



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 479 OF 2015
FAST TRACK

LUCY WANJIRU MBUGUA.....PLAINTIFF/APPLICANT

VERSUS

SPEED CAPITAL LIMITED.....1ST DEFENDANT/RESPONDENT

REGENT AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to Notice of Motion Application dated 22nd February 2017 brought under the provisions of Order 40 Rules 1, 4 and 10 of the Civil Procedure Rules, 2010 (Cap 21) Laws of Kenya, Section 79 of the Land Act No. 6 of 2012 and all other enabling Provisions of the Law.

2. The Applicant is seeking for orders that:-

(i) That a temporary injunction be issued by this Honourable Court restraining the defendant, by themselves, their servants, agents or otherwise from selling by public auction and/or interfering with all or part of that parcel of land known at LR No. NGONG/NGONG/46227 belonging to the Applicant pending the hearing and determination of the Application;

(ii) That the O.C.S. Ngong Police Station do supervise compliance of this Court Order;

(iii) That costs of this Application be in the cause.

3. The Application is based on the grounds thereon and Affidavit of Lucy Wanjiru Mbugua, described as the legal owner of all that parcel of land (herein the suit property). She deposed that in the year 2014, she offered the suit property as a security for a loan facility of Kshs 2,500,000 granted to her by the 1st Respondent. The loan was repayable at the rate of Kshs 250,000 per month. That she managed to make payment but was unable to fully redeem the loan as her business was not doing well. However, she kept communicating with the 1st Respondent and made serious proposal on her intention to settle the loan but the 1st Respondent did not respond.

4. Subsequently, contrary to the provisions of section 79(7), (8) and (9) of the Land Act No. 6 of 2012, the 1st Respondent proceeded to issue a Notification of sale of the suit property and a Notice to Auction the same on 23rd February 2017 at 11.00am. The notice was published in the Daily Nation Newspaper of 2nd February 2017. She avers that the legal requirement is that, the 1st Respondent should have obtained a Court order before advertising and/or realizing the security as the loan was secured by an informal charge over the suit property.

5. She further avers that the property she offered as security is LR No. Ngong/Ngong/46227, but the 1st Respondent has advertised a property known as LR No. Ngong/Ngong/46277 which does not belong to her.

6. Further, that the interest charged is over 66% per annum which is extremely high and contrary to the current applicable Central Bank of Kenya interest rates. Finally, she avers that the property is grossly undervalued as the Respondents intend to sell by public auction subject to a reserve price of Kshs 4,275,000 which is way below the current market value. That the Respondent has not done any valuation to establish the current value of the property which is Kshs 15,000,000 and way above the reserve price. Hence the reason why it is only fair and just

that the intended auction should be suspended pending the hearing and determination of the main suit for the ends of justice to be met.

7. However, the Application was opposed vide a Replying Affidavit dated 21st June 2017 sworn by James Ouma, the Chief Executive Officer of the 1st Respondent Company. He deposed that the Applicant borrowed Kshs. 2.4 million and offered the subject suit property as security. She subsequently defaulted on repayment of the loan and was reminded on several occasions to repay the same but she did not. Hence the instructions to the Auctioneer to auction the property on 9th July 2015. That the Respondent followed the laid down procedure, to recover the loan amounts and interest thereon.

8. However, the Respondent argued that this Application is Res judicata as Applicant filed an Application dated 1st October 2015 seeking injunctive orders which the 1st Respondent opposed. The Application heard and a Ruling delivered on 5th February 2016 whereby the Application was dismissed and the Defendant ordered to serve a statutory notice as required under Section 90(1) of the Land Act.

9. The Respondent denied the allegations that, it required a court order to exercise its power of sale. It further denied that allegations that, the interest charged is excessive and argued that it was as per the contract signed by the Parties being 5.5% per month. That the Applicant should know that courts do not rewrite contracts for the parties. That the Applicant is using the Application to deny the 1st Respondent the right to recover its money and is thus underserving of any equitable remedies, as she has not made any effort since the ruling was delivered to try and redeem her property but only waited till the last minute to run to court for injunctive orders. That it is therefore in the interest of justice that the Parties should not litigate forever and litigation should come to an end.

10. The 1st Respondent filed a further Replying Affidavit dated 6th October 2017 sworn by James Ouma in which he deposed that, the 1st Respondent on 3rd October 2017, conducted a search and was shocked by the results which revealed that the Applicant has reported to the County Commissioner that her title deed is lost, thereby restricting any dealings with the land when she verily knows very well that the title document is with the 1st Respondent who have a charge over the same. Therefore, the Applicant is undeserving of any equitable remedies as she has come to Court with unclean hands; she is dishonest and has even stopped servicing the loan which is now outstanding at over Kshs 6.9 million.

11. The Parties agreed to dispose of the Application by filing submissions. The Applicant filed submissions dated 19th July 2017. It was admitted that a binding Legal Charge agreement was entered into between the Plaintiff and the 1st Defendant, however it was reiterated that it was an informal Charge Agreement, as the provisions of Section 79 (a) and 79(5) of the Land Act No. 6 of 2016 were not complied with. Therefore, under the provisions of Section 79(7) of the Land Act (supra), the 1st Defendant is required to obtain a court order to sell the property.

12. It was further submitted that, in the valuation report by Realty Valuers EA, dated 19th January 2014, the property is valued at Kshs 5.7 Million with reserve price of 4,275,000, which is not possible as the property was bought on 8th July 2011 at Kshs 5,100 and taking into account the development thereon, the price cannot be Kshs 5.7 Million. Therefore, the 1st Defendant is in breach of the provisions of Section 91 of the Land Act.

13. The Respondent refuted the issue of Res judicata arguing that the 1st Respondent must comply with the provision of Section 79 of the Land Act as ordered by the Court. That the Application herein is different from the Application decided on dated 1st October 2015.

by the Court. The Applicant relied on the case of; Twin Buffalo Safaris Limited vs Business Partners International Limited (2015) eKLR.

14. The Applicant termed the argument that there is an informal charge in place in terms of Section 79(6) of the Land Act No. 6 of 2012 as a pure misconception. That at paragraph 4 of the Plaintiff, it is pleaded that:

“As security for the said loan facility, the Defendant registered a charge over Ngong/Ngong/46227”.

Further, among the Plaintiff's documents filed on 1st October 2015, in support of its claim, is a document of search confirming the Charge over the property is registered. Clearly, the new Plaintiff's Advocates are moving under a gross misconception.

15. Reference was made to the case of; Thugi River Estate Limited & Another vs Citi Bank N.A. Limited (2014) eKLR and the case of; Francis Joseph kamau Ichatha vs Housing Finance Company of Kenya Limited (2014) eKLR, where the Court held;

“A court of law cannot re-write a contract between the parties. The Parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain; it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

16. I have considered the Application and find that there is no dispute that the Plaintiff/Applicant borrowed Kshs 2.4 million and was granted the same by the 1st Defendant/Respondent upon execution of a loan agreement. The credit facility was secured by a charge over the Plaintiff's/Applicant's suit property. It is not in dispute that the Plaintiff/Applicant repaid only one installment and defaulted. It is also not in dispute that, the 1st Defendant/Respondent proceeded to exercise its statutory power of sale where upon the Plaintiff/Applicant sought for an injunction order vide a Notice of Motion Application dated 1st October 2015. After hearing the same, the 1st Defendant/Respondent was ordered to serve a fresh statutory notice as required under Section 90(1) of the Land Act, and carry out valuation of the suit property.

17. The 1st Defendant/Respondent alleges that, they have complied with the Court order and the Applicant has emerged again with another Application. However two questions arise: Is this matter Res judicata? Analysis of the Application dated 1st October 2015 and the current Application reveal that Prayer (b) of the Application dated 1st October 2015 and the prayer (b) herein are the same.

18. A further analysis reveals that, the Applicant intends to stop the sale scheduled for 23rd February 2017 issued through a daily Newspaper of 2nd February 2017. The Application of 1st October 2015, was seeking to stop the sale advertised in the Star Newspaper dated 2nd September 2015 scheduled 2nd October 2015 therefore, the two Applications are distinct and the Application herein is not Res judicata.

19. The other issues that have arisen relates to whether the 1st Defendant/Respondent require a Court order before exercising of its statutory power of sale. Before I address this question, I wish to deal with the question raised as to whether the 1st Defendant/Respondent complied with the order issued by the Court on 5th February 2016.

20. I have considered the documents annexed to the Replying Affidavit sworn by James Ouma dated 21st June 2017 and note that he has annexed thereto a valuation report by Realty Valuers EA Ltd, dated 19th January 2014. This valuation was carried out before the Court delivered its subject ruling where it was ordered that a fresh valuation be done. It does appear to the Court that no fresh valuation was done after the Court's ruling of 5th February 2016, although it does seem that the 1st Defendant/Respondent issued a fresh notice of sale dated 17th August 2016 and sent to the Plaintiff/Applicant by registered mail.

21. What exactly was the 1st Defendant/Respondent ordered to do in the said ruling. The order reads as follows;

“Pursuant to the foregoing, the Court makes the following orders:

a) the Plaintiff's application herein fails;

b) the Defendant shall be at liberty to exercise its statutory power of sale and to sell the suit property upon:

(i) Service of a statutory notice required under Section 90(1) of the Land Act;

(ii) Valuation of the suit property”

22. Therefore, in the absence of the valuation report, the 1st Defendant/Respondent has not complied with the Court order and cannot be heard to oppose this Application. Be that as it were, in the course of the hearing of this Application, two issues have been brought to the knowledge of the Court that impugns the conduct of the Applicant. First, the Applicant is alleged to have reported to the County Commissioner that “her title deed was lost”. These averments are contained in a further Replying Affidavit sworn by the 1st Defendant/Respondent's Chief Executive Officer, James Ouma. The allegations have not been rebutted. If they are true, then the Plaintiff/Applicant has committed a serious criminal offence and should have been charged by now. In that regard, she has no moral or legal authority to approach the seat of justice and be heard and/or be granted an equitable remedy.

23. Secondly, it does occur to the Court, that, the Plaintiff/Applicant is abusing the Court process. While this Application was pending, the Plaintiff/Applicant has filed a third Notice of Motion Application dated 10th October 2017, seeking for the same prayers as herein. It is therefore clear that, the Plaintiff/Applicant is taking advantage of the judicial system to delay the hearing of the main suit by filing multiple Applications.

24. Thirdly, even if the Court were to disregard the multiple Applications and the alleged falsified report regarding the loss of the title deed, one thing is clear that, the Plaintiff/Applicant does not deny having been advanced the loan facility and having failed to repay the same.

25. In the given circumstances, has the Plaintiff/Applicant established a prima facie case? The Principles of Equity are clear, that “Equity looks on that done which ought to be done” and that “He who comes to Equity must come with clean hands” and finally, “He who seeks Equity must do Equity”.

26. The Plaintiff/Applicant who is seeking for an equitable relief of injunction must and is bound by these principles. She has failed to demonstrate compliance thereto. This is informed by the fact that she has admitted default and she is simply faulting the manner in which the 1st Defendant/Respondent is procedurally exercising its power of sale.

27. However, the 1st Defendant/Respondent has simply failed to do what the Court ordered it to do. It cannot fail to comply with a Court order and expect to exercise its statutory power of sale unprocedurally, and therefore as much as the Applicant has not demonstrated a prima facie case, as defined by the Mrao's case, the 1st Defendant/Respondent cannot be allowed to disobey a Court order.

28. In conclusion, I uphold the Ruling of the Court dated 5th February 2016 and order the 1st Defendant/Respondent to comply with the conditions set therein. In the absence of such compliance, any purported sale will be null and void.

29. In the meantime, the Application lacks merit and is dismissed and therefore if the 1st Defendant/Respondent issues the relevant statutory notices and conducts a fresh valuation, it will be at liberty to proceed with the sale. The pending Application dated 10th October 2017 is marked as overtaken by events.

30. In view of the fact that none of the Parties have won or lost, each party will bear its own costs.

31. It is so ordered.

Dated, delivered and signed in open Court this 16th day of April 2018.

G.L. NZIOKA

JUDGE

In the presence of:-

Mr. Ayabei for the Plaintiff/Applicant

Mr. Mugenyi for Kirimi for the 1st Defendant/Respondent

No Appearance for the 2nd Defendant/Respondent

Langat.....Court Assistant