



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 19 OF 2013 [O.S]

FRANCIS MUTURI MAINA PLAINTIFF

VERSUS

BARCLAYS BANK (K) LTD.....DEFENDANT

RULING

1. The applicant FRANCIS MUTURI MAINA has moved this court under Sec. 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules seeking orders;

(a). Service of this application be dispensed with in the first instance.

(b). THAT pending the hearing and determination of this application inter-parties there be a temporary injunction restraining the Respondent its agents and/or servants from auctioning the title Kimilili/Kimilili/1069 in a public auction or by private treaty.

(c). Pending the hearing and determination of this suit there be a temporary injunction restraining the Respondent its agents and/or servants from auctioning that title Kimilili/Kimilili/1069 by a public auction or by private treaty.

(d). Costs of this application be provided for.

2. The motion is supported by the grounds on its face and the supporting affidavit of the Applicant. The main grounds are;

I. The Applicant has financial difficulty to settle the loan on the terms set by the documents.

II. The subject property is the only residential home to the Applicants young family.

III. This court seized is with jurisdiction under the Land Registration Act to grant the orders sought.

3. The application is opposed by the Respondent. Through a replying affidavit sworn by the Respondents Recoveries Officer, Mr. Castro Mutai, outlaying the reasons for the opposition. First that the Applicant has admitted his indebtedness and failure to make payments for the loan. Upon the Applicant's default, he was issued with a demand notice as required by law.

4. The Respondent depones further that the Applicant was issued with all the relevant statutory notices before the property was advertised for sale. They have all been annexed to the replying affidavit.

That the Applicant's allegations of his financial difficulties have not been proved. Lastly, that once the property is charged it ceases to have any sentimental value as it becomes a commodity which can be sold.

5. The parties thereafter filed their written submissions. The Applicant submits that his application is anchored under sec. 63 (e) of the Civil Procedure Act and sec. 106 (2) (6) of the Land Act. That if this application is not granted, the entire suit will be rendered an academic exercise.

6. The Applicant submits he has demonstrated good faith by stating his first installment will be Kshs. 218000/= if this application is allowed and he has gone ahead to make that payment even before the court has made such an order. On the issue of prima facie case, the Applicant says this is his residential home which his young family knows. Secondly the Applicant will be greatly prejudiced as the house has been grossly under valued by the Respondent and/or his agent from Kshs 6million to Kshs 3.2 million.

7. The Applicant also questions the notice served upon him by the Respondent in his submissions. That the 40 days notice under Section 96 (2) has to be preceded by 90 days under sec. 90 (1) of the Land Act. That the Respondent also failed to do a current forced valuation before the sale as the valuation report annexed was done six months before date of sale. He referred the court to the case of **David Gitome Kuhiguka vs. Equity Bank Ltd [2013] e KLR**. He urged the court to allow the application.

8. The Respondent on its part submitted highlighting both the uncontroverted facts and the controverted facts. I will concern myself only with the controverted facts. Briefly, the Applicant does not deny he was granted a loan to which he signed an agreement binding him to comply with the terms and conditions of the loan. The Respondent referred the court to court of appeal case of **Giro Commercial Bank Ltd. vs. Halid Hamed Mutesi No. 342 of 2000**.

9. That is is trite Law that an injunction cannot issue where there is default. There are set precedents when injunction can be granted to a borrower and none of them is among these listed by the Applicant. It cited **Pelican Investments Ltd. Vs. National Bank of Kenya Ltd. CC No. 570 of 1998** quoting Halsbury's Laws of England [4 ed] volume 32 at paragraph 725.

10. On the applicant suffering irreparable loss, the Respondent submits that the value of the land is one that can be quantified and therefore capable of being addressed by damages. The Respondent cited **Joseph Kiarie Mbugua vs. Consolidated Bank of Kenya Ltd. & Garam Investments** where Waweru J. said that any property offered as security is converted into a commodity whose value in monetary terms is readily ascertainable.

11. The Respondent submits further that the Applicant has failed to establish a prima facie case. Lastly on the issue whether the court can re-write a Charge contract under Section 105 and 106 of the Land Registration Act, it wants the court to find the application is commenced under section 90 of the Land Registration Act. The reliefs relied upon do not afford this court jurisdiction to re-open the charge.

12. I must thank both counsels for lengthy and well researched submissions filed on the application before me. I do find there are three issues for my determination as follows.

- I. Whether the Applicant has established a prima facie case to warrant the orders sought.
- ii. Whether if the orders sought are not granted, the entire suit can be rendered nugatory.
- iii. Whether this court can re-open the charge and revise the terms thereof.

Prima Face Case:

13. The Applicant's averment contained in the supporting affidavit is on the strength that the suit property Kimilili/Kimilili/1069 is the only home his young family knows. He has financial difficulties

occasioned by fraud of his relatives and employees. That the Respondent has under-valued the property. These issues are contested by the Respondents. Having considered the submissions by both parties and taking into account provisions of the case law on charged property, I do agree with the Respondent submissions that once the property is charged, it became a commodity for sale and therefore lost its sentimental value. See **Augustine Kibet Vs. Savings And Loan (K) Ltd.**

14. Further the Respondent deponed that the Applicant did not disclose where he lived before he acquired this property hence he cannot say it was his only home. The Applicant did not explain this away either in the pleadings or his submissions. Mr Ocharo orally told the court on 27th Feb 2014 that he had filed a supplementary affidavit but I found none from the record at the time of writing this ruling.

15. On the limb of under valuing the property by the Respondent, again I find the Applicant's case wanting. He deponed that the property was bought at Kshs. 6,000,000/= having secured Kshs. 4,000,000/= from the Respondent while he paid Kshs 2,000,000/=. He did not annex an agreement of sale showing the land was sold for Kshs.6,000,000/=. He also did not annex his own independent valuation report to give a higher value than what the Respondent presented. The application as presented minus this evidence makes it difficult for this court to exercise her discretion in favour of the applicant to grant the orders sought.

16. Last limb of this heading as regards his financial difficulties. It is well captured in paragraph 14 and 15 of the replying affidavit which states the applicant failed to prove that his cousin and employees caused him financial troubles to warrant the court's sympathy. Nothing in the pleadings supported this averment nor was it substantiated in the submissions made by the Applicant. In summary, I find the applicant has not established a fact to merit the exercise of the discretion of the court favourably.

Irreparable loss:

17. It is not disputed the suit property is quantifiable as it was bought for Kshs 6,000,000/ as put by the applicant. The issue the applicant has is the fact that this is the only home his family knows (sentimental value) which in his view is unquantifiable. The Applicant has submitted his application was not brought under Order 40 of the Civil Procedure Rules as alluded to by the Respondent in their submissions. The sections under which it is premised relates generally to the fair administration of justice and exercise of discretion of this court which when the court is exercising must ensure justice is done to both parties since it is a double edged sword. In any event, principles for granting injunctions whether applications are brought under order 40 of the Civil Procedure Rules or not are guided by the decision in the renowned case of *Giella Vs Cassman Brown*. The court cannot exercise discretion in a vacuum but evaluate the facts presented.

18. The Applicant has also not substantiated the nature of prejudice he will suffer and whether or not it cannot be compensated by way of damages. From his affidavit and submissions, I find no prejudice disclosed that cannot be compensated by way of damages.

19. Can the court re-open the Charge? Section 105 of the Land Act No. 6 of 2012 grants this court power to re-open a charge secured on a matrimonial home in the interest of doing justice to the parties. The Applicant asked the court to invoke the provisions of section 106 of the Land Act.

20. Looking at the application before me, it is seeking temporary orders of injunction pending determination of suit. The prayer of whether or not to re-open the charge is contained in the substantive suit (originating summons). Secondly the application was not anchored to be brought under section 106. There was no mention of re-opening of the Charge as one of the grounds relied upon. The advocates bringing the issue of re-opening the Charge in their submissions the interlocutory stage is tantamount to confusing the court to determine a matter that is not prayed for in the application for determination now. This court will not delve into determining issues not before her and without giving parties a hearing. I will therefore let this issue rest here to await the determination of the originating summons.

21. Consequently, having considered the application wholesome and for the reasons given in the above paragraphs, I find this application is lacking in merit and do dismiss it with costs.

DATED, SIGNED and DELIVERED this 25th day of March 2014

A. OMOLLO

JUDGE.