



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM.NO.50 OF 2016

(Consolidated with HC.COMM.54 OF 2016)

PATRICK KANGETHE EDWARD.....PLAINTIFF

VERSUS

1. CO-OPERATIVE BANK OF KENYA LIMITED

2. JOSERICK MERCHANTS AUCTIONEERS.....DEFENDANTS

RULING

1. The Plaintiff filed this suit against the defendant seeking in the main an order of declaration that the manner in which the plaintiff sought to exercise its statutory power of sale was illegal and unlawful. Contemporaneously filed with the plaint was a Notice of Motion dated 2.5.2016 filed under certificate of urgency in which is sought order of injunction restraining the 1st defendant from taking any further steps in the exercise of its statutory power of sale and as against the 2nd and 3rd defendants from advertising the suit property for sale or in any other way offering the same for sale pending the hearing and determination of the suit. The suit concerned two parcels of land known as L.R.No. 209/136/44 and DAGORETI/RIRUTA/2229. The application was grounded on the fact that the 1st defendant had sought to exercise its statutory of sale over the parcels of land with a market value in the sum of kshs.400,000,000 that the agreegate demand by the 2nd and 3rd defendants was kshs.397,002,243.38 a sum double what is owed being kshs.198,501,121.60 and that if left unabated the action would result in substantial loss and damage to the plaintiffs. The application was supported by an affidavit of the 3rd plaintiff which essentially reiterates the grounds of the application and the plaint only adding that due to hard economic times, they had been in default in servicing the loan as a consequence of which they held several meetings with the 1st defendant with a view to reach a solution but on 20/05/2016 and again on 26/5/2016 the 2nd and 3rd defendant advertised the two parcels of land for sale each seeking to recover the sum of kshs.198,501,121.69 therefore making an aggregate of kshs.397,002,243.38 a sum more than the debt actually owed. The last point made was that the exercise was being carried out without service of the mandatory statutory notice. On 31.5.2016 the plaintiffs filed Hcc No. 54 of 2016 which by consent of the parties was consolidated with this file with an order that this decision will bind the other file.

2. In opposition to that application, the defendant filed a replying affidavit sworn by one Ann Olango who is disclosed as the 1st defendant credit officer. The deponent opposes the suit and the application on the grounds that the court lacks the jurisdiction to entertain the matter. On the merits it is contended that the application lacks merit, amounts to an abuse of court process, meant to merely vex and frustrate the 1st defendant from legitimate exercise of statutory right accrued. The deponent then goes on a detailed

explanation how the loan was conceived, approved and disbursed and for that purpose exhibited a letter of offer forming the basis of the agreement between the parties pursuant to which the plaintiff offered four parcels of land as security for the facility in the aggregate sum of kshs.166,000,000/= repayable by monthly instalments of ksh.2,503,630. By the year 2012 the deponent says, the plaintiff had defaulted on their monthly obligations and at their request the defendant varied the initial terms contained in the letter of offer by executing an addendum dated 18/7/2012. That addendum enlarged the term of the loan from 122 months to 216 months and revised repayment rate at kshs.2,525,961.46 per month. It was contended further that despite the restructure, the default persisted hence the realisation process with the 1st defendant serving upon the plaintiff the statutory notices which were delivered by registered post. Evidence of postage were exhibited as CB-6 a & b respectively. Subsequent notices were equally sent by registered post and the auctioneer also sent a notice which then triggered the plaintiffs to request for time upto April 2016 to sell one of their other property so as to settle the outside loan. However come April the plaintiff requested for additional time upto July.

3. As a result of such delay the 1st defendant formed the opinion that the plaintiff were merely buying time with no cogent intention to pay the debt. It then instructed the 2nd and 3rd defendant to advertise the property for sale which advertisements then ignited the current suits. The 1st defendant therefore contend that it had the undoubted right to instruct separate auctioneers to assist it realise its security and that by law the two auctioneers are bound to disclose the total indebtedness for purposes of informing the debtor of its full obligation to the creditor. It was then contended by the 1st defendant that even after there shall have been a sale of the two property subject matter of suit No. 50 of 2016 at the forced sale value, the maximum realisable would still leave a deficit of 40,551,121.69. In this context, the valuation report exhibited in suit Hcc.No. 53 of 2016 reveal that the forced sale value of the property is kshs. 56,700,000/=.

4. Subsequent to the said replying affidavit the defendants have filed a joint statement of defence which beyond raising the lack of jurisdiction in the court paints the plaintiffs suit as lacking in merits and should be dismissed. Equally filed was a list of authorities dated 8/6/2016 filed in suit No. 50 of 2016. Those were the parties Respective positions on the application for injunction as of 21.7.2016 when the matter came up for hearing and on which position the parties made oral submissions to court.

5. I have read all the papers filed by the parties and taken into account oral submissions and the law applicable and to the court, the following issues present themselves for resolution:

- i. Does the court have the jurisdiction to entertain the suit it being grounded on a contract of charge?
- ii. Only if the (I) above is answered in affirmative, whether the plaintiff has established a case to merit being granted a temporary injunction/

Analysis and determination

I) Jurisdiction of the court

This court has in the past and not once held and found that a charge, not being a transfer, vests in the chargee no title to the land nor does it vest upon the chargee the right to occupy or use the land. In this court's view therefore, this courts jurisdiction as admittedly ousted by the dictates of Article 165(5) must be seen in the light of what Article 162(2) b by which the constitution mandated parliament to establish court of equal status to the High Court, to hear and determine dispute relating to Environment, and the use and occupation to land and title to land.

In his submissions before the court, Mr.Kongere very eloquently submitted to the court that when a chargor gives his title to land to secure a financial or other monetary accommodation from a chargee, such chargor is actually using the property. That may be the literal understanding by the term use of land. However in the courts understanding, what is normally pledges and tendered as a security is the document of the title to the land.

In the courts mind and view the use and occupation used by the drafters of the constitution, must be actual and physical use and must form the core of the dispute between the parties. In the matter before me, the dispute between this parties currently is not whether or not either can occupied and use the land. Rather it is a dispute whether or on the chargee should proceed and realise its security. In my mind, that dispute is commercial in nature to which the title of the land is only used as a collateral and no more. In the words of section 80, tenant Act, 2012 a charge shall act as security only and shall not operate as a transfer of any interests or rights in the land.

The foregoing determination reiterates my view and opinion that being a purely commercial transaction leading to the dispute herein the jurisdiction of the court has not been ousted by operation of Article 165(5). It therefore follows that the court has the requisite jurisdiction to hear and determine the dispute in this matter. To that extent I determine that this court has jurisdiction over the matter.

Is the plaintiff entitled to an order of a temporary injunction?

6. The pleadings filed by the parties agree on there having been legal charges being that dated 18/8/2010 but registered on the 4.10.2010 over title No. LR.No.209/136/44 and another dated 18/8/2016 but registered on the 24.9.2010. Although the parties are at an agreement that another property known as LR.209/DAGORETTI/RIRUTA/2289 was equally charged, no evidence has been led by either side to exhibit that charge instrument to court.

7. This being an interlocutory determination which ought not to go to the merits of the suit, I will proceed from the premise that there exist three distinct charges all securing the total indebtedness of the plaintiff to the defendant. I will equally take into account the fact that the plaintiff do not dispute the debt. The complaint seems limited to the contestation about the service of the Notice and the choice by the 1st defendant to appoint three different auctioneers to sell each of the property offered as security. At the close of the respective parties submissions it remained a contestation whether the notices were indeed issued and served in accordance with the law.

8. To the court that is a matter that has to await production of evidence at trial Surfaces to say however that on the documents exhibited to court, it is not apparent that section a 96(3) c and (1) was complied with.

9. Equally section 97(1) Land Act now places a duty of care on a chargee while exercising its powers of sale. That duty to this court includes the duty to ensure that the best achievable price is realised and further that the chargor whose land is to be sold is not exposed to unnecessary and avoidable expense and costs.

10. In the present case it has been pleaded and conceded that the 1st defendant has instructed the 2nd and 3rd defendant in this suit as well as the 2nd defendant in Suit No. 54 of 2016 all seeking to recover the same sum of money and therefore entitled to recover for such sale their respective costs and expenses. Indeed the 2nd defendant in this matter, Nguru Auctioneers, has disclosed his fees excluding advertisements and other necessary incidental expenses and V.A.T. At kshs.1,225,000 or thereabout.

11. Leakey auctioneers on the other hand has equally laid a claim to auctioneers charges and other incidental expenses. The same position has been taken by Jusrick Merchant Auctioneers who have pegged their charges on the provisions of the Auctioneers Act.

12. This to me suggest that after the auction, whether successful or not, the three auctioneers will lay a claim to fees and in terms of clause 2.1 of the charge, such payment or burden would fall upon the shoulders of the plaintiff to bear. My concern as a court is *whether the* 1st defendant has discharged its duty of care to the plaintiff by exposing them to thrice the expenses of realisation. That to me is another issue that at trial the court will have to interrogate and resolve. Those two concerns lead me to the conclusion that the plaintiff may have as well demonstrated a *prima facie* case.

13. How about the second requirement of an injury that may not be compensated by an award of damages. I proceed for the understanding that equity follows the law and if there was to be a variance between a dictate of equity and that of the law then the law would prevail. In this case, PART VII of the Land Act, creates new and mandatory obligations on the chargee and novel rights on the chargor which were never there by the time the court laid the principles of law in GIELLA -VS- CASMANN BROWN. In my view those statutory obligations are now bound to guide the application of equitable principles. It is therefore not enough to say that we are financially able, take any actions from us for we shall pay if found liable. That to me is not the purpose of the law even in equity. Property rights including a chose in action are indeed sacrosanct and must be guarded even if they be for the the financially weak. One cannot be forced to forebear a right in exchange for damages.

14. For these reasons I am persuaded that the plaintiffs/applicants have demonstrated merited case for the grant of a temporary injunction.

15. I grant it to them but not at their pleasure and leisure. I impose the following conditions.

1. Within 7 days from today the plaintiff applicant shall pay to the 1st defendant and into their account the sum of kshs.10,000,000 towards the reduction of the loan and pay another kshs.10,000,000 on or before the 15th August 2016.

ii. Within 14 days from today noting that their request was for accommodation upto end of July, the plaintiff shall give to the 1st defendant a clear and unequivocal acceptable proposal to liquidate the entire debt withing a period not later than 90 days from today.

In default of compliance with any one of the foregoing conditions, the injunction herein granted shall stand lapsed and the 1st defendant shall be at liberty to proceed and realise the security through a one appointed auctioneer. Not the three different auctioneers.

16. This matter shall be mentioned in court on the 29.8.2016 to confirm compliance and for further directions.

Dated and delivered at Mombasa this 26th day of July, 2016.

In the presence of:

Ms.Luganje for the plaintiff.

Mr.Kongere for the defendant.

P.J.O.OTIENO

JUDGE

26.7.2010

Mr.Kongere: I have an application to make. It is to the effect that the proceedings be typed and certified on priority basis.

Mr.Luganje: No objection to that application.

Court: Let the proceedings be typed on priority basis and availed to the parties upon payment

of requisite court fees.

P.J.O.OTIENO

JUDGE

26.7.2016