



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 34 OF 2013

JOHN KAGUU GITHAE PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JOHN PATRICK MACHIRA.....2ND DEFENDANT

AMY WAIRIMU GITHAE.....3RD DEFENDANT

RULING

1. This Ruling relates to an application by the Plaintiff for an interlocutory injunction against the 1st, 2nd and 3rd Defendants. The application is expressed to be brought under the provisions of Order 40 Rules 1, 4 & 11 of the Civil Procedure Rules, 2010 and Sections 1A, 1B & 3A of the Civil Procedure Act. The Plaintiff seeks the following orders-

(a) *That an order of temporary injunction do issue restraining the Defendants whether by themselves, their authorised agents, employees, workers or otherwise howsoever from trespassing on, wasting, alienating, selling, transferring, charging and/or in any other manner whatsoever dealing with or interfering with the Plaintiff's use and quiet possession of the properties known as L.R. NO. Nyandarua/Karati/5301, L.R NO. Nyandarua/Karati/5302, L.R NO. Nyandarua/Karati/5303, L.R NO. Nyandarua/Karati/5303, L.R NO. Nyandarua/Karati/5304 and L.R NO. Nyandarua/Karati/5305;*

(b) *that in the alternative and without prejudice to prayer (2) above, the Land Registrar Nyandarua be directed and ordered to forthwith issue and register an inhibition against L.R. NO. Nyandarua/Karati/5301, L.R NO. Nyandarua/Karati/5302, L.R NO. Nyandarua/Karati/5303, L.R NO. Nyandarua/Karati/5303, L.R NO. Nyandarua/Karati/5304 and L.R NO. Nyandarua/Karati/5305 and the same be preserved and all dealings in and the making of any entries in the register relating to the subject properties be forbidden until the final determination of this suit;*

(c) *that the costs of this application be provided for.*

2. The background to the application is this. Sometimes in the year 1993, the Plaintiff took out a loan and an overdraft facility for the total sum of Kshs. 750,000/= with the First Defendant. He intended to utilise this loan facility for undertaking several farming and herbal medicine research projects. The parties agreed that the sum would attract an interest of 25.5% p.a and a penal interest of 28.5% p.a for all sums which remained unpaid as and when they fell due. The sum was to be

- repaid from the income generated from the farming activities. In addition, the loan facility was secured by a charge created over the parcel of land known L.R. NO. Nyandarua/Karati/151 (*hereinafter referred to as the suit property*) which was at the time registered in the name of the Plaintiff.
3. Following the default by the Plaintiff to honour the terms of the loan agreement, the First Defendant, in exercise of its statutory power of sale, sold the suit property by way of public auction to the Second Defendant on 18th December 2008. Upon the successful transfer of the property in his name and obtaining the title deed, the Second Defendant proceeded to subdivide this property and into five parcels of land, and has sold one of these parcels to the Plaintiff's estranged wife, the Third Defendant.
 4. The Plaintiff's case is that the public auction was illegal and invalid as it was conducted in disregard of the orders of injunction issued by the court in NAKURU HCCC NO. 383 OF 2008. He also alleges that the sum which was being recovered by the First Defendant was excessive and that it had unilaterally applied high and oppressive interest rates. The Plaintiff alluded that he was willing to settle the amount truly due from him upon being issued with a statement of account, which were never furnished by the First Defendant. He is of the view that since the auction was a nullity *ab initio* then all subsequent actions, including the transfer of the suit land to the Second Defendant, the demarcations of this land and sale to the Third Defendant are null and void.
 5. In his Plaint filed in this court on 23rd April 2003, the Plaintiff prayed for, *inter alia*, an order annulling and setting aside the sale of his property, an order redirecting the Deputy Registrar of Lands to cancel all titles excised from his property, a permanent injunction restraining the Second and Third Defendants from alienating, transferring or interfering with his use and possession of the suit land or in the alternative, that the First Defendant be ordered to compensate him for the damages suffered for the wrongful and irregular exercise of its statutory power of sale.
 6. In the application now before court, he seeks injunctive orders restraining the Defendants from alienating, transferring or in any manner whatsoever interfering with his use and possession of the properties or in the alternative the District Land Registrar to be directed to issue and register an inhibition against the suit properties pending the hearing and determination of the suit. His application is premised on the fact that he has information that the Second and Third Defendants are in the process of further alienating L.R. NO. Nyandarua/Karati/5301-5305. He is apprehensive that if this is done his interest will be compromised thereby exposing him to irreparable harm and damage.
 7. The Application was opposed by the Defendants. The First Defendant relied on a Replying Affidavit sworn by Armstrong Kavoo on 26th July 2013. The loan was to attract an interest of 25.5% per annum which was variable at the option of the First Defendant. It was his contention that the Applicant has on many occasions failed to honour the terms of the loan agreement, resulting to the First Defendant issuing statutory notices, the first one was issued on 18th October 2007 and the second dated 26th November 2008. He has also made several proposals on repayment of the loan which he did not honour. The argument that the loan was subjected to high interest rates is not tenable because the agreement gave the First Defendant a right to vary the rates as it deems fit.
 8. The First Defendant maintained that the auction was carried out legally and within the province of the law. It denied that the property was undervalued and the same was sold in terms of the valuation report prepared by Apple Cross Surveyors on 5th November 2008. The Plaintiff had come before court with unclean hands and was undeserving of the orders of court.
 9. In opposition, the Second Defendant filed grounds of opposition dated 24th June 2013 and a Replying Affidavit sworn on 25th June 2013. His case was that the Plaintiff is not in possession of the suit premises or its registered owner and is therefore not entitled to the equitable remedy he seeks. The Second Defendant's interest in the property is protected and cannot be impeached.
 10. Having purchased this property in good faith and without notice of any illegality on the part of the First Defendant, he is entitled to deal with the property in any manner he wishes. He was not aware of the injunction restraining the sale of the property. In addition, the Plaintiff has not demonstrated a true intention of pursuing his claim as he was well aware of the sale of his property in the year 2008, but took no action until 2013. It was his contention that the Plaintiff has no rights in the suit property capable of being protected by way of an injunction.

11. The Third Defendant also opposed the application by her Replying Affidavit sworn on 1st July 2013. She contended that she was not privy to the particulars of the indebtedness of the Plaintiff to the First Defendant or the latter's sale of the property to the Second Defendant. She denied engaging in any fraudulent activities with the First or Second Defendants. In any event, she has the right to transact with any person she wishes.
12. The parties filed written submissions to support their respective arguments. The Plaintiff reiterated the position that there was no valid auction that took place on 18th December 2008. The First Defendant did not have powers to sell the property during the subsistence of the order issued on 17th December 2008 by a court of competent jurisdiction restraining the sale. He added that the Plaintiff's agent who was at the venue of the purported auction from 10.00am to 12.00pm reported that no auction took place at that time.
13. It was also submitted that the First Defendant had a duty to act in good faith and have regard to the interests of the chargor in exercising his power of sale. The First Defendant failed to do so when it sold the property at Kshs. 4,600,000/= instead of its market value of Kshs. 33,025,000/=. The First Defendant also failed to render a true account of the proceeds of the sale to the Plaintiff. It was therefore his contention that his right to redeem his property could not have been extinguished by this illegal auction.
14. For the First Defendant, it was submitted that the Plaintiff had not made a *prima facie* case and has no chance of success because the Plaintiff failed to exercise his equitable right of redemption before it was extinguished when the valid sale between the First Defendant and the Second Defendant was completed. The Plaintiff did not serve any injunctive orders upon the First Defendant. Therefore in exercising its power of sale, the First Defendant was not acting illegally or in bad faith. Further a person seeking an injunction under Order 40 Rule (1) of the Civil Procedure Rules must prove an interest in the property he seeks to protect. The Plaintiff having lost his right to redeem the property, has no interest or legal right that should be preserved.
15. The First Defendant submitted that the balance of convenience in this case is in its favour as the Plaintiff has defaulted in the repayment of the loan despite being indulged by the First Defendant on several occasions.
16. In the submissions filed on 5th May 2014, it was submitted on behalf of the Second Defendant that the Plaintiff had not demonstrated a *prima facie* case with a probability of success. To do so, he was required to show that he had complied with the terms of his agreement with the First Defendant. In any event, even if the Plaintiff were to succeed in his claim against the First Defendant for unlawful exercise of its statutory power of sale, damages would be adequate compensation for his injury. Reliance was placed on Section 77 (3) of the Registered Land Act (Cap. 300, Laws of Kenya) (repealed) which provides for the remedy of damages only in the event of an irregular exercise of the chargee's power of sale. In addition, the Plaintiff had shown indolence in pursuing his claim as he waited for five years from the date when the property was sold to file his suit. The maxim, delay defeats equity, was relied on for the proposition that this court cannot exercise its discretion in favour of a party who has been indolent.
17. The Third Defendant's submissions filed on 11th April 2004 reiterated the issues raised in the Replying Affidavit and the submissions of the First and Second Defendants.
18. Having carefully considered the pleadings and submissions of the parties, I find that the issues for determination in this case are-
 - (a) whether the sale of the charged property by way of public auction carried out on 18th December 2008 was invalid and illegal;
 - (b) whether the allegations of inflation of the amount due, undervaluation of the property and failure to render accounts of sale constitute grounds upon which an injunction may be granted;
 - (c) if so, would damages adequately compensate the Plaintiff; and
 - (d) where does the balance of convenience lie?
19. The purpose of an interlocutory injunction under Order 40 of the Civil Procedure Rules is to

- preserve the suit property or the right of the parties pending the hearing and determination of the suit. In exercising its discretion whether or not to grant these orders, the court will consider the principles set out in **GIELLA VS CASSMAN BROWN & CO. LTD [1973] EA 358**; that the Plaintiff has established a *prima facie* case with a high probability of success, that unless the orders are granted, the Plaintiff would suffer irreparable loss, and that on the balance, the convenience lay with the Plaintiff.
20. It is not disputed that the Plaintiff took out a loan and a draft facility with the First Defendant for the sum of Kshs. 750,000/= and that he charged his property L.R. NO. Nyandarua/Karati/151 as security for this loan. The Plaintiff does not deny that he was served with a statutory notice dated 30th March 2007. He also admits in his supporting affidavit that he received the notification of sale issued by Watts Enterprises on 26th November 2008 and was therefore well aware of the impending public auction of 18th December 2008.
21. However, he failed to take any steps to stop or prevent the sale until the eve of the auction when he filed a suit in the Nakuru High Court on 17th December 2008 and with it an application to stop the intended sale pending the *inter-partes* hearing of the application and the suit. It appears that these orders were extracted late in the day and could only be served upon the First Defendant on the following day and alleges that this was at 10.00am an hour before the auction was to take place. He alleges that the sale having been conducted in contravention of the orders, was null and void, and no proper title could pass to the First Defendant.
22. I agree that an action done in breach of a court order is null and void *ab initio* and any further action based on it is invalid and both must be set aside. However for there to be non-compliance with the orders, it must be established that the contemnor had knowledge of these orders but chose of his own accord to disobey them.
23. As stated earlier the suit and application giving rise to the orders complained of were filed on the day before the auction. Therefore the First Defendant had no knowledge of the suit or reason to believe that any orders restraining it would be made. Further the orders were granted ex-parte in the first instance and in the circumstances, it was upon the Plaintiff to ensure that they were served on the First Defendant before the auction. This he alleges to have done the following day at about 10.00 am. The copy of the order annexed to his supporting affidavit has indeed been endorsed in acknowledgement of service but the time of receipt has not been indicated.
24. Therefore, I am unable to say as a matter of fact that the First Defendant was aware of these orders as at the time the auction was undertaken but went ahead in disregard of them. Though issued before the impending sale, at the time they were served, they had been overtaken by events and the action they intended to restrain had already taken place. The First Defendant cannot be deemed to have acted in contempt of court orders. The Plaintiff has not proved that the said auction was illegal or invalid.
25. Having found that the sale of the charged property was valid, the determination of the two further issues raised, of whether the injunction may be allowed against the Second Defendant because of the dispute regarding the amount owed, failure to render accounts to the Plaintiff and undervaluation of the property, the court must look to the provisions of the Registered Land Act (*Repealed*) on the chargee's power of sale.
26. Sections 72(1) and 77 (3) and (4) which are relevant to this case provide-

(1) 72. (1) Subject to this section, a chargor, on payment of all money due and owing under the charge at the time of payment or on fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 74, may redeem the charged land, lease or charge at any time before it has been sold under section 77, and any agreement or provision which purports to deprive the chargor of this right of redemption shall be void; and, for the purposes of this subsection, land, a lease or a charge shall be deemed to have been sold when a bid has been accepted at the auction sale.

(2) 77 (3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

(4) Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee has consented in writing).

27. The above provisions are to the effect the chargor loses his right of redemption on the fall of the hammer at the auction. Upon a successful registration of a transfer in favour of a purchaser, the chargor is discharged of his obligations under the charge and his interest in the property is vested in the purchaser. The purchaser is further protected in that the sale cannot be set aside on the basis of irregularities in the exercise by the chargee of his power of sale as any remedy that remains is one of damages against the chargee.

28. The legal position is that the chargee will not be restrained from exercising his power of sale on the basis that there is a dispute in regard to the amount owed. **Halsbury's Laws of England vol 32 4th Edition Paragraph 725** provides for this position in the following terms-

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however, if the mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive.”

29. This position was adopted in **KENYA COMMERCIAL BANK LTD V HARUNANI [2002] KLR 691** where the court further held-

“Whether under the terms of the mortgage the claim is excessive will depend on the terms appearing on the documents underpinning the transaction. Onyango-Otieno J in the Pelican Investment case expressed the view that courts would intervene when it was plain in any particular case that there was fraud when the contracts were entered into or where one party used its superior position to force another into contractual obligations which were oppressive.”

30. After carefully perusing the letter of offer dated 22nd June 1993 which contains the terms of contract between the First Defendant and the Plaintiff, I see no indication that the interest rate charged upon the Plaintiff was in contravention of the agreed terms. There has been no imputation of fraud on the part of the First Defendant/Respondent or that it used its superior position to impose contractual obligations on the Plaintiff. In **GATI VS BARCLAYS BANK [2001] KLR 25**, the court held that failure to render accounts does not form a basis for granting an injunction. I adopt that finding in this case as well.

31. The Plaintiff also alleged that the First Defendant sold his property at a gross undervalue. He annexed a valuation report prepared by Lotus Valuers which showed that as at April 2010, the property had an open market value of Kshs. 33,025,000/=. Before the suit premises was sold by auction, the First Defendant caused a valuation to be conducted by Ms Applecross Surveyors on 5th November 2008, and who placed a reserved price of Kshs. 4,600,000/= on the property and an open value market value of Kshs. 8,000,000/=. The property was sold at the reserved price, and no reason has been given to impute fraud on the part of the First Defendant particularly because the Plaintiff's valuation report was prepared about one and a half years after the property was sold.

32. In any event the court of appeal in **DOWNHILL LIMITED VS HARITH ALI EL-BUSAIDY & ANOTHER [2000] eKLR** held that-

“If, as the borrower contends, the property had been sold at an undervalue, that was a proper ground for recovering damages from the bank. It is no ground for stopping the sale and transfer to the appellant. We note that the borrower instituted these proceedings after his equity of redemption had been extinguished. He could have paid the amount demanded even after the sale to the appellant but before he was registered as proprietor.”

33. Further, a person seeking an injunction which is an equitable remedy, must come before court with clean hands. The Plaintiff has failed in this regard. There is ample evidence that the Plaintiff

had defaulted in paying the loan under the agreement and then again defaulted on his own proposals of repayment. He filed the earlier suit for an injunction to restrain the sale but agreed to withdraw it after the sale was concluded and did not pursue his case. He has now come to this court five years after the auction primarily to prevent its alienation by the Second and Third Defendants.

34. The court must balance the interests of the Plaintiff against the Second Defendant who purchased this property in good faith and has been in possession and occupation of the same for the past five years. The circumstances of this case, in my view, tilt in favour of the Second Defendant.

35. For the above reasons, I dismiss the Plaintiff's application with costs to the First, Second and Third Defendants.

36. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 31st day of October, 2014

M. J. ANYARA EMUKULE

JUDGE