



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCC. CASE NO. 438 OF 2014

ABDULKADIR SHARIFF AVDIRAHIM.....PLAINTIF

VS.

ECO BANK KENYA LIMITED1ST DEFENDANT

VERICARD SYSTEMS LIMITED 2ND DEFENDANT

RULING

1. By a Plaint dated 6.10.2014 the Plaintiff seeks injunctive and declaratory reliefs plus costs against the Defendants. Contemporaneously with the filing of the above Plaint, the Plaintiff filed a motion seeking injunctive reliefs against the Respondent as follows;
2. **THAT** a temporary injunction restraining the Defendants, by themselves, their agents, servants, employees, officers and /or directors or any other person under their direction, authority and/or supervision from evicting the Plaintiff and/or trespassing, alienating, leasing, selling, charging, transferring and/or committing acts or otherwise from interfering with the Plaintiff's possession or L.R No. 37/262/3 Nairobi or otherwise howsoever evicting and/or interfering with the property pending the hearing and determination of this application which Order be enforced by the Officer Commanding Station, Langata Police Station.
3. **THAT** a temporary injunction restraining the Defendants, by themselves, their agents, servants, employees, officers and /or directors or any other person under their direction, authority and/or supervision from evicting the Plaintiff and/or trespassing, alienating, leasing, selling, charging, transferring and/or committing acts or otherwise from interfering with the Plaintiff's possession or L.R No. 37/262/3 Nairobi or otherwise howsoever evicting and/or interfering with the property pending the hearing and determination of suit which Order be enforced by the Officer Commanding Station, Langata Police Station.
4. **THAT** a temporary injunction do issue compelling the 1st Defendant to forthwith deliver to M/S National Bank of Kenya and/or its advocates Sheikh & Company Advocates for onward transmission to M/S National Bank of Kenya Ltd and/or its advocates the following documents in its possession;

(a) Original Title to Land Reference No.37/262/3.

(b) The charge by the Plaintiff to the 1st Defendant entry No.24 to the aforesaid title.

(c) A discharge of charge duly executed by the Defendant discharging the charge registered as entry No.24 of the Plaintiff's property LR.No.37/262/3 free from any encumbrances.

(d) The said documents being released to M/s National Bank of Kenya Ltd and/or its Advocates Sheikh & Company Advocates on their written professional undertaking loan on the suit property.

5. **THAT** this Honourable court be pleased to make any other orders deemed fit for the end of justice.

6. **THAT** the costs of this application be provided for.

2. The application is based on the grounds on the face of the motion and is supported by the Affidavit of ABDULKADIR SHAMFF ABDIKAHIM sworn on 6.10.2014 and his supplementary affidavit sworn on 25.5.2015.
3. The application is opposed by the first Defendant via a replying affidavit sworn by ELIZABETH HINGA and filed on 3.11.2014 and her further affidavit sworn and filed on 4.5.2015.
4. The 2nd Defendant also opposed the application via an affidavit sworn by EDITH IRERI on 11.4.2014 and her further affidavit sworn on 6.10.2015. The parties advocate consented to canvass the matter via written submissions which were filed and exchanged.
5. The Plaintiff case is that on or about 5.11.2008 he charged his property LR 37/262/3 with the 1st Defendant in consideration of obtaining financial accommodation.
6. In order to redeem the same he entered into a sale agreement with Salama commodities Trading Co. Ltd (SCT) which was being financed by the National Bank of Kenya (NBK).
7. The 1st Defendant however refused to allow the charge of same with NBK and transfer to the SCT and claimed to have sold the same to the 2nd Defendant. This prompted the filing of the instant application.
8. The Plaintiff submits that the 1st Defendant acts were calculated to unjustly benefit the 2nd Defendant by clogging his right to equity of redemption. He cites **SHAROK KHER MOHAMED ALI & ANOTHER VS. SOUTHER CREDIT BANKING CORP. LTD.** (2008) ECLR where the court held that;

“the fact that a person seeks financial accommodation from a bank does not mean that a bank can deal with charged property in the way it deems fit. The existence of a mortgage document cannot give a bank unlimited powers to seize, take possession and deprive the property owners”.

9. The Applicant submit that, the chargee is required to exercise its statutory powers of sale in good faith and fairly. However the said duties were breached by the mortgagee when it rushed to sell suit property while negotiations were still ongoing on how the Plaintiff would redeem the suit property and when it failed to respond to NBK advocates.
10. The Applicant relies on the case of **GIVAN OKALLO INGARI & ANOTHER VS. HFCK LTD (2007) ECLR** where the court held that;

“the equity of redemption gave the mortgagor a general right to redeem his property on or before actual date of redemption. It also gave him the grace period which extends long after the actual date of redemption”.

11. This means according to the Plaintiff' submissions, failure of borrower to pay mortgaged debt

does not in any way extinguish his interest on the property. However the Applicant argue that the 1st Defendant's acts and omissions were aimed at clogging equity of redemption by purportedly selling suit property. He cited **GIVAN OKALLE INGARI** supra case which stated that;

"a chargee fetter on equity of redemption is void, that nothing or nor action can make the right of mortgagor to release his property irredeemable"

12.He submits that there is no evidence the suit property has been sold. Relying on **HFCK LTD VS. GILBERT NJUGUNA HCC 160/1999** case, the Plaintiff cites the holding which was to the effect that;

"contracts belong to the parties and they are at liberty to negotiate and even vary the terms when they choose and this they must do together and with meeting of minds. If it appears to the court that one party varied terms of contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contract".

13.The Applicant also lament that, the 1st Defendant sold suit property 209/11067/7 at Ksh.19 million while its market price was Ksh.37 million and another property LR 37/262/3 at Kshs.50.5 million which is over and above Ksh.50 million thresh hold as required by Duplum Rule under S 44A of the **Banking Act (amendment No.9/06)**.

The rule is to the effect that;

section"44A

(1) An institution shall be limited in what it can receive from a debtor with respect to a non-performing loan to a maximum amount under subsection (2).

(2) The maximum referred to in subsection (1) is the sum of the following;

- a. **The principal owing when the loan becomes non- performing;**
- b. **Interest in accordance with the contract between the debtor and the institution not exceeding the Principle owing when the loan becomes non-performing and**
- c. **Expenses incurred in the recovery of any amount owed by the debtor"**.

14. The Plaintiff reiterates that there is no evidence of sale or transfer of the suit property to the second defendant. Under **S.98 (4)** it is upon registration that the interest of the chargor passes to the purchaser. In alternative the Plaintiff submit that the equity of redemption has not been extinguished.

15.He cites **GIVAN OKALLO INGARRI** case Supra , where the court noted that;

"The equity of redemption is normally extinguished at the fall of the hammer but this only applies where there is a valid contract in existence".

16.The Plaintiff submits that the sale in the instant case is void because the due process was not followed by the 1st Defendant in conduct of sale thus equity of redemption cannot be clogged by a legal wrong.

17.The Plaintiff submits that he has met the thresh hold for granting an injunction in terms of **GIELLA VS. CASSMAN BROWN & CO. LTD 1973 EA 358**. The Plaintiff also rely on the case of **MRAO VS. FIRST AMERICAN BANK (K) Ltd & 2 OTHERS (2003)** e **KLR 125** to demonstrate the establishment of a prima facie case as defined in that case.

18.Further he relies on **GIVAN OKALLO INGARI** case where court stated that;

"...a party deprived of his property would suffer irreparable loss and /or damage..."

19.He also relies on the case of **ALICE OWINO OKELLO Vs. TRUST BANK LTD & ANOTHER LLR no.625(CCK)** as he submits that;

“the balance of convenience is in favor of an applicant as the sale of one’s property is a serious matter that deprives one of a right recognized by law”.

20. He concludes that the 1st Defendant acted illegally and thus in words of the court in **NGATA KAMAU VS. PATRICK KIIRUNKU HCC CA 89/01 (2005)** e KLR case, thus;

“where the law offer protection to a citizen...it is the duty of the court to uphold such law...”.

He prays for the orders sought.

RESPONDENT NO. 1 CASE.

21.The 1st Respondent opposed the application. It avers that the Plaintiff offered his property as security for financial facilities advanced. He defaulted in payment constraining the 1st Respondent to exercise statutory power of sale. The Plaintiff filed several cases challenging the exercise of his powers. The High Court and Court of Appeal dismissed such application, ref. to page 129-203 of MS. HINGA replying affidavit.

22.However the parties entered into an agreement that the Plaintiff to pay Ksh.20 million on or before 30.3.2014 and in default the agreement to become null and void. Come 30.3.2014 same amount was not paid thus the agreement above lapsed.

23.The above facts are not denied by the Plaintiff. The 1st Respondent submits that the applicant is now via the instant application seeking to have court rewrite parties contract.

24.1st Respondent cites the case of **RIPPLES LTD VS. KAMAU MUCUBA** which held that;

“it is trite law that a contacting party who fails to perform his part cannot obtain an injunction to restrain a breach of covenant by other party as that would be inequitable”.

Thus the applicant has not met the thresh hold set in **GIELLA SUPRA** case.

25.The 1st Respondent submits that the suit property was sold to the 21nd Defendant and it is now the correct registered owner. The documents of sale, payment and transfer are all exhibited in Ms. HINGA Replying affidavit.

26.The mandatory injunction sought for release of documents to NBK is enforcement of a lapsed contract which cannot be enforced. The 1st Respondent argues that in any event that an injunction cannot be issued to restrain what has been overtaken by event. See **STANLEY KIRUI Vs. WESTLAND PRIDE LTD HC ELC 184/2013**. Also **NAI C.A 125/012 PATRICK MBUGUA MWAURA VS. LAWRENCE MAINA MWANGI & ANOTHER**.

27.The Plaintiff submits that no prima facie case has been established under **Order 40 Rule CPR and GIELLA case**. This is because what the Applicant sought to be enforced lapsed. In the case of **AG OF BELIZE ETAL Vs. BELIZA TELKOM LTD & ANOTHER (2008)**, IWLR 1980 page 609 1993 citing authorities, the court held;

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves..”

28.The 1st Respondent submits that the Plaintiff having defaulted in performing his part of contract cannot seek intervention of the court when all what the 2nd Defendant is doing is in accordance with a charge documents and the law. The 1st Respondent submits that the Plaintiff has not also met the thresh hold of grant of mandatory injunction which is that;

If the case was;-

- a. *Clear and one which the court thought it ought to be decided at once.*
- b. *If act done was simple and a summary one which could easily be remedied.*
- c. *Or if the defendant attempted to steal a match on the Plaintiff .*

Ref. to Magnate Ventures Ltd Vs. Eng Kenya Ltd (2009) KLR 538.

29.The 1st Respondent thus prays for the dismissal of the application with costs.

THE 2ND RESPONDENT CASE

30.The Second Defendant avers that it purchased the suit property on an auction on 30.6.2014 after seeing an advertisement. It was the highest bidder for Ksh.50.5 million. The 2nd Respondent submits that it is a bonafide purchaser for value without notice of any defects against the sellers titles. It relies on the case of **CAPTAIN PETER KANYAGIA & ANOTHER Vs. DAMARIS WANGECHI & 2 OTHERS (1995) e KLR** where the court held that;

“I see no duty cast, in law on an intending purchaser at an auction sale, properly advertised to enquire into the rights of the mortgagee to sell”.

31.He submits that **S.38(2) of Land Act 2012** protects any sale conducted by way of an auction. Further it relies on the case of **JACOB OCHIENG MUGANDA VS. HFCK LTD CA 453 of 2001**, where the court held that;

“if there was any irregularity in the conduct of an auction, the applicant would be entitled to damages against the auctioneers pursuant to section 26 of the Auctioneers Act...”

Same holding was adopted in **KUTUR & ANOTHER VS. STANDARD CHARTTERED BANK & ANOTHER 2(2002) IKLR 640.**

32.Further the 2nd Respondent submits that **S.99 of Law Act 2012** protects Purchasers of properties sold in exercise of chargee's statutory power of sale.

33.The 2nd Respondent also submits that the thresh hold for grant of temporary injunction as set out in **GIELLA** case has not been met. The 2nd Respondent prays for dismissal of the application with costs.

ANALYSIS

34. After going through the Pleadings, affidavits and the parties submissions, I find the following issues arising;

1. **Whether the agreement between Plaintiff and 1st Defendant for payment of Ksh.20 million to redeem suit property on or before 30.3.2014 was breached by the Plaintiff and thus lapsed after 30.3.2014?**
2. **Whether the 1st Defendant was entitled to exercise statutory power of sale herein?**
3. **Whether 2nd Defendant is a bonafide purchaser for value?**
4. **Whether the thresh hold for grant of temporary injunctions have been met?**
5. **What is the orders as to cost?**

35.The Plaintiff does not deny being granted facilities amounting to Ksh. 19 million by the 1st Defendant on security of its property LR No.37/262/3. The Plaintiff does not also deny the default in payment of the same amount. This rendered the 1stDefendant to exercise statutory power of

- sale which attracted suit and appeal which the Applicant lost both in High Court and Court of Appeal.
36. Further in early 2014 the Plaintiff and 2nd Defendant entered into a contract in which Ksh.20 million was to be paid by the Plaintiff to the 1st Defendant on or before 30.3.2014 to clear the loan.
37. It is not also denied that same was not paid to date in breach of the said agreement. The aforesaid breach constrained the 1st Plaintiff to exercise power of sale culminating with sale of the suit property to the 2nd Defendant for Kshs.50.5 million.
38. In the foregoing circumstances, can the Plaintiff still enforce the contract he breached? In the case of **RIPPLES LTD VS. MUCUBA HCC NO. 4522/1992** the court held;

“it is trite law that a contracting party who fails to perform his part of contract cannot obtain an injunction to restrain a breach of a covenant by the other party as that would be inequitable”

39. In the case of **AG of BELIZE** Supra, the court held;

“The court does not make a contract for parties. The court will not even improve the contract which the parties have made themselves...”

40. The parties (Plaintiff and 1st Defendant) having voluntarily entered into a contract for payment of Kshs.20 million to redeem the suit property on or before 30.3.2014, and the Plaintiff have failed to honour the same, the court cannot vary the terms thereof to extend time of performance of the same.
41. The parties agreed that the contract was to lapse on 30.3.2014 if payment was not effected. The payment was not done in the premises the agreement lapsed.
42. The court holds that the same agreement was breached by the Plaintiff by failing to pay Kshs.20 million by 30.3.014 and thus lapsed after 30.3.014.
43. The agreement having lapsed and the default of payment for secured amount remaining outstanding, the 1st Defendant was right to exercise power of sale. The belated efforts to factor in NBK to take over the loan did not cure the default of the agreement for payment for Kshs.20 million and thus the sale of suit property was justified.
44. The applicant does not demonstrate with material or otherwise that the process of exercise of power of sale was devoid of due process or failed to follow statutory procedure provided by the law.
45. The 2nd Defendant has established that it purchased the suit property via an auction at a price for Kshs.50.5 million and same was paid.
46. The documents for ownership were prepared and transfer effected. The 2nd Defendant was not obliged to enquire into the rights for the mortgagee to sell. Refer to **Captain Patrick Kanyagia** supra case.
47. In terms of **BOMET BEER DISTRIBUTORS Ltd & ANOTHER Vs. KCB LTD & 4 OTHERS (2005) EKLR**;

“once a property has been knocked down and sold in a public auction by chargee in exercise of its statutory power of sale, the equity for redemption of the chargor is extinguished”.

48. If there were irregularities in conduct for the Auction, the Applicant would only be entitled to damages against the auctioneers under **S. 26 of the Auctioneers Act**. Also See **JACOB OCHIENG** case Supra. The above 2 authorities demonstrates that the Applicant lost equity of Redemption and thus he can only be compensated in damages if he proves irregularities during trial .
49. See also **KITUR & Another** case Supra.
50. For grant for injunction, the Applicant has to meet the thresh hold set in the case of **GIELLA** Supra that is;

- a. **He must show a prima facie case.**
- b. **That if orders are not granted, he will suffer irreparable damages which cannot be compensated in damages.**
- c. **and if in doubt, the court will decide case on balance of convenience.**

51. The Applicant breached the agreement to redeem his property by 30.3.014 thus the suit property was sold and transferred to the 2nd Defendant. The Applicant lost equity of redemption.

52. The court finds that in view of the above circumstance of the case, the Plaintiff has not established a prima facie case as set out in **Giella case** and defined by **MRAO case** Supra.

53. Having found that there is no prima facie case we need not go to the 2nd and 3rd limb of the conditions set in **GIELA** on grant of temporally injunction.

54. On the issue of the sought mandatory injunction, the court finds that the thresh hold as set out in **MAGNATE VENTURES Ltd** case Supra was not met.

55. There is no prove that it is a clear case which court can decide at once. Nor is it simple for summary remedial. There is no element of prove of the 1st Defendant attempt to steal a match on the Plaintiff. In any event both restrictive and mandatory injunctions have been overtaken by events as he suit property was sold and transferred to the 2nd defendants.

56. The court has already found that the 2nd Defendant was a bonafide purchaser for value without notice of any defect in title.

57. The court thus finds no merit in the Application and makes the following orders:

1. **The Notice of motion dated 6.10.014 is dismissed.**
2. **Any temporary orders issued are discharged.**
3. **Costs to the Defendants.**

Dated, signed and delivered in court at Nairobi this 29th day of January, 2016.

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C. KARIUKI

JUDGE