to set aside the ruling and orders granted by the trial Magistrate and substitute them with an order dismissing the application dated 13th December 2018.

The appeal which is vehemently contested proceeded by way of written submissions. I have considered the rival submissions, the cases cited by Counsel, the proceedings before the lower court, the ruling and the law. It was not disputed that the appellant had advanced a loan to the 1st respondent. It was also not denied that the 1st respondent had defaulted and that therefore the appellant had a right to realize its security. It is also evident that the appellant did also demonstrate that it had issued a statutory notice as required by **Section 90 (1) of the Land Act** but the 1st respondent disputed that the address to which the notice was sent belonged to him. It is my finding therefore that the trial Magistrate was correct in coming to the conclusion that that was an issue to be tried in the case and that the 1st respondent had established a prima facie case to warrant an order for stoppage of the intended sale. However, I find that the court erred by issuing an order that perpetually prevented the appellant from exercising its statutory power of sale when in fact all that was required was for the appellant to issue a statutory power of sale and properly serve the 1st respondent. The order I would have issued in this appeal therefore would be that the injunction would be granted subject to the appellant issuing and properly serving the 1st respondent with a notice as required by **Section 90 (1) of the Land Act** or upon the hearing and determination of the suit whichever came first. It will however be noted that the injunction has since lapsed by dint of **Order 40 Rule 6 of the Civil Procedure Rules** which states: -

“6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

There is nothing before me to demonstrate that the court that issued the injunction has ordered otherwise and the order having lapsed by effluxion of time and by prescription of the law there is nothing for this court to set aside. Had the appeal been heard expeditiously the order that I would have granted would have been one to preserve the appellant’s statutory power of sale subject to issuance and proper service of the statutory notice. The appeal would have succeeded and been allowed to that extent only. Those would have been the orders of this court and that being the case on costs the order that best commends itself to me is that each party shall bear their own costs.

The 2nd respondent was improperly joined to this appeal and the appeal against him shall be dismissed but as he did not file a response there shall be no orders for costs.

Signed and dated at Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE