



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA
AT NAIROBI AT MILIMANI COMMERCIAL COURTS.
CIVIL SUIT NO. 414 OF 2010.

MARTHA MWIKALI NYAMAI1ST
PLAINTIFF.
STEPHEN KASOMO KIMWELE2ND
PLAINTIFF.

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST
DEFENDANT.
GARAM INVESTMENTS2ND
DEFENDANT.

R U L I N G.

1. The chamber summons dated 22nd June, 2010 is taken out by the plaintiffs who seek for an order to restrain the defendant from transferring, assigning, conveying or dealing in any manner with the properties known as L.R. No. 12715/2644 (Original number 12715/835/4) situated in Mavoko Municipality herein after referred to as the suit property. This application is supported by the grounds stated on the body of the application, the matters deposed to in the supporting affidavit of Stephen Kasomo Kimweli sworn on 22nd June, 2010. According to the applicant, they are husband and wife and joint registered proprietors of the suit premises. In December, 2004 and November, 2005 the 1st plaintiff borrowed loans from the 1st defendant and executed a charge and a further charge. The 2nd plaintiff executed guarantees and indemnities guarantee the payment of the loan to the 1st defendant which was in the tune of Ksh. 4.7 million. The 2nd plaintiff contents that he gave the loans between 17th January, 2005 upto 11th June, 2010 he had paid approximately Ksh. 4.3 million as per the attached bundle of bank statements and deposit receipts. However, on 29th March, 2010 the applicants were served with notification of sale which indicated that their property would be sold by public auction on 2nd June, 2010. The plaintiffs' property was advertised for sale by the 2nd defendant on 31st May, 2010 for a public auction scheduled for 15th June, 2010. On 11th June, 2010 the first defendant misled the applicant that they should deposit a sum of Ksh. 200,000/= and that the sale that was advertised was supposed to be cancelled. While relying on those representations the applicant deposited Ksh. 200,000/= but the 1st defendant failed to stop the sale but proceeded to issue a fresh advertisement on 14th June, 2010 and

proceeded to sell the property on 15th June, 2010. The 2nd applicant avers that he attended an auction conducted by the 2nd defendant. He saw two bidders at the auction and his property was sold at Ksh. 4.9 million to a Mr. Maina who was not the highest bidder. The applicant contends that the suit property is valued over 10 million and it was grossly under valued and under sold. The highest bidder was a Mr. Samwel Mutonyi although the auctioneer purported to declare a Mr. Maina the purchaser. Thus the defendant did not exercise care and in this regard Mr. Wamae, learned counsel for the applicants relied on the case of ***Kenya Commercial Bank vs. Osebe, Civil Appeal No. 60 of 1980 (Kisumu) [1982 – 1988] 1 KAR 48*** and also the case of ***Mbuthia vs Jimba Credit Finance Corporation & Another Civil Appeal No. 111 of 1986***. In those two decisions the Court of Appeal held that the mortgagee is bound to act in good faith and to have regard to the interest of the mortgagor.

2. It was further submitted that the suit premises is the matrimonial home of the applicant. The applicant had paid substantial portion of the loan. The sale is also faulted as having been conducted in an oppressive manner which shows there was a compromise between the defendants in order to defraud the plaintiff of their matrimonial home. Counsel urged the court to find that they have established a prima facie case with a probability of success to be granted interim orders.

3. The respondent did not file a replying affidavit. On 28th June, 2010 Mr. Ogaro, learned counsel for the respondent applied for an adjournment to be able to file a replying affidavit. The application was stood over to 27th July, 2010 but on that day Mr. Odero unsuccessfully applied for an adjournment. Since the adjournment was denied he submitted on the points of law that under Section 77 of the Registered Land Act where the property has been sold by way of auction the remedy to the applicants lie in damages. The suit premises is registered under the Registered Titles Act therefore the suit property passed to the buyer at the auction. The plaintiffs lost their rights of redemption and their remedy lie in damages.

4. This application by the plaintiffs principally seek for an order of injunction to restrain the defendants from transferring the suit premises following an auction which the plaintiffs are challenging. The plaintiffs contend that the property was not sold to the highest bidder it was under sold. Their interest were not taken into account especially the fact that they had paid a sum of Ksh. 4.3 million towards the loan repayment. The defendant did not file any replying affidavit to controvert those matters of facts but only relied on points of law that the sale had already taken place. The plaintiff has averred in his supporting affidavit that he attended the auction where there are two bidders. The highest bidder was a Mr. Samwel Mutonyi who bid for Ksh. 4.9 million while a Mr. Maina bid for Ksh. 4.8 million. The lowest bidder was declared the purchaser. The 2nd defendant who was served with the application has not sworn the affidavit to explain why he did not use reasonable care to obtain the best possible price in the circumstances. The plaintiffs also attached to the application valuation report conducted on the suit premises on 14th May, 2010 which indicated the value of the suit premises for mortgage value at Ksh. 7 million and open market for Ksh. 10 million. In view of the above factors, which were not controverted by the defendant the plaintiff has established a triable issue. According to the court of appeal, in the case of ***Mrao Ltd vs. First American Bank of Kenya Ltd. & 2 others [2003] KLR 125*** what constitutes a prima facie case in the following terms:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case 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.”

Accordingly, I allow the application in terms of prayer No. 3 that is:-

“That the first and second defendants herein whether by themselves, their servants or agents be restrained from transferring, assigning, conveying, or further dealing in any manner whatsoever in

the property known as L.R. No. 12715/2644 (Original Number 12715/835/4) situate in Mavol9Municipality hereinafter referred to as “the suit property” pending the hearing and inter-partes.”

5. Costs shall be in the cause.

Ruling read and signed on this 10th Day of January 2011 at Nairobi.

M. KOOME.

JUDGE.