



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 8 OF 2011

JAMES NJOROGE KAMAU.....1ST
PLAINTIFF
MILKAH NYAMBURA NJOROGE2ND
PLAINTIFF
- VERSUS -

FRANCIS NJUGUNA1ST DEFENDANT
MOLYN CREDIT LTD2ND DEFENDANT

RULING

1. I have before me a notice of motion by the plaintiffs dated 14th January 2011. The plaintiffs are husband and wife respectively. They pray in the main suit that the sale by the 2nd defendant to the 1st defendant of LR No Kabete/Karura/2443 belonging to the 1st plaintiff be declared null and void and that an order be made to restore it to the 1st plaintiff. In the notice of motion they pray for a temporary injunction to restrain the 1st defendant or his agents from selling, transferring, developing or in any way dealing with the suit property. The plaintiffs aver that the 2nd defendant purported to exercise a chargee’s statutory power of sale to the 1st defendant fraudulently, irregularly and illegally. The plaintiffs aver that they were never served with the requisite statutory notice and that there was a conspiracy by the defendants to conceal the sale from the plaintiffs.
2. The gist of the 1st defendants objection to the motion is that he is an innocent purchaser for value without notice. He further avers that the sale was not tainted by fraud and there is no evidence of the alleged collusion by the defendants to conceal the sale. The 1st defendant states he has thus acquired a good and indefeasible title under the provisions of sections 27, 28 and 143 of the Registered Land Act. The 1st defendant avers that the plaintiffs do not dispute taking a loan from the 2nd defendant. Finally, the 1st defendant submitted that there has been material non-disclosure of a purported sale of the suit property by the 2nd plaintiff to the 1st defendant without disclosing the charge debt. The 1st defendant thus avers that the plaintiffs have come to court with unclean hands.
3. The 2nd defendant’s position is that it loaned the 1st plaintiff Kshs 200,000 on the security of the suit land. It challenges the *locus standi* of the 2nd plaintiff to bring the suit. It also challenges the letter of authority annexed to the plaint and the affidavit of the 2nd plaintiff as being defective. The 2nd defendant avers that when default in repaying the charge debt occurred, it issued a statutory notice and that the power of sale had accrued and was exercised in a regular manner. Finally, the 2nd defendant avers that the

plaintiffs have in any event not made out a case for grant of injunction.

4. I have heard the rival arguments. I am of the following considered opinion. From the particulars of the title deed of the property known as Kabete/Karura/2443, the sole proprietor is James Njoroge Kamau ID 7583555. That is the 1st plaintiff. The 2nd plaintiff, who is his wife does not appear in the property section of the title. Although it is alleged at paragraph 5 of the plaint that the 1st plaintiff held the suit property in trust for himself, his family and the 2nd plaintiff, that is not borne out by the title. I would in those circumstances find that the 2nd plaintiff for want of proprietary rights has no capacity to injunct the defendants in dealing with the suit.

5. That said, I do note that there is annexed a sale agreement dated 1st September 2009 for sale of the suit property executed by the 2nd plaintiff and the 1st defendant. The wording of that agreement creates the impression that the two plaintiffs were the proprietors of the suit land. But at the foot of that agreement, the 2nd plaintiff states she has authority of her husband, the 1st plaintiff, to transact the sale. Although these are matters that will become clearer at the trial and upon evidence, on the face of it, I am not satisfied that the 2nd plaintiff had proprietary rights over the suit land to ground an injunctive relief.

6. I am however, on the face of it, satisfied that from the authority to appear or act dated 9th January 2011 granted by the 1st plaintiff, the 2nd plaintiff is entitled to litigate on behalf of the 1st plaintiff. The veracity of that authority to appear or act will be a matter for the trial court to determine on evidence. The attack on the 2nd plaintiff's supporting affidavit for not disclosing the description, place of abode or postal address is well taken in view of the provisions of order 19 rule 4 of the Civil Procedure Rules. However, this court is now enjoined to do substantial justice to the parties without undue regard to technicalities. That is clear in article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act.

7. I am satisfied on the evidence before me in the depositions of the defendants as well as the admission at paragraph 6 and 7 of the plaint that the 1st plaintiff took a loan of Kshs 200,000 from the 2nd defendant on the security of the suit land. The plaintiffs have not pleaded in the plaint that they repaid the loan. The agreement for the loan is exhibited. The charge in favour of Moly Credit Limited was registered on 22nd July 2009 as per the encumbrances section in the title. It appears to me that there were certain agreements, particularly the sale agreement dated 1st September 2009, between the plaintiffs and the 1st defendant. Indeed, the 1st defendant entered a caution against the title claiming a purchaser's interest. He only withdrew it on 28th June 2010 obviously to allow the transfer to himself on 2nd July 2010, the same date that a discharge of charge was also registered.

8. The plaintiff's say that the sale agreement to the 1st defendant was provisional and was only to become absolute in the event they were unable to repay the debt of Kshs 200,000. The 1st defendant denies that aspect and says that the sale agreement of 1st September 2009 was binding and that the Kshs 200,000 he paid was a deposit of the purchase price of Kshs 600,000. He says he was not lending money to the plaintiffs. He was thus surprised to learn later that the property was being auctioned by the 2nd defendant. That is when, to mitigate his losses and to safeguard his interest, he bought the property from the 2nd defendant at a bid of Kshs 1,600,000. He said he only recovered his earlier deposit by way of garnishee proceedings in Resident Magistrates Civil Case Number 3522 of 2010. It is not lost on me that the plaintiff in the latter suit is the 1st defendant herein and he had sued the present plaintiffs and one Derek Kioko Ndonge in the garnishee proceedings. Those are too many coincidences and lucky breaks for the 1st defendant. They do not by themselves prove fraud or collusion but they leave doubt in my mind at this stage about the bona fides of the 1st defendant in the entire transaction. The matters of fraud and collusion between the 1st and 2nd defendant will be for the trial court and the less I say about them at this stage the better.

9. It then becomes instructive that the said Derek Kioko Ndonge is a partner in the firm of Ndonge & Associates Advocates who issued, a statutory notice dated 23rd November 2009 to the 1st plaintiff. Those facts are clear on the face of the letter dated 23rd November 2009 annexed to the affidavit of Lydia Anyangu sworn on 11th February 2011. That notice was for 3 months. To that extent of its wording, it complied with section 74(1) of the Registered Land Act. The chargee would only be entitled to sell the property under section 74 (2) (b) upon maturity and service of that notice. The statutory notice in this case was posted to the 1st plaintiff to P. o Box 43013-00100. This is clear from the further averments of Lydia Anyangu in the further affidavit of 14th March 2011. But that affidavit or the annexed copy of a certificate of posting does not indicate the date of posting.

10. Furthermore, I note from the affidavit of Milka Nyambura that the 1st plaintiff had immigrated to the United States of America at around July 2010 when the 1st defendant gave a further loan of Kshs 200,000 or in the latter's version paid a deposit for purchase of the suit land. The claim that the 1st plaintiff had immigrated has not been contested. It would then raise doubt about receipt of the statutory notice. With regard to the 45 days redemption notice annexed to the replying affidavit of Lydia Anyangu sworn on 11th February 2011, there is no evidence whatsoever of postage or other service by the auctioneer as required by rule 15 (d) of the Auctioneers Rules 1997. I do note that on the face of it, the names James N. Kamau are written in the place of the signature. There has been no affidavit by the auctioneer to explain that gap particularly in view of the contested service. But what is really telling is that the time and place of service is stated as 26th February 2010 but that document is predated at the bottom 24th February 2010. If that is in doubt, the same inconsistencies in dates and signatures are found in the notification of sale appearing at page 23 of the annexures to the said affidavit. The certificate of sale annexed says the 1st defendant was the highest bidder. Since the plaintiffs aver that the sale was secretive, it was incumbent upon the defendants to get the auctioneer to depone to the circumstances of sale. There is another salient matter. Even if I were to assume that the statutory notice dated 23rd November 2009 was sent immediately on that date, the auctioneer states in the 45 days redemption notice that he was instructed on 19th February 2010. By the latter date, the 90 days statutory notice period had not matured. I am thus left in serious doubt that both the statutory notice and the 45 days redemption notice were received by the chargor or that there was a valid public auction.

11. The decision of the court of appeal in Nyangilo Ochieng and another Vs Fanuel Ochieng and two others Civil Appeal 148 of 1995 [1996] e KLR is instructive. It says in the pertinent part

“It is for the chargee to make sure that there is compliance with the requirements of section 74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent”.

12. In those circumstances, I find that the failure of service of the statutory notice was in breach of section 74 (2) (b) of the Registered Land Act and voids the subsequent sale. The 1st plaintiff's equitable right of redemption could not be extinguished when the statutory power was exercised improperly or irregularly by the 2nd defendant.

13. There is the argument by the 1st defendant that he was a bona fide purchaser for value without notice. I have already cast doubt on the entire process of sale by auction and the conduct of the 1st defendant. The 1st defendant relied on sections 27, 28 and 143 of the Registered Land Act and proposed that since his title was indefeasible upon the transfer, the remedy for the 1st plaintiff is in damages. I disagree. As held in the Nyangilo case above, “a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold”. I also agree with my brother Justice Mohamed Warsame that damages are not an automatic remedy particularly for loss occasioned by breach of the law. In Joseph Siro Mosiomo Vs Housing Finance Company of Kenya Nairobi HCCC No 265 of 2007 [2008] e KLR the learned judge held;

“Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the

law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”

14. The defendants had also stated that the prayer for injunction in the motion is at variance with the prayers in the plaint. That would be fatal. And here the defendants placed reliance on the decision of Ringera J, as he then was, in Dismas Oduor Owour Vs Housing Finance Company (K) Ltd and another Nairobi HCCC No 630 of 2001 cited with approval in Lukas Njuguna S. Karobia Vs Consolidated Bank (K) Ltd Nairobi HCCC No 329 of 2005 (unreported).

15. That is not true of the plaint here. At paragraph 13 (b) of the plaint, the plaintiffs pray for “an order nullifying the sale and subsequent transfer of the suit property to the 1st defendant and reverting ownership thereof to the 1st plaintiff thereof to the 1st plaintiff”. By those words, the plaintiffs are praying for a mandatory injunction to nullify the sale and restore the property back to them. They have not used the word “injunction” but it is more than clear from the relief sought. They are thus entitled to the interlocutory relief sought in the notice of motion under order 40 rules 1 and 2 of the Civil Procedure Rules 2010. I am satisfied that granted all the circumstances of this case and in the interests of justice the 1st plaintiff has made out a case for grant of an injunction.

16. Finally, an injunction is a discretionary remedy. I am also satisfied that the 1st plaintiff has made out a *prima facie* case for grant of interlocutory relief as per the time honoured decision of Giella Vs Cassman Brown and Company [1973] E.A. 358. I have already alluded to my view that in this case damages would not be an appropriate or adequate remedy.

17. In the result, I allow the plaintiffs’ notice of motion dated 14th January 2011 and order that there shall be an injunction restraining the 1st defendant either by himself, his agents, servants or employees from offering for sale, selling, transferring, developing or in any way dealing in the suit property known as Kabete/Karura/2443 until the determination of this suit.

18. I also grant the 1st plaintiff costs of the application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of January 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.