



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 134 of 2011

OKENYE ONSONGO PLAINTIFF

-VERSUS-

KENNEDY MOMANYI ONCHONGA 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT

KOLATO AGENCIES 3RD DEFENDANT

RULING

The suit property which is the subject matter of the present suit is a parcel of land known as **Nyaribari Chache/B/B/Boburia/7596** measuring approximately 0.06ha. According to the facts before court, sometimes in January 2007 the 1st defendant obtained an agricultural development loan in the sum of kshs. 200,000 from the Agricultural Finance Corporation (AFC) hereinafter the 2nd defendant. The loan was to be repaid at a variable interest rate of 10% per year within a period of 3 years.

The applicant offered the parcel of land, being **Nyaribari Chache/B/B/Boburia/7596** as security for the said loan and a charge was duly registered on the 5th January, 2007 against it by the 2nd defendant to secure its interests. The 1st defendant defaulted in payment, wherein the 2nd defendant moved to exercise its statutory power of sale by instructing Kolato Auctioneers Services hereinafter, the 3rd defendant to dispose the charged property by public auction.

It is the plaintiff/applicant's case that he and the 1st defendant jointly bought the parcel of land on the 25th November, 1998. He has displayed a memorandum of sale of land to support this. He claims that the parcel was later subdivided by the 1st defendant who proceeded to transfer and register **LR No. Nyaribari Chache/BB/Boburia/7596**, a subdivision original **LR Nyaribari Chache/BB/Boburia/ 3215**, in his names.

In his supporting affidavit, the plaintiff further contends that the suit land is fully developed with his residential house which is the only investment where he lives with his family. He further claims that the 1st defendant's actions were fraudulent for amongst other reasons, failing to seek for and/or obtain the permission and consent of the plaintiff before charging the property and failing to disclose to the relevant authorities that he held the land in trust for the plaintiff.

It is plaintiff's claim that he got to know of the charge on 30th June, 2011 when the 3rd defendant visited

the suit property with the intention of auctioning it pursuant to instructions he had received from the 2nd defendant. It was then that he filed suit (Civil Case No. 134 of 2011 filed on 4th July, 2011) against the defendants and the present application in which he seeks temporary injunctive orders.

He seeks amongst other orders a declaration that he is entitled to a half share of the property; an order compelling the 3rd defendant to cancel, discharge the charge over the suit property; and, release of the title document to the plaintiff unconditionally and damages.

The 1st defendant/respondent **Kennedy Momanyi Onchoga** has not filed a replying affidavit to the Notice of Motion. He has however filed a defence to the suit dated the 16th February 2012, in which he avers that he is the sole registered owner of **LR Nyaribari Chache/B/B/Boburia/ 7596** which he charged with the 2nd defendant and that he was paying back the loan with the assistance of the plaintiff. He contends that the 2nd and 3rd defendants advertised the suit property which is also subject to Kisii CMCC No. 74 of 2011 and Kisii CMCC No. 80 of 2011 awaiting hearing and final disposal. He is the plaintiff in the two suits. He further asserts that the plaintiff was not entitled to the prayers sought as he had not pleaded the particulars of trust implied or constructive and issued notice that he intended to raise a preliminary objection to have the pleadings struck out on grounds that the same were time barred and failed to plead particulars of trust.

Through a replying affidavit by one **Mrs. Rose Ochanda**, the Corporation Secretary of AFC dated the 14th September, 2011 the 2nd and 3rd defendants oppose the plaintiff's claim stating that their actions were within the law and that the 2nd defendant's statutory power of sale had already crystallized. That the plaintiff has never registered any interest he might have had against the pledged security. That the 1st defendant served the court's order upon the 2nd defendant on 13th April, 2011 after the parcel had been sold at a public auction.

On the 13th December, 2011 parties took directions before me and agreed to canvass the application by way of written submissions. The plaintiff and the 2nd and 3rd respondents duly complied while the 1st respondent elected not to make any submissions.

I have considered the submissions along with the authorities filed. The issue for my determination is whether the applicant has made out a case for an injunction as per the principles set out in **Giella –vs- Cassman Brown & Co. Ltd (1973) E. A 358** and whether the injunctive order sought is capable of being granted.

The applicant alleges that he has an interest in the suit land having jointly bought the same with the 1st defendant. His claim is that the 1st defendant secretly registered himself as the sole owner and subsequently charged the property to the 2nd defendant. He has displayed a sale agreement dated 25th November, 1998 showing that they were co-purchasers. He now wants the statutory sale stopped to protect his interest in the suit land. The alleged fraudulent registration and subsequent charge can only be determined upon trial.

To that extent I would agree with the applicant that he has a prima facie case capable of being tried. For now what is apparent from the pleadings on record is that the defendant is the registered owner whose title is protected under section 23 (i) of the **Registered Land Act**. See **Dr. Joseph N. K Ngok –vs- Justice Moiwo Ole Keiwua & 2 Others Nairobi Civil Appeal No. 60 of 1997** where the court delivered itself thus:-

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title”.

The 2nd respondent's case and prime argument is that the restraining order sought has been overtaken

by events. In opposing the application, the 2nd defendant deposed in the replying affidavit of one **Rose Ochanda** that the suit land was sold on the 13th April, 2011 in a public auction. In paragraph 14 she states:-

“That through a public auction conducted on the 13th April, 2011 at Kisii Town near General Post Office, the suit parcel was sold at noon in accordance with the newspaper advertisement of 21st March 2011”.

She has annexed to her affidavit a memorandum of sale to one **Sammy Mainye Momanyi** dated 13th July, 2011. She has further averred that there was a court order stopping the sale but which was served upon the 2nd respondent after the sale. The third respondent has associated itself with the pleadings of the 2nd respondent.

It is pertinent at this point to ask whether the applicant made the application after the property had been sold. And if so whether the order sought is capable of being granted. My perusal of the proceedings indicate that the application was filed on the 4th July 2011 and presented before **Makhandia J.** who ordered it to be fixed for interpartes hearing without granting any interim orders.

The application was subsequently listed for hearing before **Sitati J.** on 19th July, 2011. On that date **Mr. Kisia** held brief for **Mr. Ngaira** for the 2nd and 3rd respondents, while **Mr. Owade** held brief for **Mr. Nyambati** appearing for the applicant. The 1st defendant did not attend court. The advocates on record entered a consent in the following terms *inter alia*:-

“The interim orders be and are hereby extended pending hearing and determination of the application”.

The same ‘order’ has been extended numerous times. It appears to me from the record that there was no order in the first place. What is baffling however is why the 2nd respondent would aver on the one hand that the property had already been sold and on the other hand enter into a consent staying the sale.

The above notwithstanding, I find that the applicant has not controverted the 2nd respondent’s averment that the suit property had already been sold. The applicant would have assisted the court if he had responded to the 2nd defendant’s averment through a further affidavit. Indeed even the applicant’s submissions are silent on whether or not the sale has already taken place. In the circumstances, and on the basis of the material before me I am not persuaded on the propriety of a restraining order. The court will not act in vain. The application must consequently fail and is so dismissed.

Costs of this application will abide the outcome of the main suit.

Ruling dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE