



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 449 OF 2015

TWIN BUFFALO SAFARIS LIMITED.....PLAINTIFF

VERSUS

BUSINESS PARTNERS

INTERNATIONAL SME FUND L.P.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO t/a

GURAM AUCTIONEERS.....2ND DEFENDANT

CHESIRE ENTERPRISES LIMITED.....3RD DEFENDANT

LAND REGISTRAR.....4TH DEFENDANT

RULING

1. This short Ruling answers the 1st and 2nd Defendants' Notice of Motion dated 11th March 2016 for the following prayers:-

a) This Honourable Court be and is hereby pleased to strike out the Plaintiff/Respondent's Complaint and dismiss the suit here in limine as the Plaintiff's suit fails to disclose a reasonable cause of action known in law, as against the 1st and 2nd Defendant; the suit is similarly scandalous, frivolous and vexatious and consequently an abuse of the process of Court.

b) In the alternative the Honourable Court be and is hereby pleased to order the Plaintiff/Respondent to tender adequate security for costs in regard to the suit; and

c) The costs of this Application and for the entire suit be borne by the Plaintiff.

2. The relevant facts to the matter before the Court can be stated in brief. Twin Buffalo Safaris Limited (Twin Buffalo) was granted a financial facility by Business Partners International SME Fund L.P (Business Partners) and amongst the securities offered was a legal charge for Kshs.20,000,000 over property known as Dagoretti/Ruthimitu/835 (The charged property) in favour of Business Partners. Over time Business Partners saw default in repayment of the facility and sought to exercise its Statutory Power of Sale. Twin Buffalo would not hear of it and brought Milimani HCC NO.560 of 2013 Twin Buffalo Safaris Ltd vs. Business Partners Ltd(hccc 560 of 2013) in challenge thereof.

3. In an application dated 19th December 2013, Twin Buffalo sought to injunct Business Partners from exercising its Statutory Power of Sale. That application did not meet a kind fate and was dismissed by Havelock J. on 19th June 2014. Seeing continued default, Business Partners sold the charged property by way of Public Auction to Chesire Enterprises Ltd (Chesire or the 3rd Defendant herein).

4. Displeased with that turn of events, Buffalo took out a Motion in Civil suit NO. 560 of 2013 seeking two interventions. The first was an injunctive Order to restrain the transfer of the property to Chesire. The other was to seek Leave of Court for amendment of the Complaint to set aside the sale. Both requests were declined by Hon. Gikonyo J. in a Ruling of 20th April 2015.

5. The result of that Ruling is that the Charged Property was subsequently transferred to Chesire. This suit challenges that sale and the Land Registrar is joined as the 4th Defendant allegedly for wrongfully and without due diligence and care transferring the suit property. The prayers sought in this suit are as follows:-

- a) An Order consolidating the instant suit with Hccc No. 560 of 2013 Milimani Commercial Courts Nairobi.
- b) A Declaration that the auction of Title number Dagoretti/Ruthimitu/835 was illegal, fraudulent and irregular.
- c) A Declaration that the transfer of Title number Dagoretti/Ruthimitu/835 is illegal, fraudulent and irregular, null and void.
- d) Revocation of the transfer and rectification Title number Dagoretti/Ruthimitu/835 back to the Plaintiff's name.

6. Business Partners has taken the position that this matter need not detain the Court any further as it does not disclose a reasonable cause of action and/or is otherwise *subJudice* and *res judicata*. I have given regard to the written submissions of both sides and take the following view of the matter.

7. In declining to grant leave for Amendment of the Plaint in Civil suit No. 560 of 2013 Hon. Gikonyo observed as follows:-

“These protections carry constitutional as well as statutory weight and should always bear on the decision of the court when determining matters affecting the rights of a bona fide purchaser for value. On the other hand, the law does not leave a damnified chargor without a remedy; it provides for a remedy and the manner of applying and against whom. Accordingly, allowing an amendment of the existing plaint which is between the chargee and the chargor in the manner proposed by the Plaintiff and in total disregard of the rights of the purchaser will be most unfair. In the circumstances; it the amendment is tantamount to introducing a new and inconsistent cause of action in the plaint. To allow it would be contrary to the law. The best course to follow is to file a fresh suit on the sale and or for damages wherein all the arguments advanced in support of proposed amendments will be canvassed and determined among the parties quite independent of the other issues in the plaint herein which are not related to the sale of the suit property. This course will not sow multiplicity of suits but rather will avoid difficulties or absurdities which may arise in trying to adjudicate upon causes of action that are irreconcilable or inconsistent. I decline to grant the amendment sought.”

8. While this suit still challenges the sale and subsequent transfer of the charged property to Chesire, it also seeks Damages being the difference between the market price of the property and the auction price; in addition to General Damages for the an alleged fraudulent sale of the property. These two limbs are not taken up in Civil Suit No. 560 of 2013 and indeed could not be taken up following the rejection for amendment. This Court is unable to say that these two issues are *res judicata* Hcc. No. 56 of 2013.

9. Striking out of a suit is a drastic step and the learning of D.T Dobie & co. (K) Ltd vs. Muchina [1982] eKLR 1, is that it is a power to be used very sparingly and only in the clearest of cases.

10. The Charged Property was sold for Khs.24,510,000/= on 11th November 2014. This is a common position. Buffalo thinks the sale was at an undervalue. It avers:-

“The property was sold at a gross undervalue having no reserve price”.

On its part Business Partners is confident that the Sale price passes muster as it was slightly above (by Kshs.10,000/= more) above the forced sale value of Kshs.24,500,000/= returned in the valuation by it and carried out by Crystal Valuers Ltd on 29th November 2013. The Valuers had also returned an open market value of Kshs.32,500,000/=. If this was a fair valuation then the charge would be within the law as the valuation was done within 12 months of the sale (see Rule 11 of The Auctioneers Rules).

11. That valuation is however questioned by Buffalo whose Valuer (Daytons Valuers Ltd) returned the following values on 29th August 2014:-

- a) Open market value – Ksh. 40,000,000/=
- b) Forced sale value – Khs.30,000,000/=

12. This is not the first time Buffalo raises the issue of sale at under value. It had done so in Hcc No. 560 of 2013 as a basis to injunct the transfer of the property to Chesire. Hon. Gikonyo J. made the following limited observations in respect to that objection:-

“30. There have been allegations that the suit property was sold in utter undervaluation; and that there were concealment of salient matters in respect of the said sale. These are essentially matters on irregularity in the manner the sale was conducted, and are matters for fresh cause of action envisaged under section 99 and 104 of the Land Act. As a general Rule, they cannot found injunctive relief against a purchaser for value without notice. I note that the Plaintiff admitted that there were two bidders at the auction but for reasons known to the Plaintiff, argued that there was concealment of salient matters on the auction. And that reality takes away the sincerity of averments by the Plaintiff on the matter. On that basis, I hereby reject the application for injunction to stop the transfer of the land to the purchaser. I will not make an order of costs given the circumstances of this case. It is so ordered.

13. Whilst the issue of valuation could not be a basis to restrain the transfer it does not mean that it cannot be properly taken up as a foundation for pressing for damages. If a sale at a gross undervalue is found then Buffalo will be deserving of a remedy in damages. There are two valuations before the Court, one placing the forced sale value at Khs. 24,500,000/= and the other at Khs.30,000,000/=. A Trial Court will have to consider the evidence and make a finding as to which valuation to believe and whether there was sale at a gross undervalue.

This in my view raises a triable issue. It has a semblance of a cause of action which should be allowed to survive for test at a full Trial.

14. Even a single triable issue is sufficient to defeat an application for striking out for want of a reasonable cause of action.

15. Should I order the Plaintiff to render security for costs in regard to the suit?

16. The application for security for costs is founded on the provisions of Order 26 Rule 1 which reads:-

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party”.

17. Counsel for both sides have cited various decisions which discuss the principles to be applied in deciding an order 26 Rule 1 application. They include **Saudi Arabia Airlines Corporation vs. Jean Express Services Ltd** [2014] eKLR and **Martha Wambui vs. Irene Wanjiru Mwangi & another** [2015] eKLR. From these decisions the principles can be summarized as follows:-

a) The matter is one in the complete discretion of Court, which needless to say must act judiciously.

b) The inability of the Plaintiff to pay costs. But with a caveat! This alone is not enough to grant the order as financial distitution should not be a reason to stifle an otherwise bonafide claim.

c) The bonafides of the Plaintiffs claim without carrying out a detailed examination of the prospect of the case.

d) The timing of the Application. An application brought way after the proceedings have been filed may be viewed as an afterthought unless the lateness is well explained.

This list is by no means exhaustive. And to be noted is that the Court may be called upon to carry out a difficult balancing act that is consequent upon the tension between the possibility of preventing a proper claim by making the order and the injustice that not making the order may cause on a Defendant who may not, ultimately, be able to recover costs.

18. Applying these principles I reach the following conclusions. By declining to strike out the Plaintiffs claim, I have necessarily found that it is not frivolous. Secondly, if the Notification of Sale that preceded the sale is anything to go by, then the Price at the Auction met the entire debt of Business Partners and it may have achieved a surplus (Ksh.19,671,368/= as at 1.10.2014 against the sale price of Kshs.24,510,000/=). In this regard there is no evidence that the financial position of Buffalo is so distressed as to be unable to meet an ultimate order of costs. On these two considerations the Court takes the view that an order for security is unnecessary and declines to grant it.

19. Ultimately the entire application is without merit. The motion of 11th March 2016 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 28th day of September, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Ruto for Plaintiff

Mwenesi for Mutua for 1st and 2nd Defendant

N/A for 3rd and 4th Defendants

Nixon - Court Assistant