

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 152 of 2001

CLETUS NYONGESA WAMALWA t/a CLEAN FARM.....PLAINTIFF

~VRS~

CO-OPERATIVE BANK OF KENYADEFENDANT

RULING

This is a ruling on a preliminary objection by the Defendant dated 23/6/2003. The objection was heard by Justice Mitey on 10/7/2003. The ruling was not delivered as scheduled by the judge who later retired. I have taken over this file for purpose of writing the ruling.

Mr. Makokha argued the objection on behalf of Ochieng, Onyango, Kibet and Ohaga advocates for the Defendant. He submitted that the suit and the application for injunction were compromised by the order recorded on 18/6/2002 before Justice A. Ringera. In that order, parties agreed to give the Plaintiff time to sell his security by private treaty and in default, the Defendant to exercise his statutory power of sale. The Plaintiff can not again revive the application for injunction or revive the suit.

Mr. Lugalo for the Plaintiff submitted that the Defendant had not given the required statutory notice under section 74 of the Registered Land Act Cap 300. As such the Defendant cannot validly exercise its statutory power of sale. The consent order cannot therefore be implemented due to that failure to comply with the law.

I have perused the record and seen the consent order of the parties recorded on 18/6/2002. It provided *inter alia* that, the Plaintiff be allowed 45 days within which to sell the charged property by private treaty and in default the Defendant be at liberty to exercise its statutory power. The matter came for mention on 31/7/2002 when the parties indicated that there were negotiations by the parties to settle the matter out of court. The Plaintiff thereafter filed his application under certificate of urgency to restrain the Defendant to sell the land. It is against this application that the preliminary objection was raised.

It is rightly observed that the consent order is still in force and unless the parties set it aside by consent or in any other manner, the order remains in force. The court cannot entertain an application by the Plaintiff to restrain the Defendant from exercising its statutory power in accordance with the consent. It appears that the Plaintiff defaulted in selling the land by private treaty as agreed. The default clause has to be applied as per the consent order.

I therefore agree with the Defendant that by recording the consent order both parties compromised the suit. The application by the Plaintiff to restrain the Defendant can not be entertained at this stage since the consent order is still in force.

I therefore uphold the preliminary objection.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 29th day of April, 2010.
In the presence of Mr. Makokha for Onyango Ohaga & Co. Advocates for Defendants .

