



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
HCCC CASE NO 140 OF 2013

LASET LIMITED..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED1ST DEFENDANT

**JANE NYAMBURA MWANGI & JANE WAIRIMU MWANGI
(the Administrators of the Estate of Wilson Mwangi Karogo)2ND DEFENDANT**

RULING

INTRODUCTION

1. Before the Plaintiff's Notice of Motion application dated 11th April 2013 and filed on 12th April 2013 was heard *inter partes*, the 1st Defendant filed a Notice of Preliminary Objection dated 22nd April 2013 and filed on 23rd April 2013. The said Preliminary Objection was canvassed by the parties and on 30th August 2013, this court delivered a ruling in which it dismissed the same as it found that there were several issues that needed to be addressed before it could give a substantive decision pending the hearing and determination of the suit herein.
2. The prayers that had been sought by the Plaintiff herein and brief facts were set out in the said ruling. This court will not repeat the same herein but it will set out in brief, the contents of the several affidavits that were filed by the parties herein.

AFFIDAVIT EVIDENCE

3. On 22nd April 2013 Donald Oseko swore the Replying Affidavit on behalf of the 1st Defendant. He said that he was the 1st Defendant's Assistant Legal Manager. He stated that the Plaintiff had failed to disclose material facts related to the case herein and had come to court with unclean hands.
4. He averred that, at the instance of the Plaintiff, the 1st Defendant provided financial accommodation to the Plaintiff's then employee one, Mary Anne Wangai in the sum of Kshs

- 75,000/= exclusive of interest, which facility was secured by the Plaintiff's property namely Kajiado/Olooloikitoshi/Kitengela/185 (hereinafter referred to as "the subject property"). The charge was registered on 28th January 1986.
5. It was his further averment that the said borrower defaulted in paying the amount secured in the charge as a result of which the 1st Defendant exercised its statutory power of sale. He said that the subject property was sold through a public auction on 30th June 1992, to one Willy Mwangi Karogo (now deceased).
 6. He explained that the firm of M/S Hamilton Harrison & Mathews Co Advocates forwarded all the necessary documents to the deceased after he completed paying for the purchase but that the consent from the Land Control Board was not obtained for the reasons that:-
 - i. **the Kajiado Land Control Board closed down, the purchaser died,**
 - ii. **the Discharge of Charge was misplaced and/or got lost,**
 - iii. **the administrators to the deceased's estate did not have instructions; and**
 - iv. **the filing of HCCC No 327 of 2011 at Machakos High Court by the 2nd Defendants against the 1st Defendant.**
 7. It was his contention that had there not have been delay in the completion of the transfer formalities caused by the deceased, the subject property would have been transferred to him in 1992 and latest by 1993.
 8. He was emphatic that the Plaintiff was duly served with a Statutory Notice and was aware of the sale of the subject property by way of public auction and which was sold at the best market value. Copies of the Conditions of Sale and Memorandum of Sale were duly annexed to his affidavit.
 9. He denied that the order issued by the High Court in Machakos was irregular or invalid irrespective of whether one Nephath Momanyi Kiboi Advocate did not have a valid practising certificate at the time the said order was issued.
 10. In the Replying Affidavit sworn by Jane Nyambura Mwangi on 7th May 2013 and filed on the same date, she stated that she was the administrator of the estate of one Wilson Mwangi Karogo who had purchased the subject property in a public auction on 30th June 1992 for a sum of KShs 180,000/=. She added that the deceased did not attend the Land Control Board as it had been suspended.
 11. She said that the deceased received the title documents from M/S Hamilton, Harrison & Mathews Advocates but that the 1st Defendant delayed in transferring the same to her and Jane Wairimu Mwangi as administrators of the deceased's estate after he passed away on 1st August 1998 necessitating them to file HCCC No 327 of 2011 (O.S) at High Court Machakos whereat the court ordered that the said property be transferred to them. She said that she received the Land Control Board Consent on 10th April 2013 and was in the process of transferring the property when she was served with the order herein stopping the said transfer.
 12. It was her contention that the Plaintiff could not come to court twenty one (21) years after the transaction and purport that it did not know about the same of the subject property when in fact the same had been advertised in the newspapers. She annexed a copy of the advertisement carried in the newspaper on 26th June 1992. The same was marked as Exhibit "JWM 1 b".
 13. She also attached copies of the Certificate of Sale dated 7th July 1992 by Crown Auctioneers, a Valuation Report and several letters exchanged between the deceased and M/S Hamilton Harrison & Mathews & Co Advocates and between Hamilton Harrison & Mathews & Co Advocates and M/S Nyakio General Contractors Limited. These letters were dated between 1992 and 1993.
 14. In his Supplementary Affidavit in response to the 1st Defendant's Replying Affidavit also sworn and filed on 23rd May 2013, Prof Nathan Kahara, a director of the Plaintiff accused the 1st Defendant of material non-disclosure of relevant facts and contended that at no time did the 1st Defendant inform the Plaintiff of default of payment of the loan by the said Mary Anne Wangai or make any attempts to recover the loan from her. He reiterated that the Plaintiff was never served with any Statutory Notice of Sale and that therefore, there was no valid sale.
 15. Donald Oseko swore a Further Supplementary Affidavit on behalf of the 1st Defendant. It was filed on 7th October 2013. He pointed out that M/S Hamilton Harrison & Mathews & Co

- Advocates no longer had the original file which had the Statutory Notice and Notification of Sale as it was destroyed in 2008.
16. The fact about the destruction of the file at M/S Hamilton Harrison & Mathews & Co Advocates was confirmed in the 1st Defendant's Further Affidavit sworn on 22nd October 2013 by George Gitonga Murugara. It was filed on 23rd October 2013. He averred that the said firm of advocates fully complied with the requirements of the law before the 1st Defendant exercised its Statutory Power of Sale.
 17. In a Supplementary Affidavit responding to the 2nd Defendant's Replying Affidavit sworn and filed on 23rd May 2013, Prof Nathan Kahara, denied ever having seen the advertisements in the newspaper or having been served with any Statutory Notice of Sale or any other legal notice prior to the said sale. He questioned how a valuation of the subject property could have been done in 1988 as seen in the Valuation Report dated 9th December 1988 by Kahuthia, Kibui & Co when the subject property was said to have been sold on 30th June 1992.
 18. He was emphatic that M/S Crown Auctioneers never gave him a Notification of Sale and that the consent of the Land Control Board was obtained and the purchase price paid outside the period stipulated in the condition's of sale and/or the period prescribed by the Land Control Act.
 19. It was his contention that consent issued about twenty (20) years was null and void as it was well outside the period prescribed by the Land Control Board and as such, the transaction was null and void.
 20. He also stated that the 1st Defendant could not purport to transfer the subject property to the 2nd Defendant as there was no privity of contract between them and that the 2nd Defendant could not take possession of the subject property as the sale was not valid.
 21. Jane Nyambura Mwangi swore another response to the Plaintiff's Supplementary Affidavit. The same was sworn on 1^{4th} June 2013 and filed on 1^{8th} June 2013. She was categorical that the deceased took ever possession of the subject property after the purchase but that the fence was removed by herders in the area, in 1993.
 22. In yet another Further Supplementary Affidavit sworn on 22nd November 2013 and filed on 25th November 2013, Prof Nathan Kahara reiterated that the failure by the auctioneers to serve him with the Notification of Sale rendered the alleged sale of the subject property, by auction, illegal and null and void.

LEGAL SUBMISSIONS

23. When the matter was allocated time for highlighting of the written submissions by the parties at 11.00 am on 24th February 2014, the 2nd Defendant was not represented leaving the Plaintiff and the 1st Respondent to proceed with orally highlighting the said submissions. That morning, however, Mr Okello had indicated that Mr Kamau, who he was holding brief for, had informed him that he did not wish to orally highlight the 2nd Defendant's submissions and asked that the court adopts the same.
24. In its written submission dated 22nd November 2013 and filed on 25th November 2013, the Plaintiff submitted that it had met the criteria set out in the case of **Giella vs Cassman Brown [1973] EA 338** as
 - i. **no Statutory Notice or Notification of Sale was served upon it; and**
 - ii. **that the purchase price was not paid within the stipulated period of thirty (30) days.**
25. The Plaintiff relied on several cases where the common thread was that the mortgagee could not exercise its Statutory power of sale without issuing the Statutory Notice and the case of **Mwathi vs Kenya Commercial Bank (1987) KLR** where the Court of Appeal held that payment of the deposit of the purchase price in an auction two (2) days after the fall of the hammer did not create a binding contract.
26. It was the Plaintiff's submission that the purported sale was null and void as the consent of the Land Control Board was not sought within the period prescribed by the Land Control Act Cap 302 (laws of Kenya). He submitted as follows:-

i. Section 6 (1) of the Land Control Act provides;

“Each of the following transaction;

- a. **The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area.**
- b.
- c.

Is void for all purposes unless the Land Control Board for the Land Control Board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”

ii. Section 8(1) of the same Act provides;

“An application for the consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto.

iii. The 1st Defendant was aware of the requirement of obtaining the consent of the Land Control Board as in Clause 10 of the conditions of Sale it was indicated:-

“The purchaser is responsible for obtaining all consents necessary for the sale to him including but not limited to Land Control Board consent. Application for such consents must be made within 14 days of the date of the sale of which time is of the essence...”

27. The Plaintiff also relied on the case of Onyoka vs Migwalla (2005) eKLR where the Court of Appeal held that:-

“... as this transaction related to agricultural land it was imperative that the consent of the Land Control Board be obtained”.

28. It was also the Plaintiff's submission that in the case of Fred C Fedha and Another vs Edwin E Arava Majani (2010) eKLR, the court held as follows:-

“... the agreement for sale dated 1st July 1989 being a controlled transaction was void for all purposes and equity would not compel specific performance of a contract which was illegal”.

29. A further argument advanced by the Plaintiff was that the 2nd Defendant would be in breach of Section 22 of the Land Control Act by purportedly remaining in possession of the subject property which the Plaintiff was adamant was still in its possession.

30. The case of In the matter of Hasalon Mwangi Kahero (2013) eKLR, appears to be distinguishable from facts herein and this court will therefore not attach much weight to it.

31. The Plaintiff also averred that the 2nd Defendant had no *locus standi* to bring the proceedings herein as the subject property did not constitute part of the deceased's estate. It argued that a chargee in law cannot transfer a property to a person not authorised in law to receive such property.

32. The last issue submitted on by the Plaintiff was that it had established a *prima facie* case and listed several contentions it considered ought to be resolved during trial. It said that damages would not be adequate to compensate it and that as the registered owner of the subject property, balance of convenience tilted in its favour for this court to grant a temporary injunction pending the hearing and determination of this suit.

33. In its written submissions dated and filed on 10th December 2013, the 1st Defendant argued that the Plaintiff had not shown a *prima facie* case with a probability of success. It relied on the case of Amos Muriithi Kariamatu vs Margaret Wambui Wamugunda and Another (2013) eKLR

which referred to the case of **Giella vs Cassman Brown** (supra) which had set out the principles regarding the granting of an injunction.

34. It argued that the Plaintiff had not been able to discharge the standard of proof required in civil cases. On its part, it said that it discharged its burden of proof when it explained the circumstances surrounding the loss of the file by its advocates. It relied on the case of **Abdullahi Haji Mohamed and 2 others vs Abdullahi Dagare Bare [2013] eKLR** in which was held that:-

“..... it must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not”.

35. The 1st Defendant relied on several cases to argue its ground that the Plaintiff was not likely to suffer irreparable damage that could not be compensated by way of damages. It singled out the case of **Joseph Otura Allai vs China Overseas Engineering Group [2013] eKLR** and said that affidavits submitted by an applicant had to be evident of such damage.

36. It said that the Plaintiff had not indicated to the court that it (the Plaintiff) would suffer irreparable loss unless the orders sought were granted. It added that once the Plaintiff charged the suit property, it became a commercial property, the loss of which would entitle the Plaintiff to an award in damages. He referred this court to the case of **CA No 114 of 2009 Nyanza Fish Processors Ltd vs Barclays Bank of Kenya (2009) eKLR** in this regard.

37. On the issue of a balance of convenience, the 1st Defendant argued that the 2nd Defendant was in possession of the subject property in which case the balance of convenience tilted in its favour. It referred this court to the case of **Paul Saiti Muthui Alias Paul Saidi Muthui vs Wilson Mwangi Mutia [2013] eKLR** where the court held that:-

“On a balance of convenience, find that the Defendant being already in occupation of the portion of the Suit Property and having made various developments thereon stands to lose more if he is evicted at this preliminary stage of the proceedings. No evidence has been tendered to show that the Applicant is in occupation of the Suit Property. The balance of convenience therefore tilts in favour of the Defendant who is in occupation of the Suit Property”.

38. It therefore prayed that the Plaintiff's application be dismissed as it was undeserving of the orders of injunctive it had sought.

39. The 2nd Defendant's written submissions were dated and filed on 5th December 2013. The administrators of the deceased's estate argued that the Plaintiff ought to have known the repercussions of charging a property and that the issue of the illegality of the auction should have been raised twenty two (22) years ago when the property was advertised.

40. They submitted that the consent of the Land Control Board was not obtained within the prescribed period as the board had been suspended in addition to the deceased being sickly and in and out of hospital several times between 1992 to 1998.

41. They said that they obtained the consent of the Land Control Board pursuant to the court order of HCCC No 327 of 2011 Machakos. They submitted that the said order had been issued by a court of competent jurisdiction and had not been set aside to date. It was their argument that the Plaintiff had not established *prima facie* case and asked for the dismissal of its application.

LEGAL ANALYSIS

42. This court has identified the following issues as those for determination by the court:-

- i. **Whether the 1st Defendant issued the Plaintiff with a Statutory Notice of Sale?**
- ii. **Whether the purchase of the subject property was valid on the grounds that:-**
 - a. **payment of the purchase price was made after the stipulated period in the Land Control Act; and**
 - b. **the transaction herein was null and void for want of obtaining a consent from the Land Control Board within the six (6) months period provided in the said Land Control Act?**

iii. **Whether the Plaintiff had met the test in the case of Giella vs Cassman Brown (supra) which was that an applicant seeking an interlocutory injunction had to show that:-**

- a. **he had established a *prima facie* case with a probability of success;**
- b. **unless the interlocutory injunction was not granted, he would suffer irreparable loss that would not be compensated by way of damages; and**
- c. **if a court was in doubt, it would decide the application on a balance of probabilities.**

43. It did come out from the 1st Defendant's affidavit evidence that it is unable to produce a copy of the Statutory Notice of Sale of the subject property on the ground that, M/S Hamilton Harrison & Mathews & Co Advocates who are acting for it destroyed their file.

44. While that may have been so, it is incumbent on a financial institution to have to all its documentation readily available as a dispute is never too far away especially in cases where a property has been sold by way of public auction. Where a property is sold in an auction pursuant to the exercise of a statutory power of sale, and not pursuant to a court order, such a financial institution must ensure that should intervention of the court be sought, it would be able to defend its position with documentary evidence. A high degree of vigilance is expected.

45. Whilst a party who charges his property as security for the advancement of loan facilities must also be aware that that his property becomes a commercial commodity for sale in an open market, it must not be forgotten that such a sale must be done strictly in accordance with the law. This court therefore finds the issue of the non-production of the Statutory Notice that was said to have been issued to the Plaintiff and the issue of the valuation Report that was prepared in 1988, well before the sale of the subject property are matters of fact that need to be explained further in a full trial.

46. At this juncture, it is not possible for this court to interrogate the circumstances under which the valuation of the subject property was done in 1988, four (4) years before the sale by public auction and/or whether the value attached to the property between 1988 – 1992 remained the same.

47. The court has taken the view that the 2nd Defendant was not able to show through the affidavit evidence that they are in occupation of the subject property or that developments have been erected thereon to persuade this court to find that balance of convenience tilted in their favour.

48. The question of the validity of the transaction, in view of the express provisions in the Land Control Act, is also an important one. It would therefore be critical for the 2nd Defendant to demonstrate if they can enforce specific performance on behalf of the deceased's estate particularly because the issuance of the Statutory Notice and validity of the transaction by virtue of the Land Control Act were challenged by the Plaintiff.

49. These issues including the explanation of what led to the subject property not being transferred twenty two (22) years ago are matters of fact that must be interrogated in a full trial before this court can make a just determination of this matter.

50. Accordingly, having considered all the oral and written submissions, and case law, submitted by the parties herein, it is the view of this court that the Plaintiff has been able to demonstrate a *prima facie* case with probability of success and for which it would be entitled to an interlocutory injunction on a balance of convenience pending the hearing and determination of the case herein.

51. The existence of an order, from another court of equal jurisdiction as this one, between the 1st and 2nd Defendants would not affect the rights that would accrue to the Plaintiff for the 1st Defendant from the charge in respect of the subject property as the issues before the two (2) courts, though relating to the same subject matter, are different.

DISPOSITION

52. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated 11th April 2013 and filed on 12th April 2013 is merited and the same is allowed in terms of prayer (3) therein.

53. The Plaintiff is hereby directed to file a letter of undertaking for payment of damages herein in the next seven (7) days from the date hereof.

54. It is so ordered.

DATED SIGNED and DELIVERED at NAIROBI this 31st day of March, 2014

J. KAMAU

JUDGE