



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Suit 89 of 2011

ROBERT JUMA WAPANG'ANA.....1ST
PLAINTIFF

SIMEON SIMIYU WAPANG'ANA.....2ND
PLAINTIFF

~VRS~

ERIC KIMINGICHI WAPANG'ANA.....1ST
DEFENDANT

EQUITY BANK LIMITED.....2ND
DEFENDANT

ANTIQUA AUCTIONEERS AGENCIES.....3RD
DEFENDANT

RULING

By motion filed on 28/9/11 the Plaintiffs sought that:

“Pending the hearing and determination of this motion and suit the Defendants/Respondents by themselves and their agents be restrained by way of temporary injunction from disposing land Reference number E. Bukusu/S.Nalondo/618 in occupation of the applicants.”

The application was on the grounds that the Plaintiffs are beneficiaries of the suit premises by way of transmission and that their right in the charged property cannot be defeated by the illegalities committed by the first and second Defendants; that the 1st Defendant had no legal right to charge the suit property to the 2nd Defendant as he held the property in trust for the Plaintiffs and other beneficiaries; that the Plaintiffs and other beneficiaries stand to suffer irreparably as they will be evicted from the suit property which is their ancestral home; and that the exercise of statutory power of sale by the 2nd Defendant is tainted with fraud and illegalities. The 1st Plaintiff swore a supporting affidavit to support his case and that of the 2nd Plaintiff. The application was opposed by the replying affidavit of Purity Kinyanjui who is the Head of Defendant Recovery Unit of the 2nd Defendant’s bank. The 1st Plaintiff filed a supplementary affidavit to respond to the replying affidavit.

There is no dispute on 15/2/2010 a company called Magharibi Investment Machineries Ltd resolved to apply for a loan from the 2nd Defendant and proposed to use title to land parcel E. Bukusu/S.Nalondo/618 (*“the suit property”*) as one of the securities. The 1st Defendant was one of the directors of the company. On 29/3/2010 a formal application for a loan in the sum of Ksh.6,700,000/=

was made. On 4/7/2010 the 2nd Defendant wrote to offer the loan to the company. The offer was accepted. A charge was prepared, executed and registered. This was after a search was conducted to reveal that the suit property was registered in the name of the 1st Defendant since 11/1/2002. The consent of the Land Control Board to charge the suit property to the 2nd Defendant had been obtained. The original title deed was lodged with the 2nd Defendant.

The 1st Defendant was not able to service the facility as agreed and on 12/4/2011 a notice of the exercise of statutory power of sale was sent to him. When no action was taken by him to regularize the account instructions were given to the 3rd Defendant to sell the property by public auction to recover the amount in question. On 19/9/2011 the 3rd Defendant advertised the suit property for sale. On the following day the Plaintiffs filed this suit and application. In the suit, the Plaintiffs asked for a declaration that they were the legal owners of the suit property and that the 1st and 2nd Defendants had breached trust in respect of the same by using it as security without their (Plaintiffs') consent. They also asked for an injunction, to stop the sale. Their case was that the suit property belonged to their late father Fredrick Nandali Wapangana who died intestate on 23/9/95. He had bought the suit property which was subsequently registered in the name of his eldest son Phillip Wapang'ana. The Plaintiffs and the 1st Defendant are brothers of Philip. Philip subsequently died in a road accident. The family agreed that the 1st Defendant takes out letters of administration on their behalf. This is how, they say, he became to be registered in respect of the land. The Plaintiffs stated that they live on the land together with their step-mother Mary Wapang'ana and brother Simeon Simiyu Wapang'ana. They were unaware that the 1st Defendant was using the title to obtain a loan; that the consent of the family was not sought or obtained to charge the property. They were therefore shocked when they saw the advertisement by the 3rd Defendant to sell the property.

The case by the 2nd Defendant was that a search was conducted to reveal that the suit property had since 18/2/2002 been registered in the name of the 1st Defendant, and that is how the bank accepted it as security for a loan to the company in which the 1st Defendant was a director. The loan was disbursed and when it was not paid the bank sought to realize the security.

In the supplementary affidavit, the 1st plaintiff swore that after the death of their father they authorized Philip to take out letters which he did. In 2001 Philip transferred the property to the 1st Defendant to help him secure a loan for Ksh.500,000/= from Barclays Bank to enable him pay fees for the siblings. The family allowed him to consent to the property being used as security. The 1st Defendant was to revert the property back to Philip to continue to hold in trust for the family. He did not revert it. The family was unaware he had used the property to obtain a loan from the 2nd Defendant, or that there was a default in the servicing of the loan.

In the plaint the Plaintiffs alleged that the 2nd Defendant had accepted the security without seeking and obtaining the consent of the family and by failing to establish the interest of the family in the suit property. In the affidavit of the 1st Plaintiff, he claimed that had the 2nd Defendant visited the suit property before charge it would have established that they had settled on the same. The 2nd Defendant is saying that its business was to establish that the title was not encumbered, and it was not.

The 1st Defendant did not enter appearance or file defence, and did not respond to the application. The same for the 3rd Defendant.

It is not in dispute that once the 1st Defendant obtained a loan on the charged property and failed to repay the money, the 2nd Defendant was entitled to exercise its statutory of power of sale.

Looking at the material before the court, there is no evidence that the 2nd Defendant knew that the Plaintiffs had any interest in the suit property. Such interest could only have been disclosed by the 1st Plaintiff in which case the bank was not going to accept the security. The exhibited title shows that the

1st Defendant was the absolute proprietor of the property. The search revealed this. There was no encumbrance. Any claim of fraud against the 2nd Defendant has at this stage of the case not been substantiated. In other words, the Plaintiffs have not shown that they have a case that will probably succeed as against the 2nd Defendant in terms of **Giella v. Cassman Brown & Co. Ltd [1973] EA 358**.

It is further considered that the Plaintiffs are seeking an injunction against the 2nd Defendant. An injunction is an equitable remedy. But, the 2nd Defendant has a statutory right of action. It is exercising its statutory power of sale now that the 1st Defendant has failed to repay the loan that was secured by the charge. It is trite that where a party has a statutory right of action the court will not usually prevent that right being exercised except that the court may interfere if there was no basis on which the right could be exercised or if it was being exercised oppressively (**Fina Bank Ltd v. Spares and Industries Ltd [2003], 1 EA 52**). The 1st Defendant has no complaint about the exercise of the statutory power of sale by the 2nd Defendant, and there is no privity of contract between the Plaintiffs and the 2nd Defendant.

Lastly, the suit property has a value. Once charged it is a commodity of sale. It cannot be said that the Plaintiffs will suffer irreparably if the application is not granted and the intended sale proceeds. In any case, the 2nd Defendant is a bank and should pay the Ksh.2.2 million value that the Plaintiffs have attached to the suit property.

I dismiss the application with costs.

Dated, signed and delivered at Bungoma this 12th day of July 2012.

A. O. MUCHELULE
JUDGE