



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Suit 310 of 2006

THUO MATHENGE APPLICANT

VERSUS

JANE MUTHONI WAHOME 1ST RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LIMITED 2ND RESPONDENT

RULING

1. The brief back ground of this matter shows it was filled by the plaintiff way back in June 2006 by way of an Originating Summons brought under **orders XXXVI rule 3A and 12, Order XXXIX Rule 1, 3 and 9 Order XX Rules 1 of the Civil Procedure Rules, section 3, 25(2) and 30(3) of the Matrimonial Causes Act, Christian Marriage and Divorce act Cap 151 Section 3A of the Civil Procedure Act** and all other enabling provisions of the Law. The plaintiff is seeking for several declaratory orders against the 1st defendant who is his wife and an order of injunction restraining both the 1st and the 2nd defendant either by themselves or their servants or agents from selling or transferring property known as **LR TIGONI/MABROUKE/BLOCK 1/954**. That suit was simultaneously filed with a Chamber Summons Application dated

12th June 2006 which was heard by **Ochieng J** and by a ruling delivered on 23rd October 2006 that application was dismissed.

2. The plaintiff'/applicant filed another application dated 9th October 2009 which is expressed to be brought under the provisions of 3A of the Civil Procedure Act Cap. 21 Laws of Kenya and order XXXIX, Rules 1(a), 2, 3 and 9 of the civil procedure Rules. The applicant is seeking for an order of injunction to restrain the defendants from selling the property known as **LR TIGONI/MABROUKE/BLOCK 1/954** by public auction which was scheduled on 13th October 2009 or any other time thereafter.

3. This application is premised on the grounds that the 2nd defendant intends to sell the suit property by way of public auction despite the fact that a consent agreement was entered into by the applicant and the 2nd defendant whereby they had agreed the outstanding loan was **Ksh.1.472,584.70** which amount the plaintiff fully paid. The 2nd defendant proceeded to issue a notification of sale of the suit premises despite the fact that the loan had been paid. This application is supported by the affidavit of **Thuo Mathenge** sworn on 9th October, 2009

which has elaborated in greater detail the above grounds. The plaintiff also relied on his further affidavit sworn on 17th November 2009. He attached a copy of the consent which was entered on 5th September 2006 between his advocates and the 2nd defendants' advocates which consent is in the following terms.

“By consent

The Plaintiff do pay to the 2nd defendant Ksh.1,4472,584.70 in full and final settlement of the loan balance currently standing at Ksh.2,619,511.10 subject to the following terms.

- a) ***Payment of Ksh.500,000/- immediately.***

*b) Payment of Ksh.500,000/- on or before
30th September 2006.*

*c) Payment of the balance of Ksh.472,574.70 within 120 days from
30th September 2006 but on or before 30th January 2007.*

*d) In default of any one installment the 2nd Defendant be at liberty to rescind the offer and
reclaim the full debt.*

*e) Upon payment of the above amounts in full the 2nd defendant do continue holding and
not to release or discharge to the 1st Defendant the original title documents in respect
of L.R. NO. TIGONI/MABROUKE/BLOCK1/954, pending further orders.*

**MWANGI WAMBUGU
ADVOCATE FOR THE PLAINTIFF**

WE CONSENT

KIMANI WAWERU
ADVCOATES FOR THE 2ND DEFENDANT

4. This application was opposed by the 2nd defendant. Counsel relied on the replying affidavit sworn by **Joseph Kania** sworn on 12th November 2009. According to the 2nd defendant the suit property is registered in the name of the 1st defendant who executed the charge dated 14th December 1988 thus the plaintiff lacks *locus standi* to seek for an order of injunction. Moreover the plaintiff defaulted to repay the loan as per the consent entered into on 12th June 2006 the 2nd defendant was at liberty to exercise its rights under clause d of the consent, to reclaim the full outstanding debt. The statutory notice and notification of sale as required under the law were sent to the 1st respondent who has not complained of none service. There is an outstanding debt because the plaintiff was supposed to pay the agreed amount by 30th January 2007; however the statement shows an outstanding amount of Ksh.1,733,129.25/-. As at 31st March 2009.
5. This application is brought under the provisions of Matrimonial Causes Act by the spouse of the 1st defendant who is the chargor and the registered proprietor of the suit premises. I readily agree with counsel for the applicant that the 2nd defendant's concern is the settlement of the loan account. Further more the 2nd defendant cannot now claim the plaintiff lacks locus standi after they even entered into consent with the plaintiff on how to settle the outstanding loan. At this point I would not say the plaintiff lacks locus standi in the matter.
6. I will now proceed to consider whether the plaintiff has established a prima facie case with a probability of success. The Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** explained what constitutes a prima facie case as follows:

“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.”

In the same case the Court appeal cited with approval the circumstances in which a mortgagee may be restrained from exercising its statutory power of sale as set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

“725 When a mortgagee may be restrained from exercising power of sale.”

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claims excessive.” (Emphasis added)

7. Applying the above principles to the present case, the issue to consider is whether the plaintiff complied with the consent agreement and paid the entire outstanding sum of **Ksh.1,472,584.70** as stipulated in the agreement that is between 30th September 2006 to 30th January 2007. The 2nd defendant contends that the plaintiff defaulted. On the part of the plaintiff he has not shown any evidence that the sum was paid within the stipulated period. Accordingly the plaintiff has not established a prima facie case to warrant the granting of the order of injunction. The 2nd defendant contends the statutory notice and notification of sale were served upon the 1st defendant who is the chargor and the registered proprietor of the suit premises.
8. The 1st respondent swore a replying affidavit to this application on 30th November 2009 and there is no allegation that she was not served with the statutory notice. In the circumstances I find that the application lacks in merit. It does not meet the threshold of granting an interim order of injunction. It is dismissed with costs to the 2nd defendant.

RULING READ AND SIGNED ON 21ST MAY 2010 AT NAIROBI.

M.K. KOOME
JUDGE