



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 665 of 2008

JOHN MURITU KIGWE..... PLAINTIFF

VERSUS

EABS BANK LIMITED.....1ST DEFENDANT

CANPAN INVESTMENT LIMITED.....2ND DEFENDANT

JUJA FORTY NINE LIMITED.....3RD

DEFENDANT

RULING

The plaintiff made an application pursuant to the provisions of Order XXXIX Rules 1 and 3 of the Civil Procedure Rules, Section 69(1) and 69A of the Transfer of Property Act and Sections 6, 7 and 8 of the Land Control Act. The plaintiff seeks to restrain by means of a temporary injunction the defendants, their assigns, transferees, servants or agents or any party acting at their behest or in exercise of any powers conferred upon them by the law from in any manner whatsoever interfering with the plaintiff's quiet possession and occupation of the property known as LR No. 10823/54 (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The plaintiff further prayed for a specific order restraining the 3rd defendant by means of a temporary injunction from in any manner whatsoever asserting any rights on the suit property by virtue of the disputed transfer dated 7th April 2008 and the registration thereof on 28th July 2008 including but not limited to entering into any agreement for sale in relation to the suit property and/or executing any transfer in respect thereof pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The plaintiff contends that the 1st defendant had illegally, fraudulently and at an inordinate undervalue purported to transfer the suit property to the 3rd defendant. The plaintiff states that the purported transfer was done against the mandatory provisions of and without due compliance with the mandatory requirement of the Land Control Act. The plaintiff contends that prior to the 1st defendant purporting to exercise its purported statutory power of sale, it did not serve the requisite initial demand under the instrument of charge. The plaintiff states that the 1st defendant failed to issue the prerequisite mandatory statutory notice before purporting to exercise its purported statutory power of sale. The plaintiff stated that unless the 3rd defendant together with the other defendants are jointly restrained, there are likely to dispose off the suit property and continue with their said illegal and fraudulent acts to the detriment of the plaintiff. The application is supported by the annexed affidavit of John Muritu Kigwi. He swore a supplementary affidavit in further support of his application.

The application is opposed. The 1st defendant filed grounds in opposition to the application. The 3rd defendant's director, John Maina Kimondo swore a replying affidavit in opposition to the application. At the hearing of the application, Mr. Kimani for the plaintiff submitted that it was the plaintiff's contention that the purported sale and transfer of the suit property on the strength of the purported consent of the Land Control Board was null and void. He explained that the plaintiff made credible allegation of fraud and collusion between the 1st and 2nd defendants on the one hand and the 3rd defendant on the other. It was the plaintiff's case that the suit property was sold at a price that was grossly under valued. He submitted that although the 2nd defendant was served with summons to enter appearance together with the application herein, the 2nd defendant did not file a defence nor grounds in opposition to the plaintiff's application. He submitted that the plaintiff charged the suit property to secure a sum of KShs. 25 million which had been advanced to a company known as Kelly Petroleum Limited. He maintained that it was a fundamental term of the agreement that the security charged would not be realized until a legal demand is made and further a statutory notice is issued in accordance with the law and particularly Section 69A of the Transfer of Property Act. It was the plaintiff's case that the requisite statutory notice was not served. Neither was there evidence that the said notice was received by the plaintiff. He submitted that the onus was upon the chargee to establish that indeed it served the statutory notice once the issue was raised by the chargor in a suit. He reiterated that the right by the chargee to call in the debt from the plaintiff as a guarantor of the borrower had not accrued since the bank had already made a move to recover the amount owed by putting the borrower under receivership. It was the plaintiff's case that in the circumstances its equity of redemption could not have been extinguished since the 1st defendant had failed to comply with the conditions precedent laid down by statute before it purported to sell the suit property in exercise of its statutory power of sale. He reiterated that the 1st defendant surreptitiously sold the suit property in purported exercise of its statutory power of sale without notifying the plaintiff as required by the law. The plaintiff questioned the validity of the said sale on account of fact that no consent of the Land Control Board was granted for the sale transaction. The plaintiff took issue with the 3rd defendant's explanation that it had had the suit property transferred to it by the plaintiff after the 2nd defendant had assigned its proprietary rights over the suit property to it. Learned counsel for the plaintiff explained that the alleged agreement for sale was entered into on 18th January 2005 while the transfer was registered on 28th July 2008. He submitted that the purported consent of the land control board was secured on 1st July 2008. It was the plaintiff's case that the said land sale agreement became null and void for all purposes when six (6) months expired after the initial agreement was entered into. He submitted that the consent of the land control board could not have been issued when an application for such consent was made beyond the requisite six (6) months period. He referred the court to Section 9 of the Land Control Act and several decided cases which affirm the legal position that any transaction in regard to agricultural land is null and void for all purposes if the consent of the land control board is not secured within the period stipulated by the law. He explained that the land control board had no authority to issue a consent to a transaction in respect of the agricultural land when the requisite six (6) month period had expired. He reiterated that it was irregular for the consent to be issued in favour of a party who was not the purchaser in the original sale transaction. He maintained that the plaintiff had established a prima facie case and should therefore be granted the prayers sought in the application.

Mr. Kipkorir for the 1st defendant opposed the application. He relied on the grounds of opposition filed by the 1st defendant. He submitted that the suit property was transferred to the 3rd defendant on 28th July 2008. Under Section 60 of the Transfer of Property Act, the plaintiff's equity of redemption was extinguished when there is a valid sale agreement or where the property has been sold in a public auction. He submitted that the plaintiff had acknowledged there was a valid sale agreement in respect of the suit property and that the suit property had been transferred to the 3rd defendant. He maintained that under Section 69(1) of the Transfer of Property Act once a property has been sold by a chargee in exercise to its statutory power of sale, the only remedy available to the chargor is to make a claim for damages. He submitted that the plaintiff was re-litigating issues which a previous court had heard and rendered a ruling. He urged the court to hold that the issues raised by the plaintiff in the present suit were therefore *res judicata*. He explained that although the 3rd defendant sought and obtained the consent of the land control board before the transfer was effected, since the suit property was within Juja Township, there was no requirement that such sale transaction be subject to the provisions of the Land Control Act.

He submitted that the transfer of the suit property to the 3rd defendant was legal and above board. He urged the court to dismiss the plaintiff's application with costs.

Mr. Njaramba for the 3rd defendant opposed the application. He relied on the replying affidavit filed by George Kimondo a director of the 3rd defendant. He submitted that the 3rd defendant confirmed that the title was clear before it purchased the suit property. He submitted that the plaintiff was issued with the requisite statutory notice before the sale was effected. He maintained that even though the 3rd defendant had applied for consent of the land control board, the same was not necessary since the sale transaction was made pursuant to Section 54 of the Transfer of Property Act. He submitted that a land sale agreement made under the Section exempted the application of Section 6 of the Land Control Act. He reiterated that the consent obtained was in any event not irregular. He explained that since the plaintiff's equity of redemption was extinguished in 2005, the plaintiff cannot in law seek the intervention of the court to recover the land. He submitted that the orders sought by the plaintiff cannot be granted since the plaintiff had not indicated his willingness to pay the mortgage amount. He maintained that as the registered owner of the suit land, and having purchased the same from the bank which was exercising its statutory power of sale, the 3rd defendant was an innocent purchaser for value without notice. He urged the court to dismiss the plaintiff's application with costs.

I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the rival submissions made by counsel for the parties to this application. The issue for determination by this court is whether the plaintiffs established a case to entitle this court to find in their favour and grant them the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an order of injunction are well settled. In Giella vs Cassman Brown [1973] EA 358 at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

Certain facts are not in dispute in this application. It is not disputed that the plaintiff charged the suit property to the 1st defendant. The plaintiff charged the suit property when he guaranteed a loan advanced to a limited liability company known as Kelly Petroleum Limited. It is not disputed that the suit property was charged to secure a sum of KShs. 37 million which was advanced to the company. The charge was duly registered. The company defaulted in repaying the sum that was advanced to it. The bank called upon the plaintiff to make good the payment of the amount owed on the basis of his guarantee. In default, the bank informed the plaintiff that it would realize the security charged by exercising its statutory power of sale. It is not disputed that prior to the bank selling the suit property, it had put the company under receivership. The company's directors, including the plaintiff, challenged the bank's right to take over the management of the company. The company filed a suit i.e. HCCC No. 411 of 2007 (Milimani). Contemporaneous with filing suit, the company sought inter alia, to restrain the bank from exercising statutory power of sale. Okwengu J heard the application for injunction and dismissed it. It is apparent that in the application, the company sought to restrain the bank from selling, among other properties, the suit property.

It was the plaintiff's complaint that the bank purported to exercise its statutory power of sale before it had issued the requisite statutory notice as provided by Section 69A of the Transfer of Property Act. It was the plaintiff's case that the 1st defendant's right to exercise its statutory power of sale had not accrued since the statutory notice was not issued. In response to the plaintiff's complaint, the 1st defendant stated that the issue of notice had been considered by Okwengu J in the previous suit filed by the company. The learned judge held that the 1st defendant had indeed served the statutory notice. I have perused the ruling that Okwengu J delivered on 26th October 2007 in Nairobi HCCC No. 411 of 2007 Kelly Petroleum Limited vs. East African Building Society Bank Ltd & Anor (unreported). At page 8 of her ruling she

stated as follows:

“As regards the legal charges, although the 1st respondent exhibited copies of statutory notices which were allegedly sent to the applicant, no copy of the certificate of posting has been exhibited, such that proof of service of the notice is lacking. Nevertheless, the 1st respondent maintained that it has already disposed off the two properties in exercise of its statutory powers of sale. Copies of the agreement of sale have been exhibited.”

It is therefore evident that the learned judge addressed her mind to the issue whether a valid statutory notice had been issued before the 1st defendant exercised its statutory power of sale. I agree with the 1st defendant that the issue is *res judicata* and cannot be re-litigated in these proceedings. The issue as to whether a statutory notice was issued or not can only be addressed by an appellate court and not by a court of concurrent jurisdiction.

As regard whether the 1st defendant had acted fraudulently when it sold the suit property to the 2nd defendant and later transferred the same to the 3rd defendant who had been assigned property by the 2nd defendant, I have considered the plaintiff's complaint which is essentially that the suit property had been sold at a value that did not reflect the true market value of the property. I think it is now settled that when a chargee is selling the charged property in exercise of its statutory power of sale, it owes a duty of care to the chargor. This duty of care extends to obtaining the best possible price that can be obtained from the market at the time the property is offered for sale. The best possible price in the circumstances is not akin to the market price. It is the best possible price obtainable taking into account the prevailing economic circumstances. That is the reason why in most cases, the bank sets a reserve price before the property is offered for sale in a public auction or by private treaty as the case may be. The plaintiff cannot therefore argue that the property was sold at a value that did not reflect its true market value yet the suit property was being sold to realize the security that had been charged to the bank. The forced sale value of a property cannot be equated to the market price. Prima facie, the suit property appear to have been sold at a price that was lower than that which was valued by the government valuer. That may be sufficient ground for the plaintiff to seek compensation by way of damages but cannot be a ground for the grant of injunction.

As regard whether the 3rd defendant obtained registration of the suit property in breach of Section 6 of the Land Control Act that require consent of the land control board to be obtained within a period of six (6) months after execution of the sale agreement, this court has the following observations to make; it is not disputed that the suit property was sold to the 2nd defendant on 18th January 2005. By virtue of the Court of Appeal decision in Downhill Limited vs. Harith Ali El-Busaidy & Anor CA Civil Appeal No. 254 of 1999 (unreported), once the chargee enters into a valid agreement for the sale of the charged property in exercise of its statutory power of sale, the chargor is divested of ownership of the suit property and his equity of redemption is extinguished. Such a chargor cannot seek the court's intervention to reverse the sale transaction. Under Section 69B(2) of the Transfer of Property Act, if such a chargor is aggrieved by the manner in which the suit property was sold, his remedy lies in filing an appropriate suit for compensation by way of damages. In the present application, even if this court were to reach a finding that the 3rd defendant had unlawfully obtained consent of the land control board to transfer the suit property contrary to the provisions of the Land Control Act, this court lacks power to nullify the said consent. The said consent remains valid for all purposes until the same is nullified by a court of competent jurisdiction acting under its judicial review jurisdiction. The plaintiff cannot therefore place reliance on the fact that the consent of the land control board was obtained outside the period stipulated by the Land Control Act.

It is clear from the foregoing that the plaintiff no longer has any proprietary right over the suit property that is capable of being enforced by this court. The suit property has already been transferred to the 3rd defendant. Although the plaintiff claims that he is still in possession of the suit property, it is clear that his equity of redemption was extinguished once the 1st defendant entered into a valid sale agreement with the 2nd defendant for the suit property when exercising to its statutory power of sale. The plaintiff's

remedy pursuant to Section 69B of the Transfer of Property Act lies in filing appropriate suit for damages. (See Priscillah Grant vs. Kenya Commercial Finance Co. Ltd & 2 others CA Civil Application No. NAI 227 of 1995 (unreported) and Captain Patrick Kanyagia & Anor vs. Damaris Wangechi & 2 others CA Civil Appeal No. 150 of 1993 (unreported)).

The plaintiff has failed to establish a *prima facie* case to entitle the court find in his favour in this application. Damages will be an adequate remedy for the alleged infringements of the law complained of by the plaintiff. The balance of convenience tilts in favour of the 3rd defendant who is the registered owner of the suit property. The plaintiff's application dated 11th November 2008 is unmeritorious and is hereby dismissed with costs.

DATED at NAIROBI this 11TH day of MARCH 2009.

L. KIMARU

JUDGE