REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 783 OF 1996

ANGELA WANJIRU KAMAU...PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION...1ST DEFENDANT
HOUSING FINANCE COMPANY OF KENYA LTD...2ND DEFENDANT
NAIROBI CITY COUNCIL...3RD DEFENDANT

RULING

By a Plaint dated 27th March, 1996 later on amended on 22nd May, 2003, the Plaintiff pleaded that on or about 24th May 1988 she applied to the 1st Defendant who allocated her a house in an estate then being developed by the 1st Defendant known as Uhuru Gardens Estate Phase III namely House No. C.48 on Nairobi/block 72/2242, the house was in its very initial stages of construction, the Plaintiff agreed with the 2nd Defendant for the latter to pay the balance of the purchase price to the 1st Defendant on condition that payment of such balance would not be completed before a certificate that the premises was fit for occupation was issued by a local authority and lodged with the 2nd Defendant, the suit property was given as security for the advancement by the 2nd Defendant. The 2nd Defendant later released the entire purchase price to the 1st Defendant before a certificate of fitness for occupation had been issued by the local authority, the house was found to be inhabitable as it was not structurally sound, the house has not been rectified todate, that the 1st Defendant had demanded settlement of the advances sum and threatened to exercise its statutory power of sale. The Plaintiff came to court praying for various declarations including an injunctive order against the threatened sale.

The 2nd Defendant filed a suitable defence to the claim which was amended on 14th February, 2000. In it the Defendant pleaded that by a charge dated 25/11/91 the Plaintiff gave security of the suit property for the advance of Kshs.382,500/- which was applied towards the purchase price of the suit property from the 1st Defendant, that the 2nd Defendant had released the balance of the purchase price on the instructions of the Plaintiff, that the 2nd Defendant did not owe the Plaintiff any duty of care as relates the condition of the premises that its role was only that of the financier and that it was entitled to exercise its Statutory

Power of Sale. The 2nd Defendant also pleaded breaches of the charge agreement by the Plaintiff and that by the Plaintiff refusing to take possession of the suit property, she had exposed the same to vandalism.

Together with the Plaint the Plaintiff filed a summons praying for an injunction restraining the 2nd Defendant from exercising its statutory power of sale over the suit property. The application was fully argued whereupon the court granted the injunction on 12th March, 1998. It is that order which the 2nd Defendant seeks to discharge by its Notice of Motion dated 8th April, 2011. I should observe here that the original court file seems to have gone missing and what is in existence and before me is a reconstructed file. The parties opted to argue the application by written submissions dated 8th July, 2011 by the 2nd Defendant and 7th July 2011 by the Plaintiff.

The 2nd Defendant relied on the Supporting Affidavit of Migui Mungai sworn on 8th April, 2011, a further Supporting Affidavit of Migui Mungai sworn on 15th June 2011 and the submissions of 8th July 2011.

The 2nd Defendant's case briefly put is that it is now thirteen (13) years since the said orders were granted, that the Plaintiff has never paid a penny towards settlement of the outstanding loan which as at 30th April 2009 stands at Kshs.24,027,543/75 yet the security is valued at Kshs.2,250,000/-, that the security property lies in ruins and continues to deteriorate, depreciate and be vandalized thereby prejudicing the interests of the 2nd Defendant, that the 2nd Defendant should be allowed to exercise its statutory power of sale as it stands to suffer irreparable loss and damage as the balance continues to accrue and the loan balance has outstripped the value of the security, that if the Plaintiff is still desirous of proceeding with the matter she should deposit the outstanding balance in court or in a joint interest earning account in the names of the Plaintiff and 2nd Defendants Advocates, that what was issued as a temporary injunction 13 years ago is no longer temporary but seems to be permanent.

In answer, the Plaintiff filed a Replying Affidavit, a further Replying Affidavit and submissions of 7th July, 2011. She accused the 2nd Defendant of material non disclosure of the history of the suit, that she has not been indolent, that the case had been partly heard before Mutungi J in 2002 – 2003, that upon his transfer to the Criminal division, Waweru J ordered that the case be heard de novo on 4/5/05, that subsequently the court file went missing and an order for reconstruction was only made on 28/1/2011 and an order made for the matter to be heard on priority, that the property still has numerous defects, that the parties had attempted out of court negotiations which had not succeeded, that she had been hospitalized in the United States that had led to some delays and adjournment of the suit, that the order sought to be set aside was superseded by another order of 25/10/00 which ordered the maintenance of the status quo, that it is misleading for the 2nd Defendant to claim that the Plaintiff owes Kshs 24 million, she urged the court to let the matter proceed to full trial.

In rebuttal, the 2nd Defendant denied that this suit has ever been heard and that it has never been transferred to the Criminal division that when the court file was reconstructed, the Plaintiff never objected nor never indicated that there were any documents missing.

Learned counsel for the 2nd Defendant submitted that 13 years was a long time that the court should consider the provisions of Order 40 Rule 6, that even if the 2nd Defendant sold the property to recover the money it was a reputable financial institution and it can compensate the Plaintiff any amount of damages that may ultimately be ordered, that if the Plaintiff had been in occupation of the suit property the 2nd Defendant would not have minded for the suit to proceed to full trial, that the property is depreciating due to vandalism, that when the matter was called for fixing on 4th February, 2011, the Plaintiff's Advocates did not appear and the matter was fixed for hearing exparte for 14th November, 2011.

To the Plaintiff Advocates, the Application was unmeritorious, that a proper look at the history of the litigation would have demonstrated that the Plaintiff was not guilty of any delay in the prosecution of the case, that partly the delay was occasioned by the missing file, that an order for the suit to be listed on a

priority had been made on 28/1/2011, that the order of 12th March 1998 was set aside and an order of consent recorded on 25/10/00 to maintain the status quo, that the case was partly heard before Hon. Mutungi J, whereby the Plaintiff testified and produced exhibits, that it was ordered by Waweru, J in 2005 that the matter do start de novo. That there was no evidence of deliberate delay on the part of the Plaintiff to warrant the application. Counsel further submitted that it would be unjust and prejudicial to the Plaintiff if the property would be sold before the litigation is concluded, the Plaintiff therefore prayed that the status quo be maintained pending the resolution of the suit.

Order 40 Rule (6) of the Civil Procedure Rules under which, the application is grounded provides:-

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve (12) months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

This rule came into operation in December, 2010 approximately twelve (12) years since the order being impugned was made. I have been urged by the Applicant to apply the same in the proceedings before me. I am hesitant to strictly apply the same to the case before me because I feel it might cause an injustice. I have the following reasons for my decision not to apply the provisions:-

1. **Although a copy of the Order made on 12th March, 1998 is on record, the Respondent has sworn that it was set aside and replaced by another Order of 25th October, 2000 by the consent of the parties. A copy of that order of 25/10/2000 has not been produced and is not on record. The applicant has not challenged the Respondents assertion that the order of 12/3/98 was superseded by an order of 25/10/00, and that the court would be discharging an order that is non existent.**

2. **The other predicament the court finds itself in is that the original court file went missing. The court cannot decide one way or the other if at all there had been a trial or not as the rival parties submit. If truly the suit had been partly heard and due to the courts own action the matter was not concluded but ordered to begin de novo it will be unjust to prejudice the Respondent for no fault of hers.**

3. **The reasons given for the delay of the case commend themselves to me. That the application for injunction took too long, the ill health of the Respondent leading to her to seek medical attention outside the country, the transfer of the judge who was initially seized of the case , the disappearance of the court file. All these factors may have acted to the prejudice of the case and none in my view should be used against the Respondent's interests.**

4. **The whole suit is dependent on the existence of the suit property. Discharging the injunction would not only lead to the loss of the properly but also to either the collapse of the suit or cause substantial amendment to the pleadings to accommodate the new scenario. That will in my view not be the spirit of S1A of expeditious, just and proportionate disposal of the dispute herein.**

5. **The application has been brought so late in the day. Why did the applicant wait until after 13 years to bring the application to discharge the injunction? Why was the application not brought after say four or five (5) years? Is it not that the Defendant was happy with the ongoing with the case that it slept on its laurels until now? Why wait until after the court file has been reconstructed and a hearing date for the main trial is fixed to bring the present application?**

As stated above, discharging the order would lead to the possible removal of the substratum of the whole suit. It may amount to deciding the matter on a technicality since once the suit property is sold, there may be nothing left to litigate on. In my view, Article 159 (2) (d), of the new constitution necessitates parties to ventilate their cases fully in a court of law without hindrance.

Finally, I have noted from the court file that on 4th February, 2011, this suit was fixed for trial on 14th November, 2011 less than a month away. In my view, the justice of the case demands that the Parties wait a little while for the trial to commence and conclude so that the respective cases of the parties would be fully ventilated and determined instead of discharging the injunction at this stage and complicating the matter further.

Being of that view, I decline to grant the orders sought in the application dated 8th April, 2011 and dismiss the same with costs.

Dated and delivered at Nairobi this 28th day of October, 2011.

……………………………………
JUSTICE A. MABEYA