



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 461 OF 2007

KENYA ANTICORRUPTION COMMISSION.....PLAINTIFF/DECREE HOLDER

VERSUS

JOHN FAUSTIN KINYUA1ST DEFENDANT/JUDGEMENT DEBTOR

JOHNSON J. GITHAKA..... 2ND DEFENDANT/JUDGMENT DEBTOR

MBUYU FARMS LTD3RD DEFENDANT/JUDGMENT DEBTOR

SUMAC MICROFINANCE BANK LTD.....OBJECTOR

RULING

1. This suit was brought against the Defendants jointly and severally for Recovery of Public money allegedly wrongfully and illegally acquired by the Defendants. The loss was sustained by Kenya Reinsurance Corporation, a public body.

2. There is judgement in favour of the Plaintiff against the Defendants jointly and severally for Kshs.5,423,183/= with interest at Court rates from 6th September 2011 until payment in full. It is said that towards satisfaction of that Decree, Kshs.1,839,423/= has been recovered from the sale of Shares of the 3rd Defendant and another sum of Kshs.2,861,483 paid by the 2nd Defendant. The position of the Defendant is that it has not recovered any funds from the 1st Defendant. So as to realize the balance of the Decretal sum the Plaintiff applied for attachment of LR No.209/10611/30 (the Property) which is registered in the name of the 3rd Defendant.

3. On 22nd July 2015, Gikonyo J. made the following Orders in favour of the Plaintiff;-

(2) *“Meanwhile, I am convinced from facts disclosed that a prohibitory Order is deserved. Accordingly, I issue a Prohibitory Order prohibiting the 3rd Defendant/Judgement Debtor from transferring, disposing, charging or dealing in any manner or way and all persons from taking any benefit from such purported transfer, charge or sale of L.R.No.209/10611/30 (IR 77263).*

(3) *Order (2) above also acts as an inhibition on the said Property ie. LR NO.209/10611/30 (IR 77263). It is so ordered. These Orders subsists for 140 days”.*

On 26th January 2016 the Plaintiff notified the Objector of its Application for Execution by way of Attachment and sale of the property.

4. It however turns out that Sumac MicroFinance Bank Limited (the Objector) has a Legal charge over the property for a loan facility. That charge is dated 16th January, 2015 and was registered on 9th February 2015. In the Affidavit of John Njihia sworn on 4th February 2016, the amount outstanding on the strength of the Charge is said to be Kshs.3,984,501.14, presumably, as at the date of the affidavit. The Order of Prohibition and Inhibition of 22nd July 2015 and the proposed sale of the property aggrieved the Objector who presented to Court the Notice of Motion dated 4th February 2016 which is now before this Court for consideration. The Motion expressed to be brought under the Provisions of Order 22 Rule 51 and 52 of The Civil Procedure Rules substantively seeks an order for Stay of Execution of the Decree herein.

5. At the hearing of the Application, Counsel for the Plaintiff and Objector highlighted their respective written submissions filed in Court. Although the 3rd Defendant's Counsel was not present in Court, he had filed written submissions dated 20th April 2016 which supported the Application. While the participation of the 2nd Defendant may not have been necessary, his Counsel was in Court at the hearing of the Application and indicated that the 2nd Defendant was not opposed to it.

6. After reading and understanding the nature of the application and listening to the Counsel it is apparent that the differences between the contenders herein are slight and perhaps tractable.

7. There is a concession by the Plaintiff that the Objector is a secured Creditor holding a charge over the property which was registered on 9th February 2015. This would be about 5 months before the date of the Prohibition and Inhibition Order. It is a concession that the secured interest of the Objector takes priority over the Decree held by the Plaintiff.

8. While insisting on the Stay Order, the Objector makes certain proposals should the Court not be inclined to grant it. In paragraph 12 of the submissions dated 16th March 2016 filed by its Advocates the Objector states;-

“But should the Court be inclined to grant orders for attachment to satisfy the decree the chargee’s right must be satisfied first and the process and procedures be utilized as follows;-

(i) To safeguard the Chargee’s rights, the process of sale starting from valuation be carried out by the charger.

(ii) The court does allow the Chargee to sell the suit property by public auction so as to recover the entire outstanding loan balance including costs of recovery.

(iii) The excess amount remitted to the court so as to satisfy the decree.

(iv) In case of surplus, the same to be forwarded to the 3rd Judgment Debtor.

(v) The Decree Holder to be at liberty to participate in the process of sale.

9. To this proposal, the Plaintiff seeks the following variations;-

a) In safeguarding the Chargee’s rights the process of sale starting from valuation be carried out by the Chargee/Objector;

b) The Court allows the Chargee/Objector to sell the property known as LR No.209/10611/30 (IR 77263) by public auction so as to recover the entire outstanding loan balance including costs of recovery.

- c) Any excess amount be remitted to the Court so as to satisfy the decretal amount, costs awarded and interest thereof as at the time of remittance;
- d) In case of surplus, the same to be forwarded to the 3rd Judgement Debtor;
- e) The Decree holder herein be at liberty to participate in the entire process of sale; and
- f) The sale be undertaken within a reasonable agreed period of time.

10. As the objector holds interests prior to that of the Plaintiff over the property, the Plaintiff cannot dictate the manner in which the Objector enjoys or enforces its rights as a Chargee under the terms of the Charge Document and Statute. However, the Objector itself has made a proposal that could accommodate the Plaintiff's interest if this Court were to be inclined to order "*for attachment to satisfy the Decree*" (the words of the Objector). In view of the unique circumstance herein the Court favours a solution that safeguards the interests of the Plaintiff but which does not hamstring or stifle the Objector's Rights as a Chargee. The unique circumstance herein is that the Plaintiff is carrying out a Statutory and Constitutional duty (Articles 79 and 80 of The Constitution) in pursuing the recovery of the Decretal sum from the 3rd Defendant. The Plaintiff is seeking to recover public property. This Court has a duty to support that pursuant within the confines of the Law.

11. I turn now to consider the proposal and counterproposal. There is a consensus that:-

- (i) The Court allows the Chargee to sell the property by Public Auction so as to recover the entire outstanding loan balance including costs of recovery.
- (ii) The excess amount be remitted to Court so as to satisfy the Decretal sum, costs and interest.
- (iii) In case of surplus, the same to be forwarded to the 3rd Judgement Debtor.
- (iv) The Decree holder be at liberty to participate in the process of sale.

There was no reaction by the Objector to the Plaintiff proposal that the sale be undertaken within a reasonable period of time.

12. The only departure is that the Objector is insisting on carrying out the valuation by itself. A concern of the Plaintiff, though unspoken, could be that the property may be undervalued. This concern however may be addressed by the duty placed on a Chargee by Sections 97(1) and (2) of The Land Act. Sections 97(1) & (2) provides:-

"97(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an Order of a Court, owes a duty of care to the chargor, any guarantor of the whole or of any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale".

"97(2) A chargee shall, before exercising the right of sale, ensure that a forced sale Valuation is undertaken by a Valuer".

13. The Objector (as Chargee) already owes a duty to the Chargor, any Guarantor, and Chargee under a subsequent Charge or under a lien to cause a forced sale valuation to be undertaken by a valuer before exercising the Right of Sale and to obtain the best price reasonably obtainable at the time of sale. In view of the circumstances of this case this Court will direct that this duty be extended to the Plaintiff as well. In this way the interest of the Plaintiff will be safeguarded without permitting the Plaintiff to micromanage the realization process with the attendant risk of interfering with the Chargee's Rights.

14. One more issue, the Plaintiff requests that the sale be undertaken within reasonable time. What was unclear from the evidence before Court was whether there is default or whether the Objector's right to

sale has accrued. But given the proposal put forward by the Objector it can be presumed, reasonably, that there is default and the Objector has made a decision to exercise its Power of Sale. If this is so then the request by the Plaintiff that the sale be undertaken within a reasonable period of time is fair.

15. These are my final Orders in regard to the Notice of Motion dated 4th February 2016.

(a) There shall be a Stay of Attachment of LR 209/10611/30 on condition that;-

(i) The Objector shall within 30 days hereof commence the exercise of its Statutory remedy of sale of the property by way of Public Auction and conclude the same within reasonable time.

(ii) In exercising its Statutory remedy of sale the Objector shall ensure that a forced Sale Valuation of the Property is undertaken by a Valuer and the Objector shall obtain the best price reasonably obtainable at the time of sale in line with Provisions of Section 97(1) and (2) of the Land Act.

(iii) Any monies realized at the sale shall first be applied to pay any monies owed to the Objector under the terms of The Charge Document dated 16th January 2015.

(iv) Any surplus thereof shall be remitted to Court so as to satisfy the Decretal amount, costs, interest and in case of any surplus the same shall be forwarded to the 3rd Defendant.

(v) The Plaintiff is at liberty to participate in the process of sale.

(b) In the event the Objector intends to discharge the charge over the property, it shall give a 14 days written Notice of its intention to discharge to the Plaintiff and upon discharge, the Orders of Prohibition and Inhibition made by this Court on 22nd July, 2015 shall take effect forthwith and attachment shall issue.

(c) Each party herein shall bear its own costs in respect to this Application.

(d) Either party is at liberty to apply.

Dated, Signed and Delivered in Court at Nairobi this 29th day of July, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Jemutai for Plaintiff

Ngechu for 3rd Defendant/Respondent

Mulele for Ngani for Objector

Alex - Court clerk