



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 712 OF 2008

HOUSING FINANCE COMPANY (K) LIMITED...PLAINTIFF

VERSUS

PATRICK KANG'ETHE NJUGUNA.....1ST DEFENDANT

MARGARET WAMBUI KANG'ETHE.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The plaintiff filed an application pursuant to the provisions of **Sections 3, 3A, 63(e)** of the **Civil Procedure Act** and **Order XXXIX Rules 1,2** and **2A** of the **Civil Procedure Rules** seeking orders of temporary injunction to restrain the 1st and 2nd defendants either by themselves, their employees, their servants or agents from selling, leasing, transferring, charging or registering any further dealings and or transaction in respect of all that parcel of land known as LR No.36/VII/449, Nairobi (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The plaintiff sought orders of temporary injunction against the 3rd and 4th defendants from registering any further dealings or transaction in respect of the suit property pending the hearing and determination of the suit. The grounds of support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Joseph Kania, the manager legal services of the plaintiff. He swore a further affidavit in support of the application.

The application is opposed. The 1st and 2nd defendants filed replying affidavits in opposition to the applications. The 1st defendant swore a further affidavit in reply to the plaintiff's application. The 1st and 2nd defendants filed notice of preliminary objection to the plaintiff's suit. The 3rd and 4th defendants did not enter appearance. Neither did they file any papers in response to the plaintiff's application. It was unnecessary for the 3rd and 4th defendants to file any response to the plaintiff's application as in accordance with **Section 16(1)** of the **Government Proceedings Act**, the court cannot grant an application for injunction or an order of specific performance against a department of government. The

plaintiff's application for injunction against the 3rd and 4th defendants is not therefore maintainable in law. In their preliminary objection, the 1st and 2nd defendants raised issues essentially in regard to whether the plaintiff properly instituted suit against the 3rd and 4th defendants in view of the provisions of the **Government Proceedings Act** in relation to the issue of notice before filing civil suits against the government. The 1st and 2nd defendants preliminary objections further relates to whether the plaintiff had a cause of action against the defendants in view of provisions of **section 136** of the **Government Lands Act** and **Sections 4 and 19(4)** of the **Limitation of Actions Act**. Before the oral hearing of the application, the parties agreed by consent to file skeleton submissions prior thereto. The said written submissions were duly filed. Counsel for the parties filed authorities in support of their respective client's cases.

At the hearing of the application, I heard oral arguments made by Mr. Munge on behalf of the plaintiff and by Mr. Havi on behalf of the 1st and 2nd defendants. I have carefully considered the said submissions made including the written submissions. I have also considered the authorities cited by counsel for the parties in this case. Upon evaluation of facts of this case, the following is the summary of the facts of this case as I understood it. The 1st defendant was the registered owner of the suit property. On 24th February 1997, the 1st defendant mortgaged the suit property to secure a loan of Kshs.5 million from the plaintiff. The mortgage was duly registered and noted in the register of the title of the suit property. From the documents annexed to the affidavit of Joseph Kania, it was apparent that the 1st defendant defaulted in repaying the loan that was advanced to him by the plaintiff. The plaintiff sought to realize the mortgaged property in exercise of its statutory power of sale.

The plaintiff's exercise of its statutory power of sale was challenged by the 1st defendant. The 1st defendant filed suit against the plaintiff, the auctioneer and a party who had allegedly purchased the suit property from the plaintiff. The suit was filed before this court vide **Nairobi HCCC No. 76 of 2001 Patrick Kang'ethe Njuguna vs. Housing Finance Company of Kenya Ltd & 2 Others.** The said suit was substantially compromised by the parties when a consent was recorded in court on 21st November 2003. In the said consent, the plaintiff agreed to refund to the purchaser the purchase consideration paid in respect of the suit property. The 1st defendant agreed with the plaintiff on the terms of repayment of the outstanding amount owed in mortgage account. The temporary injunction which had been obtained by the 1st defendant against the plaintiff and registered against the title of the suit property was by consent vacated. The parties agreed that in default of either party abiding by the terms of the consent, the offended party would be at liberty to execute against the defaulting party.

It is important at this stage of the ruling to state that the said consent did not specify that or provide that the title in respect of the suit property would be discharged. In fact, the said consent did not terminate the proceedings since it provided for a further mention to enable the parties appraise the court on the position of the consent terms of settlement. For some inexplicable reason which I could not fathom from the proceedings of the above suit, the 1st defendant presented to the court a re-conveyance of the mortgage on 18th October 2004. The said re-conveyance purportedly discharged the suit property from the mortgage registered in favour of the plaintiff. The material part of the re-conveyance states as follows:

"... in consideration of all the principal monies interest and other charges due under the mortgage having been fully paid and satisfied by the mortgagor, on or before the execution of these presents (the receipt whereof the mortgagee acknowledges), the mortgagee doth hereby re-conveys and releases the mortgaged premises comprised in the mortgage freed from all the principal monies and the interests and other monies secured by and from all claims and demands under the mortgage otherwise howsoever and hereby conveys all the land particularly described in the schedule hereunto to hold the same unto the mortgagor for an estate in fee simple subject to the provisions of the Government Lands Act (Chapter 280) and the rules for the time being in force thereunder completely freed from the said mortgage from all monies, actions, claims and demands whatsoever arising thereunder. "

The re-conveyance of mortgage was not executed by the plaintiff. It was instead executed by the deputy registrar or a person purporting to be the deputy registrar of this court. I had occasion to peruse the court

file in which the above consent was recorded. There is no order by the court authorizing the deputy registrar of the court to execute the re-conveyance of mortgage on behalf of the plaintiff.

Further, even after being put on notice by the plaintiff, the 1st defendant did not present to the court evidence that he had repaid in full the sum that was advanced to him together with the accrued interest. This would have supported the 1st defendant's claim that he had repaid in full the sums secured by the mortgage. It was clear to the court that the said re-conveyance of mortgage was a forgery. The 1st defendant presented the said forged re-conveyance of mortgage to the registrar of titles, who duly acted upon it and registered it against the title of the suit property. This court wondered how the registrar of titles could have registered the said re-conveyance of mortgage against the title of the suit property on a re-conveyance of mortgage purportedly signed by the deputy registrar of this court without a supporting court order. It is therefore evident that the plaintiff established, *prima facie*, that the said re-conveyance was registered against the suit property without the authority of the mortgagee, in this case the plaintiff.

Further, it was evident that the 1st defendant transferred the suit property to be jointly registered in his name and that of the 2nd defendant in clear bid to frustrate the plaintiff from obtaining orders from the court to reinstate the conveyance that was unlawfully reconveyed to the 1st defendant. In response to the plaintiff's suit the 1st and 2nd defendants raised three preliminary objections to the suit. I will address each of the preliminary objections raised by the 1st and 2nd defendants. The 1st and 2nd defendants stated that the suit against them was not maintainable in law since the plaintiff had failed to issue the mandatory thirty (30) day statutory notice to the Attorney General (their co-defendants) as provided under **Section 13 of the Government Proceedings Act**. The 1st and 2nd defendants therefore argued that the suit against the 3rd and 4th defendants was not in the circumstances maintainable in law. In response to this aspect of the 1st and 2nd defendants' objection, the plaintiff annexed a notice of intention to file suit dated 17th December 2007 addressed to the Attorney General.

I have perused the said notice. At this stage of the proceedings I will not make a comment in regard to whether the statutory notice was issued or not. This is in view of the fact that the 3rd and 4th defendants have not filed their papers in response to the averments made against them by the plaintiff in this suit. I am not persuaded that it is the duty of the 1st and 2nd defendants to point to the court whether the plaintiff issued statutory notice to the 3rd and 4th defendants. The 1st and 2nd defendants have no legal capacity to make any representations on behalf of the 3rd and 4th defendants. I therefore hold that the 1st preliminary objection lacks merit and is accordingly disallowed. Similarly, the 1st and 2nd defendants cannot purport to act on behalf of the 3rd and 4th defendants in demanding that the plaintiff establish that it has issued the statutory notice as provided under **Section 136(1) of the Government Lands Act**. I further hold that there is no legal requirement for the plaintiff to give a thirty (30) day notice under the said Act to the 1st and 2nd defendants before institution of suit. The requirement as to thirty (30) days notice only applies to suits instituted against the government and not to suits instituted against individuals.

The 1st and 2nd defendants further submitted that the plaintiffs' suit in so far as it was in respect of the recovery of interest payable in respect of any sum secured by a mortgage was time barred since it was brought six years after the interest became due. For this proposition the plaintiff relied on the provisions of **Section 19(4) of the Limitation of Actions Act**. I have perused the plaint filed by the plaintiff. It was clear that the thrust of the plaintiff's suit is its complaint that the suit property was re-conveyed to the 1st defendant without its authority. The issue for determination by this court will therefore, *inter alia*, be whether the re-conveyance of the suit property to the 1st plaintiff was lawful. In my considered opinion the plaintiff has established a *prima facie* case that the suit property was re-conveyed to the 1st defendant, and mortgage discharged, in circumstances that clearly raises suspicion that fraud may have been committed.

In considering whether to grant the application for interlocutory injunction sought by the plaintiff, this court is required to consider, in sequential order whether the plaintiff has established a *prima facie* case,

whether the plaintiff has established that it would suffer irreparable damage that will unlikely be compensated by an award of damages, and where the court is in doubt, whether the balance of convenience favours the plaintiff (**see *Giella vs. Cassman Brown* [1973] EA 358**). In the present application, this court has considered the facts of this case in light of the applicable law and reached determination that the plaintiff established a *prima facie* case. I further hold that the plaintiff established that it would suffer irreparable damage that would not likely be compensated by an award of damages because if the suit property is sold by the 1st and 2nd defendants, the plaintiff will not be able to succeed in its claim for cancellation of the re-conveyance registered in favour of the 1st defendant together with the conveyance made in favour of the 1st and 2nd defendants.

In the premises therefore I will allow the plaintiff's application for temporary injunction in terms of prayer 4 and 5 of the suit pending the hearing and determination of the suit. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 10th day of JUNE 2009

L. KIMARU

JUDGE