



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 107 OF 2014

PATRICK MUKIRI KABUNDU PLAINTIFF

V E R S U S

EQUITY BANK LIMITED 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

RULING

ON AMENDED NOTICE OF MOTION DATED 21ST AUGUST, 2014

1. Plaintiff who acts in person has sued the 1st Defendant initially seeking an injunction to restrain the 1st Defendant from selling his property **No. 1996/IMN MOMBASA (the property)** and subsequently by an amended Plaint seeking to restrain the 1st Defendant from alienating or transferring the property. Plaintiff seeks that injunction on the ground that the Defendant conducted a sale by public auction on 19th August 2014 which sale was null and void.
2. The Defendants although served with the Amended Notice of Motion under consideration they did not attend the inter partes hearing of that application neither did they file any documents in opposition. The Plaintiff's deposition in his affidavit therefore remain unchallenged.
3. Plaintiff by that Notice of Motion seeks interlocutory injunction to restrain the Defendants from alienating, selling or interfering with the ownership of the property. By that application the Plaintiff raises three broad grounds why the order should be granted.
4. On the first ground Plaintiff alleged that the 1st Defendant had failed to serve a Statutory Notice of Sale of the property upon his wife, Linda Mshai, contrary to the provisions of Section 96(3) of The Land Act 2012 (**the Act**).
5. Linda Mshai swore an affidavit dated 21st August 2014 where she deponed that she gave spousal consent to the charge of the property and yet the 1st Defendant had failed to serve her with the Statutory Notice of sale of the property.
6. Section 96(3) of the Act provides that the chargee shall serve a copy of Notice to sell a charged property to various persons, one of whom is "**a spouse of the chargor who had given the consent.**" Bearing in mind that Defendants did not respond to the application, on a prima facie

basis I find that Statutory Notice of Sale having not been served on a spouse is sufficient ground to grant interlocutory injunction.

7. The Plaintiff also deponed that the chargee sold the property on reliance on a Valuation which not only under valued the property but Valuation that was dated 8th February 2011. I have indeed noted that the 2nd Defendant's Notification of Sale served on the Plaintiff it is stated-

“Value at Kshs. 5,500,000/- as at 8th February 2011 (OLD VALUATION).”

The Plaintiff also deponed that 1st Defendant had failed to supply him with statements of account and in his own layman's language stated;

“Subject amount his (sic) over exaggerated.”

8. Section 97 of the Act imposes on the chargee a duty of care when exercising a Power of Sale of charged property. That Section also requires a chargee to ensure that a forced sale valuation is undertaken before sale. Section 97(1) and (2) is in the following terms-

“97(1) A chargee who exercises 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 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.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

9. On this ground also on prima facie basis I find there is sufficient ground to grant interlocutory injunction. The Plaintiff has on prima facie basis shown that the Defendants may have failed to exercise care for failing to obtain recent Valuation and to supply Plaintiff with Bank statements.

10. In regard to the third ground, Plaintiff stated in his affidavit that he noticed the advert of the public auction of the property one day before the scheduled sale. That the advert was in the Newspaper on 18th August 2014 and the sale was scheduled on 19th August 2014. If that be so, it would be contrary to the provisions of Section 98(2) of the Act which provides-

“(2) If a sale is to proceed by public auction, it shall be the duty of the chargee to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land are, as near as may be, followed in respect of that sale.”

It can be argued that the advert made one day before the scheduled public auction could not have brought that sale to the attention of all the persons who might have had an interest in bidding.

11. It is clear by now that the Plaintiff has adequately met the principles of granting an injunction enunciated in the celebrated case of **GIELLA –Vs- CASSMAN BROWN AND COMPANY LTD [1973]E.A 358**. Those principles are-

- **The Applicant must show prima facie case with probability of success;**
- **The Applicant is required to show that he would suffer irreparable harm, which would not be compensatable in damages; and**
- **When the Court is in doubt it will decide the application on balance of convenience.**

12. On the first principle I believe the Plaintiff from what is stated above has adequately met it.

Plaintiff has shown prima facie case with probability of success and has therefore sufficiently met what was stated in the case **MRAO LIMITED –Vs- FIRST AMERICAN BANK OF KENYA LTD & OTHERS [2003]KLR 125** where the Court of Appeal stated that prima facie case is-

“Which on the material presented to the Court a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

13. On the second principle of granting injunction, the Plaintiff and also his wife deponed that the charged property is their matrimonial home. They fear that if the property is alienated or transferred by 1st Defendant they will lose their matrimonial home. There is no doubt when one loses a matrimonial home, in circumstances such as these where 1st Defendant is alleged to have breached the Law, that the Plaintiff will suffer irreparable injury that would not adequately be compensated by damages.

14. I do find the prayers sought are merited. I do so find bearing in mind the purpose of granting an interlocutory injunction stated by Lord Diplock in the case **AMERICAN CYANAMID –Vs- ETHICON LIMITED [1975]AC 396** viz-

“The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial”

The Plaintiff requires that protection.

15. In conclusion I grant the following orders-

- a. **The 1st and 2nd Defendants, their servants, agents or whoever, are restrained from alienating, selling, conveyancing or transferring ownership of property No. 1996/IMN MOMBASA pending hearing and determination of this suit or for one (1) year from this date hereof whichever occurs first.**
- b. **The Defendants shall pay the Plaintiff’s costs of the Amended Notice of Motion dated 21st August, 2014.**

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE