



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
HCCC NO 322 OF 2013

GEORGE W. OMONDI.....PLAINTIFF

VERSUS

GUILDERS INTERNATIONAL BANK LTD.....1ST DEFENDANT
GUARDIAN BANK LIMITED.....2ND DEFENDANT
ZEN NOMINEES LIMITED.....3RD DEFENDANT
WHITESTONE AUCTIONEERS.....4TH DEFENDANT
LAND REGISTRAR.....5TH DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 24th July 2013 and filed on 25th July 2013 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer No (1) was spent. He abandoned Prayer No (2) of the application herein on the ground that it would be dealt with in the main suit. He sought the following remaining orders:-

1. **Spent.**
2. **Spent.**
3. **An injunction to restrain the 2nd Defendant and its agents from transferring the property to Zen Nominees Limited.**
4. **An injunction restraining Zen Nominees Limited from registering the property in their name.**
5. **Restraining the Land Registrar Nairobi from registering the transfer or allowing any third party from interfering with the title of the Applicant.**
6. **THAT the costs of this application be provided for.**

THE PLAINTIFF'S CASE

2. The application was supported by the Plaintiff's Affidavit that was sworn on 24th July 2013 and his Further Affidavit in response of the Supplementary Replying Affidavit of Mary Omullo. It was sworn and filed on 4th March 2014. He averred that the 1st and 2nd Defendants could not sell LR

No 209/4401/307 (hereinafter referred to as “the subject property”) both under its statutory power of sale and in execution of the decree in **HCCC No 1217 of 2008 George W. Omondi vs Guilders International Bank (Being a consolidation of HCCC No 2117 of 1998, HCCC No 11 of 1999 and HCCC No 964 of 1999).**

3. His contention was that the purported sale of the subject property by the 4th Defendant on the instructions of the 2nd Respondent, jointly with the 1st Defendant in exercise of their power of sale and in execution of the decree was irregular, illegal and in breach of the statutes and the rules of this court as the 1st, 2nd and 3rd Defendants did not comply with the provisions of Order 22 Rules 6, 9, 10 and 18(1)(a) of the Civil Procedure Rules, 2010 as they failed to obtain warrants of execution and notify him of the same.
4. He also stated that the 1st and 2nd Defendants did not issue him with the mandatory Statutory Notice and further that the 4th Respondent failed to comply with Rule 15 (c), (d) and (e) of the Auctioneers Rules by failing to issue him a forty five (45) days’ mandatory notice of sale or to advertise the subject property a second time.
5. He expressed doubt that the auction of the subject property took place as had been alleged by the Defendants and contended that the subject property was still registered in his name. It was his argument that he would suffer irreparable loss and damage if the subject property was transferred to the 3rd Defendant who was said to have purchased the said property. His written submissions were dated and filed on 25th November 2013.

THE 1ST, 2ND, 3RD AND 4TH DEFENDANTS’ CASE

6. In opposition to the Plaintiff’s application, Mary Omullo swore Replying and Supplementary Affidavits on behalf of the 1st and 2nd Defendant on 29th October 2013 and 4th December 2013 respectively. Ashok Shah swore a Replying Affidavit on behalf of the 3rd Defendant herein on 31st October 2013. It was filed on 4th November 2013. On his part, Kennedy Ngumbao Mulwaswore a Replying Affidavit on behalf of the 4th Defendant herein. The same was filed on November 2013.
7. The 1st and 2nd Defendants were emphatic that they sent the mandatory Statutory Notice to the Plaintiff’s given address and that following the sale of the subject property, the Plaintiff’s right of redemption was extinguished. They stated that they received the proceeds of the sale in the sum of Kshs 14,500,000/= and that as at 23rd October 2013, the outstanding monies due and owing to them by the Plaintiff was Kshs 97,161,095.45.
8. It was their argument that their statutory power of sale had crystallised as had been affirmed in the judgment of Kimaru J in **HCCC 1217 of 2002 George W. Omondi vs Guilders International Bank** (Supra) and that as a result, the Plaintiff had not established a *prima facie* case with probability of success. It was their further submission that an award of damages would be an adequate remedy if the interlocutory injunction was not granted.
9. The 3rd Defendant was categorical that it had purchased the suit property after bidding in the auction conducted on 2nd November 2012 where it was declared the highest bidder at Kshs. 14,500,000/=. It paid the deposit and outstanding balance within the stipulated time. As a result, it said that it was the purchaser and owner of the subject property.
10. The 4th Defendant averred that it served upon the Plaintiff a notice of intended sale dated 24th October 2012 and that the suit property was advertised for sale on 24th October 2012 in compliance with the provisions of Section 21 of the Auctioneers Act and Rule 15 of the Auctioneers Rules.
11. Their List of Authorities was dated 30th October 2013 and filed on 31st October 2013 while their written submissions dated 5th December 2013 were filed on even date.
12. Notably, the 5th Defendant did not file its pleadings or participate in the proceedings herein.

LEGAL ANALYSIS

13. The Plaintiff argued that the 1st and 2nd Defendants did not issue him with a Statutory Notice or comply with the provisions of Sections 90 (1), (2) and (3) and Section 98 (2) of the Land Act

which became operationalised on 2nd May 2012. He said that it was odd that the 3rd Defendant did not have documentary proof of the payment of the purchase price or a transfer and that it had not taken possession of the subject property eight (8)- nine(9) months after the purported sale. On the other hand, the 1st and 2nd Defendants were categorical that the Statutory Notice the 1st Defendant issued the Plaintiff did not expire and neither was it declared null and void.

14. Evidently, on pp 37- 48 of the 1st and 2nd Defendants' Replying Affidavit were several letters between July 1997 and 11th September 1998 that were exchanged between the Plaintiff and the 1st Defendant in which the Plaintiff admitted the debt to the 1st Defendant. In his letter of 11th September 1998 (pg 48 of the said Replying Affidavit), he stated as follows:-

“...However, should after 30-45 days I will have not gotten my Kisumu business back to be able to repay you, then by this letter, you have my authority to proceed and dispose of the Makadara property- L.R. No 209/4401/307- without any notice...”

15. It appears that the Plaintiff did not repay the mortgage monies leading to the issuance of a Statutory Notice by the 1st Defendant. On pg 52 of the 1st and 2nd Defendants' Replying Affidavit was a Statutory Notice dated 26th July 2001 that was sent to the Plaintiff, under certificate of posting, to his Postal Address Box Number 25182 Nairobi. This was the same address that the court noted was shown in the Charge Instrument dated 8th January 1998 on pp 1- 36 of the said Replying Affidavit and to which all notices to the Plaintiff were to be sent to.

16. The Notification of Sale dated 20th July 1998 by M/S Palomino Enterprises Limited to the Plaintiff and the Valuation Report by Bel Air Properties Limited were contained on pp 50-51 and 69- 75 of the said Replying Affidavit respectively. The copy of the envelope appeared to be from M/S Hamilton Harris and Mathews Advocates for the 1st Defendant as it contained Ref 20/G0261/11 which was the same reference number in the Statutory Notice that was dated 26th July 2001 on page 52 of the Replying Affidavit.

17. The 4th Defendant did not annex a copy of the Notification of Sale dated 24th October 2012 that it purportedly sent to the Plaintiff but stated that the property was sold pursuant to a court order and that in any event, the relevant statutory notices herein were those that had been sent to the Plaintiff previously. There was also no evidence that was provided to show that the auctioneer's notices were sent by registered mail.

18. Notably, the Plaintiff did not provide any evidence to show that the subject property was sold pursuant to a court order or that the 1st and 2nd Defendants were required to comply with the provisions of Order 21 Rule 74 and Order 22 Rules 6, 7, 8, 9, 10 and 48 of the Civil Procedure Rules, 2010. What is, however, clear to this court was that Kimaru J held that the 1st Defendant was at liberty to exercise its statutory power of sale. In his judgment, he stated as follows:-

“The defendant shall be at liberty to exercise its statutory power of sale to sell the Makadara property i.e. L.R. No 209/4401/307 (if the plaintiff shall not repay the debt) to recover the amount owed by the plaintiff pursuant to the loan that was advanced to the plaintiff.”

19. As could be seen in paragraph 14 hereinabove, it was evident that the Plaintiff had given the 1st Defendant authority to dispose of the subject property in the event he was unable to clear the monies he owed the 1st Defendant. It did appear that he still owed the 1st and 2nd Defendants colossal amounts of money under the Charge as at the time the subject property was auctioned which sum was given as Kshs 97,161,095.45 as at 23rd October 2013.

20. Having said so, the court found the Plaintiff's contention that the 3rd Defendant did not pay a deposit or the purchase price in accordance with the conditions of sale in the 4th Defendant's advertisement in the Star on 24th October 2012 to have been a pertinent issue for determination with a view to establishing whether indeed the sale of the subject property was valid. The said conditions of contract were as follows:-

1. ...

2. Interested bidders are required to pay a refundable deposit of Kshs 1000,000.00 (sic) to obtain a bidding number and catalogue at the auctioneer's offices, before the auction.
3. A deposit of 25% of the purchase price must be paid by banker's cheque at the fall of the hammer. The balance will thereafter be payable within thirty (30) days to the chargee's advocates..."

21. The 3rd Defendant did not furnish the court with any documentary evidence to support its contention that it had complied with the aforesaid conditions of sale. In fact, the 1st and 2nd Defendants provided a copy of an Account Statement: 0100008486- George Omondi showing that a sum of Kshs 14,500,000/= was credited to the Plaintiff's said account on 13th July 2013, a fact that was confirmed in Paragraph (3) of the 1st and 2nd Defendants' Supplementary Affidavit. None of the Defendants proffered any explanation why the monies were not paid as had been envisaged under the aforesaid conditions of sale. Indeed, they all skirted around the issue leaving a lacuna on when really, the 3rd Defendant paid the aforesaid monies.

22. In the absence of any evidence to the contrary, the court was more persuaded by the Plaintiff's belief that the auction never took place on 2nd November 2012 and that if it did one, the sale could not have been valid if any of the conditions of contract hereinabove mentioned of the sale were not adhered to.

23. Having considered the pleadings, the affidavit evidence and written submissions, the court found that in view of the doubt in its mind whether indeed the auction took place on 2nd November 2012, it was of the considered opinion that the Plaintiff was not given an opportunity to exercise its right of redemption.

24. The importance of not depriving a person of his or her property was an issue that was considered in the case of **Alice Awino Akello vs Trust Bank Limited LLR No 625 (CCK)**. The Plaintiff would suffer great injustice as he would be denied his right of redemption which he was entitled to until the fall of the hammer at a public auction.

25. In this regard, the court also associates itself with the holding 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..."

26. Again, in **Muir 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."

27. However, what is worthy of note is that although the 1st Defendant issued the statutory notice as aforesaid, the subject property was not disposed of until 2nd November 2012. By this time, the Land Act Cap 280 (Laws of Kenya) had already come into force. The said Act, however, had a transitional provision. Section 162 (1) of the said Land Act stipulated as follows:-

"Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of the Act."

28. The purport of this section was that the 1st Defendant still retained all its powers including its statutory power of sale under the Registration of Titles Act Cap 281 (Laws of Kenya) (now repealed). Having issued a Statutory Notice before the coming into force of the Land Act, it did not need to issue a fresh notice to the Plaintiff.

29. This was indeed a position that was held in the case Mbuthia vs Jimba Credit Finance Corporation & Another [1986-1989] EA 340 where the court held as follows:-

“It is clear that Section 74 did not impose on the chargee the giving of more than one notice and there is no sound policy reasons why he should be obliged to give a fresh notice to the chargor any time a sale was suspended to accommodate him...”

30. In view of the lapse of complying with the said conditions and the Plaintiff's application for an injunction, the Defendants now found themselves being brought within the ambit of Section 162 (4) and (5) of the Land Act. The same provides as follows:-

4. **If a lessor or lender had initiated any steps to forfeit a lease or to foreclose a charge, as the case may be, before the commencement of this Act, a court may on the application of the lessee or the chargor issue an injunction to the lessor or, to the lender to stop the continuation of any such step.**
5. **If a court had issued an injunction under subsection (4), the lessor or lender to whom the injunction has been issued may commence any action under this Act to terminate that lease or bring that charge to an end.**

31. The Defendants did not raise the issue of how the Plaintiff's prayers had been presented before the court. Appreciably, the court was not impressed by the drafting of the Plaintiff's application for injunctive orders. The prayers were open ended and cannot be granted as prayed. The prayers that he had sought needed to have a limitation of time. In other words, he was required to indicate whether or not he was seeking the orders pending the hearing of the application or pending the hearing and determination of the suit.

32. In addition, his application was premised on the provisions of Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act whereas there are specific provisions under which the said application could be brought.

33. Be that as it may, the court is alive to the fact that Order 51 Rule 10 of the Civil Procedure Rules provides that every order, rule or statutory provision must be ordinarily stated but that no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule. In addition, Article 159 (2)(c) of the Constitution of Kenya, 2010 also enjoins the court to administer justice without undue regard to technicalities.

34. However, the court found that it was in the interests of justice to grant an injunction under Section 162 (4) of the Land Act as it was necessary to meet the ends of justice.

35. The above notwithstanding, the court found that the Plaintiff was truly and justly indebted to the Defendant and did not therefore establish a *prima facie* case with a probability of success within the parameters that were set out in the case of Giella v Cassman Brown Company Limited (1973) EA 360 in which the court 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.”

36. In the premises foregoing, nothing would prevent the 1st and 2nd Defendants from realising their security. The court found and held that they were therefore at liberty to re-issue the requisite notices that complied strictly in accordance with the Land Act as was contemplated under Section 162 (5) of the Land Act. Indeed, by virtue of Section 162 (4) of the Land Act, the Plaintiff was entitled to the right of protection and equal of benefit of the law as all chargors who would have been advanced financial facilities after the commencement of the said Land Act.

37. As was observed hereinabove, there was no evidence to show that the forty five (45) days' notice issued by M/S Palomino Enterprises Limited on pg 50 of the 1st and 2nd Defendant's Replying Affidavit was sent to the Plaintiff's aforesaid postal address by way of registered mail. There was also no indication whether the Notification of Sale dated 20th July 1998 was served upon the

Plaintiff and if so, how the same was done.

38. In the absence of any cogent explanation, the court had no option but to find that the Plaintiff was not served with all requisite notices. However, as the initial Statutory Notice that was served upon the Plaintiff was still valid and ought not to be issued afresh, the court will allow the Plaintiff to enjoy the benefit of the notice under Section 96 (1) of the Land Act that Section provides 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.”

39. Indeed, a reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three (3) months' notice and different from the forty five (45) days' Notification of Sale to be issued by an auctioneer. The court is of the view that these notices ought to be issued to Plaintiff before the 1st and 2nd Defendant can proceed to realise the subject property, in the event the Plaintiff does not exercise his right of redemption.

DISPOSITION

40. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated 24th July 2013 and filed on 25th July 2013 was not merited and the same is hereby dismissed.

41. However, the court has granted an injunction pursuant to Section 162 (4) of the Land Act which effectively means that the 1st and 2nd Defendants may proceed to realise their security as envisaged under Section 162 (5) of the Land Act. For the avoidance of doubt, the status quo order that had been issued by court on 7th October 2013 is hereby discharged, set aside and/or vacated.

42. As the Plaintiff was the cause of the action that the 1st and 2nd Defendants took to realise the said subject property herein but the Defendants did not also satisfy the court that the auction of the said subject property actually took place on 2nd November 2012, each party will bear its own costs.

43. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of December 2014

J. KAMAU

JUDGE