



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 131 OF 2010

LEAH WAMAITHA NDERIPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT
NABAKI AFRICA LIMITED2ND DEFENDANT

RULING

Leah Wamaitha Nderi, the plaintiff herein took out the summons dated 1st October 2010 in which she sought for the following orders:

- 1. That this application be certified as urgent and the same be heard ex parte in the 1st instance.***
- 2. That pending the interparties hearing and determination of this application, this honourable court be pleased to grant a temporary injunction restraining the Defendants, whether acting jointly or severally, or through their successors, assignees, servants, or agents or the successors, assignees, servants or agents of any of them, from interfering with the plaintiffs right, title and interest in the suit property and her possession of the same; and/or restraining them from trespassing upon the suit property or effecting any further transfers, alienating, disposing off, subdividing, selling and all other dealings over the suit property known as L.R. no. Thegenge/Karia/814, measuring approximately five acres (5.0 acres) or thereabouts registered in the deceased's name, situate along the Nyeri-Othaya road***
- 3. That pending the interparties hearing and determination of this suit, this honorable court be pleased to grant a temporary injunction restraining the defendants, whether acting jointly or severally, or through their successors, assignees, servants, or agents, or the successors, assignees, servants or agents of any of them from interfering with the plaintiffs right, title and interest in the sit property and her possession of the same; and/or restraining them from trespassing upon the suit property or effecting any further transfers, alienating, disposing off, subdividing, selling and all other dealings over the suit property known as L.R. no. Thegenge/Karia/814, measuring approximately five acres (5/0 acres) or thereabouts registered in the deceased's name , situate along the Nyeri Othaya road.***
- 4. That the costs of this application be provided for.***

She swore an affidavit in support of the summons. Kenya Commercial Bank Ltd, the 1st Defendant, filed the replying affidavit of Simon Gathieri to oppose the summons. While Nabaki African Ltd, the 2nd Defendant, filed the replying affidavit of Njama Wambugu to oppose the summons. When the summons came up for interpartes hearing learned counsels appearing in the matter recorded a consent order to have the application dispose of by written submissions.

It is the submission of the Plaintiff that the 1st Defendant purported to auction the Plaintiff's parcel of land known as L.R. no. Thegenge/Karia/814 hereinafter referred to the suit property on 25th February 2010 in exercise of its statutory power of sale. It is said the auction was carried out on the basis that a notification for sale dated 25th October 2010 was addressed to the charger i.e. Mwangi Nderi, deceased. It is said the notification was further to the auctioneer's earlier notification dated 7th June 2007. The Plaintiff has further averred that by that time there was an injunction which had been issued vide Nyeri H.C.C.C.53 of 1997 to restrain the 1st Defendant from selling the suit property pending the hearing and determination of the suit. The aforesaid suit was struck out on 22nd June 2009. The Plaintiff is of the view that the notification of sale issued on 7/6/2007 became null and void for all purposes and intents upon the issuance of those injunctive orders. The plaintiff stated that she attended the auction of 25th February 2010 and stayed at the venue upto 3.30 p.m. She claimed no bid was made by the 2nd Defendant's representative. The Plaintiff further questioned the delay of 154 days before the suit land was transferred to the 2nd Defendant. The plaintiff further pointed that the 25% deposit was made 13 days after the date of the auction despite the fact that the 2nd defendant claim it paid the deposit almost immediately after the fall of the hammer. The plaintiff alluded that there was a conspiracy between the 1st and the 2nd Defendant to deny the plaintiff her equity of redemption

The Defendants opposed the summons on various fronts. They challenged the legal capacity of the plaintiff. It is alleged that the plaintiff has not shown that she had obtained a grant of letters of administration in respect of the estate of Barnard Mwangi, deceased. The 1st Defendant stated that a valid statutory notice was issued upon the deceased before he died. The defendants further argued that the plaintiff should not attract the sympathy of this court in view of the admission that she had filed previously filed a suit which was dismissed for want of prosecution.

I have anxiously considered the written submission filed by learned counsels from both sides. The Defendants raised a serious preliminary point which is to the effect that the plaintiff did not have the locus standi to file this suit because she had not taken up letters of administration. That submission cannot stand because there is evidence that the plaintiff was issued with limited letters of administration on 28th June 2000. The Defendants are of the view that the only remedy available for the plaintiff is damages under s. 77 of the Registered Land Act hence the order for injunction should not be issued. I have looked at the pleadings and it is clear that the suit premises was sold and transferred to the 2nd Defendant. There is no doubt that the 1st Defendant sold the suit property by public auction in exercise of its statutory power of sale. In my view, it is obvious that the plaintiff's equity of redemption was extinguished upon at the conclusion of the sale and transfer hence what remains for the plaintiff to seek from the available remedies under S. 77 of the Registered Land Act. In view of the aforesaid provisions of the law, I am not convinced that the plaintiff has a prima facie case with a probability of success. I am not also convinced that the plaintiff has approached this court with clean hands. In any case it would appear her damage is quantifiable in monetary terms.

In sum, the summons dated 1st October 2010 lacks merit. It is dismissed with costs to the Defendants.

Dated and delivered this 29th day of July 2011.

J.K. SERGON
JUDGE

In open court in the presence of Miss Mwai holding brief Njenga for Plaintiff. Miss Keli holding brief Lompo for respondent.