



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL PETITION CASE NO. 16 OF 2018

IN THE MATTER OF SECTIONS 11(1) (h) OF THE

BANKING ACT CAP 488 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 4(a) (c), 33 (f), (g)

OF THE CENTRAL BANK OF KENYA

ACT CAP 491 LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES

10(1)(c), 22, 23, 28, 29(d) (f), 31(c), 40(1) (2) (a) 43(1)(b), 46 & 232

AND

IN THE MATTER OF CONSUMER RIGHTS VIS-AVIS FRAUDULENT,

RECKLESS TRANSACTION OF BUSINESS BY BANKS

BETWEEN

PERES ADHIAMBO ODHIAMBO.....PETITIONER

VERSUS

HOUSING FINANCE

COMPANY OF KENYA LIMITED.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

(FORWARDED FOR HEARING BY D.R. KISUMU

BEFORE VACATION DUTY JUDGE - SIAYA)

RULING:

In the Notice of Motion dated 16th August, 2018 and filed in Court the same day, the Petitioner/Applicant Peres A. Odhiambo seeks from this Court (Material to this Ruling), “3. That pending the hearing and determination of this Petition Interpartes, this Court be pleased to issue temporary conservatory orders of injunction stopping the 1st Respondent from transferring the property **L.R. No. 15983/192/3 KENYA RE-**

ESTATE Kisumu to any Third Party other than the Petitioner. 5. That the costs of this application be in the cause.”

The Application is supported by an affidavit sworn by the Petitioner/Applicant Peres A. Odhiambo on 16th August 2018 and predicated on the grounds on the face of the Notice of Motion.

Basically, the Petitioner/Applicant alleges in her Petition and Application against the Respondents Housing Finance Company (K) of Kenya and Central Bank of Kenya (CBK) that the Respondents have violated her fundamental human Rights as guaranteed in **Article 46 of the Constitution** and that the 1st Respondent has violated **Section 11(1) (h) of the Banking Act, Cap 488 Laws of Kenya** and compromised rights of consumers of banking services.

Further, that the Respondent HFCK has acted recklessly and fraudulently by interfering with the bank account held by the Petitioner at the 1st Respondent's bank which has resulted in the Petitioner/Applicant suffering poor and deplorable health as a result of which she was unable to attend **Kisumu ELC case No. 785/2015** leading to discharge of the temporary injunction orders. That the said discharge of the temporary injunction in the above ELC matter resulted in the 1st Respondent exercising its statutory powers of sale over property **No. LR 15983/192/3 KENYA-RE** whose current Market valuation is about Shs.20 million on 26.7.2018 and that the Bank may move to transfer it to a Third Party anytime hence the need to protect the substratum of the Petition.

It was further averred that this case meets the threshold for grant of conservatory orders as settled by the Supreme Court in the case of **Gatirau Peter Munya Vs. Dickson Mwenda Githinji & 2 Others** which highlights the principle of Public Interest while determining whether or not to grant a conservatory order, bearing in mind the inherent merit of the case, the public interest, the Constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.

According to the Applicant, the sale of her property named herein by the 1st Respondent is a nullity and was done in breach of her fundamental rights in the bill of rights. She claims that she fully paid for the purchase of the property by depositing money in her account with the 1st Respondent who interfered with the said funds and instead converted her cash purchase of the property into a Mortgage arrangement which then gave it the power to sell her property on account that it was exercising Statutory Power of Sale of the Property, which transaction, it is alleged, is fraudulent and reckless.

The 1st Respondent, despite being served with the Application, did not file any response to the application.

The 2nd Respondent CBK did file Grounds of opposition to the application contending principally, that there is nothing disclosed in the application and Petition to show that the 2nd Respondent has in any way violated the rights of the Petitioner/Applicant hence the application does not touch on them.

The application was argued orally by Mr. Amondi Advocate for the Applicant with Miss. Wakoli Advocate for the 2nd Respondent urging for costs of the application.

The submissions by the Petitioner's Advocate reiterate the grounds in support of the application and the depositions in the affidavit in support of the motion sworn by the Applicant.

Miss. Wakoli Counsel for the 2nd Respondent too reiterated her Client's grounds of opposition contending that the relationship between the Petitioner and the 1st Respondent was contractual to which her client was not privy. Further, that CBK does not micromanage the day today operations of the Banks hence it cannot be held liable for breach or alleged breach of fundamental rights of the Applicant. She urged the Court not to make any adverse orders against her client.

I have carefully considered the Application by the Applicant who is the Petitioner herein. I have considered the response by the 2nd Respondent and submissions thereto made by Mr. Amondi Counsel for the Applicant and MISS WAKOLI Counsel for the 2nd Respondent CBK.

The main issue for determination is whether the Applicant is entitled to the Orders sought and if so, whether the 2nd Respondent should in any way be affected by the Orders that may be made by this Court at this stage.

What emerges from the pleadings filed by the Applicant/Petitioner is that she purchased the property **LR No. 15983/192/3 from KENYA-RE** by cash payment and deposited the purchase price in her account with the 1st Respondent **HFCK a/c No. 1070-0-020 264-1**.

In satisfaction of the full purchase price. Regrettably, the HFCK misappropriated her money from the account and instead of clearing her account to pay Kenya Re, it purported to create a Mortgage facility for her on the same property and made it appear as though she had defaulted in repayment then it purported to exercise its statutory power of sale of the said property.

The Applicant challenged the sale. But before then, she had sued the 1st Respondent together with its **Branch Manager Paul Ogotu were in Kisumu HCCC 352 of 1999** for damages for unlawful withdrawals of her money from the account. Judgment was entered in her favour by Tanui B.K. J. in 2006.

As matters stand, the 1st Respondent has sold the Applicant's property in exercise of Statutory Power of sale and by a Public Auction. The Applicant is challenging the said sale terming it illegal, reckless and fraudulent. She has however, obtained a temporary stay of transfer of the said sold property to the Third Party Purchaser.

From the pleadings and submissions, albeit this Court is not expected to delve into the merits of the Petition, I have no doubt that the Applicant has an arguable case before the Court.

An arguable case is not necessarily one that must succeed but that it is not on the face of it, frivolous or vexatious and that unless conservatory orders sought are granted, the Applicant/Petitioner is likely to be rendered a pious explorer in the Judicial process.

The Applicant has demonstrated that she has a *prima facie* case as against the 1st Respondent HFCK who, despite being served with the Application has not filed any response thereto. The Court notes that the Applicant resides in Germany and therefore was not in the picture when the 1st Respondent was initiating the process of selling her property which she claims was purchased by cash transaction and not mortgage arrangement to warrant exercise of Statutory Power of sale thereof as was done in this matter.

Article 23, (3) of the Constitution empowers this Court to grant a conservatory order as one of the remedies for infringement of fundamental rights and freedoms. On the material placed before this Court, I am satisfied that the Applicant has demonstrated that she is entitled to a grant of a conservatory order in order to preserve the substratum of the petition herein so that should the petition as presented be successful, it should not be rendered nugatory. This is a principle well espoused in the **Peter Gatirau Munya** Case (supra).

Accordingly, I grant prayer No. 3 of the Application dated 16th August, 2018, and order that:

(1) Pending the hearing and determination of the petition interpartes, there shall be a temporary conservatory order of injunction stopping the 1st Respondent HFCK by or whatever name and any other person from transferring the property L.R. No.15983/192/3 KENYA RE ESTATE KISUMU to any Third Party other than the Petitioner/Applicant herein.

(2) As against the 2nd Respondent I find that no case has been made against them at this stage.

I decline to make any adverse orders against the 2nd Respondent CBK.

(3) This matter shall be mentioned before the Presiding Judge, Kisumu High Court on 19.9.2018 for further directions on the disposal of the main Petition.

(4) Costs shall be in the Petition.

Dated, Signed and Delivered at Siaya this 30th day of August, 2018.

R. E. ABURILI

JUDGE