



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 734 of 2010

EDWARD GATIBA MBUGUA.....PLAINTIFF/APPLICANT

-VERSUS-

BARCLAYS BANK (K) LIMITED.....DEFENDANT/RESPONDENT

RULING

This application is brought by a Chamber Summons dated 26th October, 2010, and taken out under **Order XXXIX Rules 1,2,3, Order XLI Rule 4** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.

The applicant thereby seeks orders that:-

- 1) The Respondent herein do supply statements and accounts of liabilities to the applicant as from the date of the advanced loan.**
- 2) The District Land Registrar Thika be prohibited from registering any transfer that pertains to land parcels Chania/Kairi/876, Chania/Kairi/1032(Original No.59), Chania/Kanyoni/753 and Chania/Ngorongo/T.379 pending the hearing and determination of this application.**
- 3) An Injunction do issue restraining the Respondents by themselves, agents, servants, buyers, or anybody interested in the charged land parcels from encroaching, entering, alienating, trespassing or form any way dealing with Land parcels Nos. Chania /Kairi/1032(Original No.59), Chania/Ngorongo/T.379, Chania/Kairi/876 and Chania/Kanyoni/753 pending the hearing and determination of this application.**
- 4) Costs of this application be provided for.**

The application is supported by the annexed affidavit of EDWARD GATIBA MBUGUA sworn at NAIROBI on 26th October, 2010.

Opposing the application, the Respondent filed a replying affidavit sworn by ALLAN ONYANGO, the recoveries legal officer of the Respondent, on 14th December, 2010 and filed on 29th December, 2010. In that affidavit, the Deponent desposes that the applicant had filed another suit, **CMCC NO. 5774 OF 2010** against the bank seeking injunctive orders and accounts which suit is still pending. That prayers 2 & 3 of the application are only sought pending hearing and determination of the application, and there is no prayer for injunction pending hearing and determination of the suit. The only prayer sought is an order for statements which have been supplied to the applicant. That the applicant has confirmed that the property

has already been sold, and having done so the applicant ought to have enjoined in the purchasers who are interested parties as he seeks orders that affect them adversely, and the rules of natural justice demand that they should be notified of any proceedings affecting them. That the applicant has not pleaded any particular of fraud as regard the sale, and it is trite that upon the fall of the hammer, the right of redemption is extinguished and the application before the court is without basis.

The Applicant swore a supplementary on 7th April, 2010 and filed on 9th April, 2010 in response and opposition to the Replying Affidavit herein above. In that affidavit, the applicant said that the averments contained in paragraph 4 of the replying affidavit are untrue and misleading in that the suit No. CMCC 5774 of 2010 was withdrawn. That the purported sale was conducted irregularly and none of the purchasers has acquired title to the property and in any case no proprietary interest has been acquired by any other person and accordingly the averments contained in the Replying Affidavit are unfounded. That the applicant never received statutory demands and the only demand received was one dated 18th April, 2011, that what the bank is demanding from the applicant is eight times the principal loan and is unreasonable and contravenes the Banking act. That the purported statutory demand notes were not issued to the applicant's address and therefore cannot be said to have been served on the applicant.

In response to the applicant's further affidavit, the Respondent swore a further affidavit on 18th May, 2011 and filed on 23rd May, 2011. In that affidavit the Respondent averred that the application for injunction was canvassed and dismissed by the Magistrate's Court on 13th October, 2010 and that since the application was seeking an injunction over the same subject matter, the current application is thus res judicata.

During the oral canvassing of the application, Mr. Muchoki appeared for the Applicant, while Mr. Maondo appeared for the Respondent. Mr. Muchoki argued that the Respondent sold by way of public auction properties Nos. Chania/Kairi/876, Chania/Kairi/1032 and Chania/Ngorongo/T.379 and Chania/Kanyoni/753. He submitted that it is the applicant's case that he was not served with a statutory notice. That the purported notice was sent to a wrong address, and the Applicant was therefore not served as required. Further, Counsel submitted that property was sold at a gross undervalue. That the Respondent did not act in good faith vis-à-vis the applicant's interest.

On his part, Mr. Maondo for the Respondent opposed the application and relied on affidavit sworn on 24th December, 2010 and further affidavit filed on 23rd May, 2011. He submitted that the application was res judicata as there was a similar case in the Chief Magistrate's Court No.5774 of 2010. In that suit which was between the same parties and involving same subject matter filed by the applicant, and the application was canvassed and the application for injunction was dismissed. He submitted that the suit was later withdrawn to pave way for this instant suit and therefore the issue was res judicata.

Further, Counsel contended that the property was already sold to some third parties, but they have not been enjoined in the suit in spite of applicant having attended the auction and knew the persons who bought the property. Mr. Maondo further submitted that section 44 A (6) of banking Act, provides that principal and interest subsisting at time of sale becomes the principal to be demanded. He argued that the amendment came into force in June, 2007 and the amount due was KShs. 3,979,745/= which becomes the principal owing.

In his reply, Mr. Muchoki maintained that the Chief Magistrate at Milimani had no jurisdiction in the matter. He submitted that the equity of redemption was extinguished on the fall of the hammer, and if the sale was illegal, then even the fall of the hammer was illegal.

Having considered the application, the rival submissions of the respective counsel as well as the authorities they cited, I take the view that the main issues for determination are whether the sale of the said properties was irregular, whether the matter is res judicata, and whether the applicant would suffer injustice and irreparable loss if the orders sought are not granted.

It is imperative to note that the applicant has admitted owing the respondent herein and that the applicant

had defaulted and was, as a result, in arrears. It is also noteworthy that the Respondent had a right to take steps in order to realize the security in the form of the properties herein. However, the question for determination would be whether the steps the Respondent took in order to realize what was due to it were proper. The applicant's case is that the statutory notice of sale was not served by the Respondent. However, after perusing the documents attached to the Application, I am satisfied that service was effectively effected by registered mail. The Respondent has also submitted that the Applicant was present when the sale was being conducted which submission has not been denied by the Applicant. From the records, this court is left in no doubt that appropriate notices were properly served on the Applicant. I also agree with the Respondent that the valuation which was done by the Applicants nearly one year after the one done by the Respondent was bound to be different because of the appreciation in value. Indeed, the two reports show a marginal difference and it can only be said that the Respondent did not undervalue the said properties. I also agree with the Respondent that transfer has not been effected because this matter is still pending in this court, and the Applicant made an application restraining Thika District Lands Registrar from transferring the same to the purchasers.

The Respondent's case is that this matter is res judicata as the same had been filed in the Chief Magistrate's court. From the records, it is true that the matter was filed in the said Court. However, the Applicant withdrew the matter from the said Court by a Notice of Withdrawal dated 22nd October, 2010 and filed on 27th October, 2010. The Respondent has submitted that it was never served with the said Notice of Withdrawal of the Suit, and that statement has not been contraverted. **Order 25 Rule 1** of the Civil Procedure Rules, 2010 provides that-

“At any time before the setting down of the suit for hearing, the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

In the instant case, there is no evidence that the Respondent was duly served with the Withdrawal Notice, and as such the Applicant's argument that the matter was withdrawn has no basis.

On the issue of irreparable loss, the applicant will do well to re-visit **section 99(4) of Land Act, No.6 of 2012 which provides that-**

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

The power of sale in the instant case was exercised by the Respondent, a well established financial institution, and if it should turn out later on that the sale was conducted irregularly as claimed by the Applicant, then the law affords the applicant protection under the aforementioned Act. However, since the Applicant had defaulted in the repayment of the loan, the Respondent was entitled to exercise its statutory right of sale, which right the applicant recognizes.

In these circumstances, the applicant has not established a *prima facie* case with a probability of success. Furthermore, the application is defective since the two main orders are sought pending the hearing and determination of the application. The Applicant did not pray for any orders pending the hearing and determination of the suit.

I accordingly find that the application lacks merit and it is hereby dismissed with costs.

It is ordered.

**L. NJAGI
JUDGE**

DATED and DELIVERED at NAIROBI this 21st day of November, 2012

MUTAVA
JUDGE