



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 290 OF 2014

NATURE HEALTH INTERNATIONAL LIMITED.....1ST PLAINTIFF
WILLIAM NJUGUNA WANJIKU.....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT
JOSEPH KARIUKI T/A JOSRICK MERCHANT.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 30th June 2014 and filed on 1st July 2014 was brought under the provisions of Section 63 (e) of the Civil Procedure Act, Order 40 Rule 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules, section,(sic) 90,96 and 97 of the Lands Act, Article 40 of the Constitution and all enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following orders:-
 1. Spent.
 2. Spent.
 3. **THAT the Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, employees, agents or in any manner whatsoever from selling, completing sale, transferring the title of the suit premises, evicting the plaintiff or otherwise interfering with the plaintiffs title and quiet use and enjoyment of the suit premises title no Ngong/Ngong/7666 based on the "notification for sale" dated 4/4/2014 pending the *interpartes* hearing and determination of the suit herein.**
 4. **Such other orders as the court may deem fit to grant in the circumstance of the case.**
 5. **THAT Costs of this suit to be borne by the Defendants.**

THE PLAINTIFFS' CASE

2. The application was supported by the affidavit of William Njuguna Wanjiku that was sworn on 1st July 2014. He also swore and filed a Further Supporting and Supplementary Affidavits on 4th July 2014 and 31st July 2014 respectively. The Plaintiffs List of Authorities dated 30th June 2014 was filed on 8th July 2014 while their written submissions were dated 5th August 2014 and filed on 6th

August 2014.

3. The 2nd Plaintiff was the registered owner of L.R. No Ngong/Ngong/ 7666 situated in Kibiko area (hereinafter referred to as “the subject property”). On or about 28th July 2012, the 1st Plaintiff, who was the borrower, obtained a loan credit facility from the 1st Defendant for Kshs 2,000,000/= which was secured by the 2nd Plaintiff’s personal guarantee and further supported by a first Legal Charge over the subject property in favour of the 1st Defendant.
4. The Plaintiffs contended that the 1st Defendant had made allegations that the 1st Plaintiff has fallen in arrears and defaulted in servicing the said loan whereupon the 1st Defendant had purported to sell the subject property. The 2nd Plaintiff said he only discovered the issue of the purported sale following a routine visit to his branch between 16th and 20th June 2014 for enquiry of the 1st Plaintiff’s loan balance and with further view to finding ways of settling or restructuring the same.
5. The 2nd Plaintiff was then informed that his loan account was reading as nil as the subject property had been sold for a sum of Kshs 6,000,000/= on 12th June 2014. The Plaintiffs denied ever having been served with the auctioneers’ Notification of Sale dated 4th June 2014 or any other Statutory Notice save for the fatally defective Notice dated the 17th July 2013 that was personally served upon the 2nd Plaintiff.
6. It was the Plaintiffs’ contention that the Defendants had breached their duty of care to them when they failed to obtain the best price obtainable for the subject property by selling the same in the sum of Kshs 6,000,000/= whereas the same had an open market value of Kshs 17,500,000/=.
7. They therefore averred that any process of sale by contract, auction or private treaty or in any manner whatsoever purporting to deprive them of the ownership and interests in the suit property based on the said notification of sale was null and void *ab initio*.
8. The Plaintiffs stated that they were ready and willing to settle the outstanding monies if they were given the opportunity to do so and therefore urged the court to grant the application as prayed.

THE DEFENDANTS’ CASE

9. On 23rd July 2014, Janet Muthee filed a Replying Affidavit on behalf of the Defendants. Their written submissions were dated 13th August 2014 and filed on 14th August 2014.
10. The 1st Defendant stated that it issued the 1st Plaintiff with a Statutory Notice and the forty (40) days’ notice pursuant to Section 96 of the Land Act on 17th June 2013 and 14th November 2013 respectively. On 4th April 2014, under the 1st Defendant’s instructions, the 2nd Defendant issued a forty five (45) days’ notice to the Plaintiffs to redeem the subject property.
11. On 26th May 2014, the 2nd Defendant placed an advertisement in the Daily Nation Newspaper for the sale of the subject property by public auction. Upon the 1st Defendant’s instructions of 29th May 2014, M/S Hallmark Valuers valued the subject property and forwarded their Valuation Report which the 1st Defendant received on 6th June 2014. The public auction took place on 12th June 2014 and on 23rd June 2014, one Mike Otieno Odero (hereinafter referred to as “the Purchaser”) who had been declared the highest bidder at the auction paid the entire purchase price of Kshs 6,000,000/= to the 1st Defendant by RTGS.
12. The Defendants contended that copies of all the statutory notices were sent to the 2nd Plaintiff and his wife by way of registered mail with the Notification of Sale also having been affixed on the subject property.
13. On the strength of the Sale Agreement, the Memorandum of Sale, receipt of the purchase price and having full knowledge that the proper legal process had been followed, the 1st Defendant executed all the necessary documents and availed the same and the Original to the subject property to the Purchaser. They therefore urged the court to dismiss the Plaintiffs’ present application.

LEGAL ANALYSIS

14. From the documentation that was placed before the court, it did appear that the following were the

issues for determination by the court:-

- a. **Was there a valid sale of the subject property?**
 - b. **If not, were the Plaintiffs entitled to the prayers they had sought in their application?**
15. The Plaintiffs contended that no valid notices were issued or served upon them by the Defendants, and in particular, the notice dated 17th July 2013 was purportedly issued under Section 58 of the Land Registration Act 2012 rather than the Land Act 2012.
16. It was their argument that even if one was to concede, which they had not conceded, that the notice was issued under Section 58 of the Land Act 2012, that section of the Land Act deals with short term leases and did not donate any statutory power of sale nor could any such power of sale arise. As a result, it was their contention that they were not issued with any notice under Section 90 of the Land Act as had been contended by the 1st Defendant.
17. It was also their argument that even if the Statutory Notice dated 17th July 2013 was taken to have been a notice under Section 90 of the Lands Act, a reading of the same clearly showed that the contents therein did not comply with the requirements set out in the said Section 90 (2) of the Land Act for the following reasons:-
- i. **Paragraph 4 therein simply stated the balance of the principal sum together with interest and other moneys outstanding as at the date of that letter but failed to state the amount of that had be paid to rectify the default and the time within which such payment had to be made as was required by Section 90(2) (b) of the Land Act.**
 - ii. **Paragraph 5 simply stated "...the above money is due and payable immediately after expiry of 3 months from the date of service..." without stating the exact amount that had to be paid to rectify the default as per Section 90(2) (b) of the Land Act.**
 - iii. **The said notice did not inform the chargor and borrower of their rights to apply to court for relief against certain remedies as was required by Section 90(2) (e) of the Land Act.**
18. The Plaintiffs relied on the case of **Security Limited vs Equity Bank Limited (2014) eKLR** and several other cases where the common thread was that if a statutory notice had not complied with the provisions of the law, there was no need to delve into the issue of whether or not the subsequent notices if any were sent or received.
19. On its part, the Defendants were emphatic that all notices were sent to 1st Plaintiff to the address in the Charge that it had provided to the 1st Defendant. It was their argument that if the 1st Plaintiff received the Notice of 17th July 2013, through the postal address used by the Defendants, then it must have received all the other mandatory statutory notices that were sent to the same postal address.
20. The 1st Defendant annexed certificates of posting, showing that all the letters were posted to the 1st Plaintiff's address, and all were sent by registered post. This included the auctioneers notice. They contended that the Plaintiffs were not being completely truthful in the affidavits.
21. Section 90 (2) of the Lands Act stipulates that the notice sent to a chargor had to detail the following:-
- (a) the nature and extent of the default by the chargor;**
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

22. In the letter of 17th July 2013, which was said to have been the Statutory Notice, it was stated as follows:-

“ That the balance of the principal sum together with interest and other moneys now outstanding from you as at the date of this letter is Kshs 1,858,123.80.

That by your reason of your failure to honour your obligation to the Bank, we hereby give you NOTICE that the above mentioned money together with interest thereon is due and payable immediately after the expiration of THREE (3) MONTHS form the date of service of this notice upon you (which shall be deemed to be Seven (7) days from the date of posting) failing which we shall proceed to exercise our statutory power of sale in realization of the security thereby conferred.

THIS NOTICE is given under the terms of the charges and Section 58 of the Land Registration Act of the Laws of Kenya.”

23. Reading the contents of the said Statutory Notice against the provisions of Section 90 of the Land Act, it is evident that the said notice did not indicate what the outstanding amount of arrears was but actually called for the whole outstanding sum of Kshs 1,858,123.80. It did not in fact set out the contents of Section 90(2) (a), (b), (c), (d) and (e) of the Land Act rendering the said Notice invalid. In fact, the mere fact that it relied on the provisions of another Act were sufficient reason for the court to agree with the Plaintiff that the purported Notice of 17th July 2013 was null and void *ab initio* for all purposes and intent.

24. Assuming the mandatory Statutory Notices were valid and lawful, which this court did not find to have been the case, the Plaintiff did not appear not to have been given an opportunity to rectify the default before the Defendant exercised its statutory power of sale which right he was entitled to.

25. Section 96 of the Land Act, the same stipulates as follows:-

“1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under [section 90\(1\)](#), a chargee may exercise the power to sell the charged land.

2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

26. The 1st Defendant issued the Plaintiff with a Notice under the provisions of Section 96 (2) of the Land Act as could be seen in the 1st Defendant's letter dated 14th November 2013 to the 2nd Plaintiff and a Notification of Sale. In the absence of any evidence to the contrary, the court found that all the statutory notices were sent to the 1st Plaintiff's Postal Address that had been given in the Legal Charge and copied to the 2nd Plaintiff.

27. However, in view of the fact that the court found that the Statutory Notice given under Section 90 (2) of the Land Act was invalid, it rendered any other subsequent notice also invalid and irregular.

28. The court therefore found that the sale of the subject property to the 2nd Defendant to have been unlawful and had no legal basis. The failure by the Defendant to comply with the provisions of Section 90 (2)(b) of the Land Act were serious issues that automatically invalidated the sale to the 2nd Defendant at the public auction on 12th June 2014.

29. Any transfer to the aforesaid Purchaser would cause the 1st Plaintiff great injustice as it would have been denied its right of redemption which it was entitled to until the fall of the hammer at the public auction. The aforesaid Purchaser cannot be deemed to enjoy the benefit of being an innocent and *bonafide* purchaser of the subject property for the reason that the whole transaction was tainted with illegality.

30. Although the court should and ought not to re-write the contracts that have been entered into by parties, it must always have at the back of its mind that the sale of a party's property is not a matter that should be taken casually because it deprives a party of right to own property, a right that is enshrined in Article 40 of the Constitution of Kenya, 2010. The importance of not depriving a party its property was an issue that was considered in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** where the court held as follows:-

“I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage...”

31. The court also wishes to associate itself with the holdings in the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR** where Warsame J had held that damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law. This was the same position that was taken in the case of **Sharok Kher Mohamed Ali v Southern Credit Banking Corporation Limited (2008) eKLR** which was cited, with approval, in **Kwanza Estates Ltd v Dubai Bank Kenya Ltd** (Supra).

32. In **Muiri Coffee Estate Limited vs Kenya Commercial Bank [2009] eKLR**, Khaminwa J (as she then was) quoting from the decision of Ringera J (as he then was) in the case of **Lucy Njoki Waithaka vs ICDC** observed as follows:-

“It is not an invariable rule that where damages may be an appropriate remedy an interlocutory injunction should never be granted. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust.”

33. It is for that reason that the court would not be keen to accept the Defendants' submissions that once the subject property was disposed of, the Plaintiffs could only be compensated by way of damages and that in any event, the said Purchaser could not be bound by the orders that were issued by the court as had been held in the case of **Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others [2005] eKLR**.

34. The fact that the aforementioned Purchaser purchased the subject property at the auction would not validate the purported sale of the same if the same was illegal. Indeed, nothing stopped the court from reversing any action that it deemed to be illegal. It is irrespective as had been argued by the Defendants that the aforementioned Purchaser was not a party to the suit herein.

35. The court can still stop the Defendants from doing an act that was clearly illegal and unlawful despite the subject property having been sold to the Purchaser. It was therefore not correct as the Defendants had submitted that injunctions cannot be granted where an event had taken place or had already taken place as was held in the case of **Jane Kemunto Manyaka vs Municipal Council of Nakuru & 4 Others [2006] eKLR** in which they relied upon to buttress their argument.

36. Title had not passed to the said Purchaser as no transfer had been effected in accordance with Section 37 (2) of the Land Registration Act Cap 300 (laws of Kenya) which stipulates as follows:-

“A transfer shall be completed by-

a. filing the Instrument; and

b. registration of the transferee as proprietor of the land, lease or charge.”

ak. Having considered the pleadings, the affidavit evidence, written submissions, and case law in support of the respective parties cases, the court found that the Plaintiff was not given an opportunity to exercise its right of redemption in view of the fact that the 1st Plaintiff was not issued with a valid Statutory Notice.

al. The above notwithstanding, from the evidence adduced by the parties and in the 2nd Plaintiff's own admission, the 1st Plaintiff was truly and justly indebted to the 1st Defendant. In Paragraph 2 of his Further Supporting Affidavit, the 2nd Plaintiff stated that the Plaintiffs were ready and willing to settle the debt to the bank given the opportunity and were ready to abide by any

reasonable conditions of the court for the grant of the injunction sought.
am. Courts do not merely grant injunctions for the sake of it. Good reason must be demonstrated why the same should be granted a position that was rightly pointed out by the Defendants when they placed reliance on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125 in which Bosire J (as he then was) stated as follows:-**

“a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

40. Whilst the court noted the cases that the Plaintiffs relied upon, it found that they did not establish a *prima facie* case with a probability of success or demonstrate that the balance of convenience tilted in their favour or show that damages would not be adequate compensation in the event an interlocutory injunction was not to be granted as was envisaged in the case of **Giella vs Cassman Brown (1973) EA 360** in which it was stated as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

41. However, as was seen hereinabove the Plaintiffs did satisfy the court that the Statutory Notices that were issued by the Defendants herein had no legal basis and the illegal actions ought not to be allowed to continue. At the same time, nothing would prevent the 1st Defendant from realising its security and the 1st Defendant, whether by itself or through its agents is therefore at liberty to re-issue the Statutory Notices that comply strictly with the provisions of the Land Act. This is because issuance of invalid notices would not in itself be a ground for a grant of injunctive orders as the omission can be rectified.

DISPOSITION

42. For the foregoing reasons, the upshot of this court’s ruling was that the Plaintiff’s Notice of Motion application dated 30th June 2014 and filed on 1st July 2014 was not merited and the same is hereby dismissed.

43. For the avoidance of doubt, the *status quo* issued herein is hereby discharged and/or vacated. The 1st Defendant may proceed to realise its security provided that it strictly complies with provisions of the Land Act. Costs in the cause.

44. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of January 2015

J. KAMAU

JUDGE