



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 169 OF 2011

PREPS INTERNATIONAL LIMITED PLAINTIFF

VERSUS

BACLAYS BANK OF KENYA LTD
J.M. GIKONYO T/A GARAM INVESTMENTS
FARIDUN SULEIMAN ABDALLA DEFENDANTS

RULING

Preps International Limited (the plaintiff), secured a loan of KShs.12,500,000/= from ***Barclays Bank of Kenya*** (1st defendant), on or about August 2007. The plaintiff's property that is known as **LR No. 37 34/940 (IR 24438)** (suit premises) was charged as security for the payment of the loan. According to the plaintiff it was unable to repay the loan as per the instalments and it requested the 1st Defendant for indulgence to service the loan as per the proposal contained in a letter dated 30th March, 2011, the plaintiff was seeking to clear the loan within 45 days.

Based on the understanding that the plaintiff's request to sell the suit property was accepted by the 1st defendant, the plaintiff advertised for the sale of the suit premises by way of private treaty and obtained several offers by prospective buyers who were offering to purchase the suit property at about 65 to 70 million.

However the plaintiff alleges that the 1st defendant reneged on the promise and it was surprised to see an advertisement in the *Daily Nation* of 11th April, 2011, where their property was advertised for sale by public auction. The plaintiff contends that it had obtained a willing purchaser who had paid KShs.6.5 million as deposit and the 1st defendant had acceded to this sale.

The plaintiff's claim is that the 1st defendant unilaterally sold the suit property at a throw away price of KShs.35 million. The 1st defendant is also accused of failing to set up a reserve price and thus failing to obtain the best value in the market value. This is the sale by public auction that precipitated this suit in which the plaintiff is seeking for perpetual injunction against the finalization of the sale of the suit premises and a declaration that the public auction was illegal unlawful and should be set aside.

Simultaneously, with the filing of the suit, the plaintiff filed a Notice of Motion dated 13th April, 2011. The plaintiff is seeking for orders that:

“pending the hearing and determination of this application the 1st and 2nd Defendants and their agents be restrained from entering, dealing and or transferring LR No. 3734/940 (IR. 24438) and or finalization

of the public auction.”

This application is based on the grounds that the 1st and 2nd defendants unlawfully sold the suit premises by way of a public auction without a proper notice, notification of sale and in disregard of the negotiations that were on going for the sale of the property by the Plaintiff by way of a private treaty.

Secondly, the plaintiff had made a genuine offer to redeem the property through a sale by private treaty that was based on the current market value. Further the plaintiff's property was sold for a paltry sum of KShs.35 million which disregarded the market value of the suit premises that stood at KShs.70 million. The plaintiff claims that she will suffer irreparable loss unless an interim order is issued.

In further arguments to support the plaintiff's case, Mr Mandala learned counsel for the plaintiff, filed written submissions which were highlighted before me when the matter came up for hearing on 13th December, 2011. Counsel also cited several authorities to support his submissions that the plaintiff's case meets the threshold for granting an order of injunction as set out in the case of **GIELLA V CASSMAN BROWN COMPANY LIMITED, CIVIL APPEAL NO. 51 OF 1972** and that it establishes a *prima facie* case as set out in the case of **MRAO LIMITED V FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS, CIVIL APPEAL NO. 39 OF 2002.**

On the part of the defendants, this application was opposed. The 1st and 2nd Defendants relied on their written submissions filed on 19th October, 2011 and relied on the replying affidavits sworn by Waweru Mathenge on behalf of the 1st defendant.

According to the 1st and 2nd defendants, after the plaintiff defaulted in the loan repayments, it was duly served with statutory notice dated 18th August, 2009. The 2nd defendant was also instructed to serve a notification of sale and a 45 days' notice upon the plaintiff as stated in an affidavit of service. After service, the plaintiff sought to negotiate the amount that was the outstanding arrears and not settlement and therefore admitted receipt of the notice vide several correspondence dated 8th June, 2009, 30th July, 2009 and 31st August, 2009. At some point the plaintiff's request was acceded to and it was allowed 90 days of to pay the outstanding arrears and costs.

Regarding the existence of another suit being, Nairobi **HCCC NO. 580 OF 2009** that touched on the same subject matter, both plaintiff and 1st defendant discovered in 2009 there was that suit wherein they were enjoined as parties to protect their interest in the suit property. That suit was subsequently struck off. That period when the suit was pending the plaintiff had an opportunity to pay the arrears but it just sat back until the suit was struck off.

It was further submitted that the property was properly advertised, and the sale by public auction on 12th April, 2011 was properly conducted and the property was sold to the highest bidder.

Since the property was sold and the 3rd defendant was declared the purchaser, the plaintiff's remedy (if any) lies in damages. That is as it was held in the case of **J.N. WAFUBWA V HOUSING FINANCE COMPANY OF KENYA, CIVIL APPEAL NO 253 OF 2004 [2011] ECLR** where the Court of Appeal held as follows:

“Whatever other remedies that the Plaintiff may be entitled to, such a claim for damages, I do not think that he is entitled to the prayers he has sought. His action must therefore fail for the simple reason that he failed to redeem his property. The same has sold in the exercise of a statutory power of sale, and his right of redemption was extinguished upon the fall of the hammer at the auction sale. Therefore he is not entitled to a re-conveyance of the same.”

The 3rd defendant also joined this suit and filed a replying affidavit. The 3rd defendant contends that he purchased the suit property at a public auction and his bid for KShs.48,500,000/= was accepted by the auctioneers. He paid KShs.12,500,000/= and he was issued with a memorandum of sale and a

receipt. However, he could not pay the balance of the purchase price due to a court order that stopped any further transfer of the suit premises.

I have considered all the rival submissions and the pleadings in this matter. The issues for determination as I see them are whether the plaintiff's property was sold unlawfully in a public auction without a proper notice notification of sale and in disregard of some ongoing negotiations. It is not in dispute that the plaintiff took a loan and charged the suit premises as security for the repayment of the loan. It is not also disputed that the plaintiff defaulted in the repayment. What the plaintiff contends is that the 45 days notification of sale was not served. According to the 1st and 2nd defendants, a notification of sale was prepared on 4th February, 2011 and it was served upon the plaintiff by registered Post Office Box No. 25146-00603, Nairobi.

Mr Joseph Mungai Githenya of Garam Auctioneers swore an affidavit and annexed the certificate of posting. The issue for determination is whether the plaintiff has established a *prima facie* case with a probability of success. As stated earlier in his ruling, the plaintiff and defendants are bound by the terms and conditions contained in the charge. The plaintiff defaulted in the loan repayment but sought to be allowed to sell the charged property by way of a private treaty.

The 1st defendant denies that it was party to an agreement that the plaintiff had entered with a third party. As far as the court is concerned the charge document that is signed between the plaintiff and the 1st defendant was the valid contract to govern the transaction. If the plaintiff had negotiated the sale by private treaty and the 1st defendant failed to accede to it, this court cannot re-write the contract for the parties.

See the case of **NATIONAL BANK OF KENYA LTD V PIPE PLASTIC SOMKOLIT (K) LTD & ANOTHER, [2001] KLR 112** where it was held:

“1. A court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence is pleaded and”

In this case of the 1st defendant refused to accede to the sale by private treaty as pleaded by the plaintiff, there is nothing on the charge document to show that they were obliged to accede to the request by the plaintiff to allow a sale by private treaty. On the service of the notification of sale, there is evidence on record that the notification of sale was sent to the plaintiff's address.

This matter is further compounded by the fact that the 3rd defendant bid for the property and he was declared the highest bidder. Under **Section 69 B of the Transfer of Property Act** it is provided as follows:

(1) *“a mortgagee exercising the mortgagee's statutory power of sale should have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights and encumbrance to which the mortgage has priority, but subject to all estates, interest, rights and encumbrances which have priority to the mortgage.*

(2) *Where a transfer is made in exercise of the mortgagees' statutory power of sale, the title of the purchaser shall not be impeccable on the ground:*

(a) *that no case had arisen to authorise the sale: or*

(b) *that due notice was not given: or*

(c) *that the power was otherwise improperly or irregularly exercised; and a purchaser is not, either before or after transfer, concerned to see or inquire whether a case has arisen to authorise this sale, or due notice has been given, or the power is otherwise properly and regularly exercised: but any person demnified by an authorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”*

In view of the above statutory underpinnings and the facts of this matter I am not satisfied that the plaintiff's application meets the threshold of the principles set out for granting an injunction.

The upshot of this matter is that the notice of motion dated 13th April, 2011, lacks merit and it is hereby dismissed with costs to the respondents.

Ruling read and signed this 30th day of March, 2012.

MARTHA KOOME
JUDGE OF APPEAL

Note:

This application was heard and concluded on 13th December, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.