



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 370 OF 2011

VIRENDER KAUR PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LTD..... DEFENDANT

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RULING

By a Plaint dated 29th August, 2011 the Plaintiff pleaded that on or about 25th May, 2009, she borrowed Ksh.2,000,000/- from the Defendant as a term loan payable in 48 months period. That loan was secured by a legal charge dated 25th May, 2009, over the property known as LR No. 209/8343/162, Nairobi (hereinafter “the suit Property”). That she had repaid the said amount to the Defendant and that she had satisfied her obligations under the charge.

The Plaintiff contended that despite as aforesaid on 19th August, 2011 when she went to make payment at the Defendant’s bank, she was informed that the suit property had been sold because she was in arrears. The Plaintiff contended that the said sale was fraudulent, unlawful and in breach of the law. She set out what she contended to be the particulars of fraud, illegality and breach of contract. These were, inter alia, that the Defendant did not issue a statutory notice of sale, the Defendant had failed to serve the 45 days redemption notice, disposing off the property at an under value and acting in conspiracy with the auctioneer.

Together with the Plaint, the Plaintiff filed a Notice of Motion dated 29th August, 2011 wherein she sought injunctive orders to stop the sale or the transfer of the suit property. In her Affidavit sworn on the same day, the Plaintiff reiterated what she had pleaded in the Plaint and produced as exhibits the letter of offer dated 11/8/2008, the charge dated 25th May, 2009, various deposit receipts totaling Kshs.1,750,000/- out of which a total of Kshs.1,250,000/- was paid between 8th and 19th August, 2011.

Mr. Njenga, learned Counsel for the Plaintiff submitted that the Plaintiff had paid approximately Kshs.1,900,000/-, that having paid the said sum there was no basis for the Defendant to exercise the statutory power of sale, that the Statutory Notice of Sale was never served, that the equity of redemption had not yet been extinguished. He urged the court to allow the application.

The Defendant filed a Replying Affidavit by Phillip Muoka sworn on 1st September, 2011. He swore that the Plaintiff had lied in that she had defaulted and a Statutory Notice of Sale was issued on 28th April, 2010 and was served by registered post, he produced a Statement of Account for the Loan Account to show that the Plaintiff was irregular in her servicing the loan and that as at 30th July, 2011 there was an outstanding sum of Kshs.2,017,091.40/- on the loan account, that Notification of Sale dated 30th May, 2011 was served by Keysian Auctioneers informing the Plaintiff of the Public Auction of 12th August, 2011. That there were two advertisements in the standard newspaper, that the open market value was Kshs.9million yet the sale was for Kshs. 8 million, that on 12th August, 2011 the successful bidder paid Kshs.2 million being the 25% of the purchase price.

Ms Mutua, learned Counsel for the Defendant submitted that whereas the Plaintiff was supposed to pay Kshs. 56,680/- per month from drawdown, she only paid on 19th January, 201 and 13th February, 2010, that the law was complied with before the sale. That the sale was properly carried out and the Plaintiff's equity of redemption had been extinguished. Counsel relied on the case of **Ze Yung Yang –vs- Nova Industries Products Ltd 92003) IEA 362** in support of that contention. That no rights of the Plaintiff has been infringed to warrant an injunction.

Relying on the case of **Downhill –vs- Harith Ali Eli Buseidy & Another, CA No. 254 of 1999 (UR)**, Counsel submitted that an injunction cannot issue to affect the interests and rights of a 3rd party who had purchased the suit property but had not been joined in these proceedings. Counsel urged the court to dismiss the injunction.

This is an interlocutory injunction application. The principles applicable are well known as set out in the **Giella –vs- Cassman Brown (1973) IEA 358**. These are, that the applicant must establish a prima facie case with a probability of success, that an injunction will not normally be granted unless irreparable the Applicant might suffer injury and that if the court is in doubt the application will be decided on a balance of convenience.

In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** the Court of Appeal at page 137 held:-

“So what is a prima facie case? I would say that in civil cases it is a case in 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.”

On the material presented before this case, is there any right of the Plaintiff which has been infringed so as to call for an explanation by the Defendant?

In the term loan facility letter dated 11th August, 2008 produced as “VK1” by the Plaintiff, it was provided in Clause 5 thereof that the facility granted to the Plaintiff was payable to the bank by 48 monthly installments of Kshs. 56,680/- each commencing the 30th day from the date of the first draw down. This was however in contradiction with the charge dated 25th May, 2009 which stipulated that the sum of Kshs.2,000,000/- loaned together with interest was payable on the 7th day after the date of the charge.

According to the charge, the entire sum was payable on or by the 1st day of June, 2009. If we go by the letter of offer, the advanced sum was payable in installments of Kshs.56,680/- from the 24th June, 2009. From the material before this court, the Plaintiff did not comply with any of the stipulations either in the charge or letter of offer. Indeed Phillip Muoka swore in paragraph 16 of his Replying Affidavit that before August, 2011, the Plaintiff had only paid a sum of Kshs.350,000/-. Going by the contractual documents produced in this court by that time the Plaintiff should have paid either the entire sum as per the charge or a total sum of Kshs.1,417,000/- in accordance with the letter of offer.

On 7th February, 2012, the Plaintiff was granted leave to file a Further Affidavit. None was filed. Accordingly, the averments in the Defendant's Affidavit of Phillip Muoka sworn on 1st September, 2011 went unchallenged. These were, that a Statutory Notice of Sale dated 28th April, 2010 was served by Registered Post, that the Plaintiff had fallen into loan arrears, that the Plaintiff had on 8th December, 2010 given a proposal to pay Kshs.1.2million by 9th December, 2010 but had failed to do so, that a Notification of Sale dated 30th May, 2011 issued by Keysian Auctioneers had been served upon the Plaintiff advising her of the public auction of 12th August, 2011, and that there had been two (2) advertisements on the Standard newspaper before the public auction was held on 12th August, 2011.

With such unchallenged evidence can it be said that there is any right of the Plaintiff which has been infringed that requires a rebuttal by the Defendant. I think not. To my mind, the Defendant has demonstrated that it was owed money by the Plaintiff, that the Plaintiff was in arrears and in breach of her contractual obligations under the letter of offer and the charge, that the Defendant followed and complied with all the legal requirements before it exercised its statutory power of sale. Surely, there is nothing that has been established by the Plaintiff so to ask and/or call upon the defendant to rebut.

Accordingly, the Plaintiff has not established any prima facie case with any probability of success.

One other thing, an injunctive order is an equitable remedy. He who comes to equity must do equity. The Plaintiff did state in paragraph 6 of her Complaint and swore in paragraph 8 of her Supporting Affidavit that she had repaid all the amounts due under the terms of the agreement between her and the Defendant. That was, to say the least, outright lies. The statement of account exhibited in the Replying Affidavit of Phillip Muoka was never challenged by the Plaintiff. The same shows that as at 30th July, 2011 the Plaintiff was hopelessly in arrears. To swear such falsehood whilst seeking an equitable remedy, in my view, is a demonstration of extreme disrespect of the court as well as an exhibition of a careless attitude towards the legal process.

Further, I am in agreement with the Defendant's Counsel that even if the Plaintiff had established a prima facie case, which she has failed to, it will still be difficult to issue any injunction in view of the fact that there is in existence a lawful sale agreement between the bank and a 3rd party, the purchaser who has not been enjoined in these proceedings. By the authority of the cases of **Downhill Ltd and Ze Yung Yang** cited by Ms Mutua for the Defendant, the Plaintiff's equity of redemption has been extinguished and no orders can be made to affect a 3rd party whom the Plaintiff has decided to leave out of these proceedings.

Being of the foregoing view, I do not think it appropriate to address the 2nd and 3rd limbs of the **Giella – vs- Cassman Brown** case.

However, in the event of an appeal being preferred, my view is that the Plaintiff has not demonstrated that any injury to be suffered, if any, if an injunction is refused will be irreparable. My view is Section 69B of the Transfer of Property Act has given a statutory remedy, which in my view will be adequate to compensate the Plaintiff in the event she succeeds at the trial.

The balance of convenience tilts in favour of allowing the bank to liquidate and recover its outlay and the innocent purchaser for value to get possession of his property.

The upshot of it all is that the Plaintiff's application dated 29th August, 2011 is without merit and is hereby dismissed with costs.

DATED and delivered this 28th day of May, 2012.

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A. MABEYA
JUDGE

