

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 606 of 2005

ELIZABETH NJERIPLAINTIFF

VERSUS

HOUSING FINANCE CO. (K) LIMITED.....1ST DEFENDANT

DELTA HAULAGE SERVICES LIMITED.....2ND DEFENDANT

SOUTHERN CREDIT BANKING CORP. LIMITED3RD DEFENDANT

RULING

The chamber summons dated 24th April 2009 was filed by the 3rd defendant that is Southern Credit Banking Corporation under the provisions of order VI r13(1) a of the Civil Procedure Rules. The 3rd defendant is seeking for orders that the suit by the plaintiff as against the 3rd defendant be struck out with costs. This application is premised on the grounds that under section 69B (2) of the Transfer of the Property Act 1892 the plaintiffs remedy if any is in damages against the person exercising the statutory power of sale who in this case is not the 3rd defendant. Counsel for the applicant submitted that the suit by the plaintiff does not disclose any reasonable cause of action against the 3rd defendant. It is not the 3rd defendant who exercised the power of sale. Counsel made reference to the case of DT Dobie and Company Kenya Limited versus Muchina 1982 KLR page1 where the Court of Appeal explained the meaning of the words reasonable cause of action in the following words:-

“The words ‘reasonable cause of action’ in Order VI rule 13(1) means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.

The words “cause of action” means an act on the part of the defendant which gives the plaintiff his cause of complaint”

Counsel further argued that the application for injunction by the plaintiff was dismissed. The allegations of irregularities made against the 3rd defendant if proved can only be compensated by damages. Counsel urged the court to dismiss the suit against the 3rd defendant.

This application was supported by Mr. Ondiek appearing for the 2nd defendant on the grounds that once an agreement has been entered with a bona fide purchaser and at the fall of the hammer the equity of redemption is relinquished and the only remedy available to the plaintiff is one for damages.

This application was opposed by the plaintiff Mr. Wambugu relying on the grounds of opposition filed on 7th July 2009. The plaintiff contends that the sale to the 3rd defendant was fraudulent therefore the award of damages cannot compensate the plaintiff for the loss of her property moreover the property was sold when there was a suit pending before the court in blatant disregard of the *Lis Pendens Rule enshrined in section 52 of the ITPA*. He urged the court to dismissed the application and order the matter to proceed in full hearing.

Having set out the summary of the gist of this application as well as the rival submissions this application is brought under order VI r 13 (1)a of the Civil Procedure Rules which provides that:-

“It discloses no reasonable cause of action or defence”

A glance at the suit filed by the plaintiff against the defendants the plaintiffs claim is against the 1st defendant with whom the plaintiff had entered into a contract whereby the plaintiff borrowed money against the security of a parcel of land known as *LR No.1/1171/1 original No.1.257/9/Nairobi*. The plaintiff claims that the defendant overcharged interest and was not entitled to sell the property without rendering accounts. The records show that the Interlocutory Application was heard and by a ruling rendered on 16th May 2008 by Kimaru J and the plaintiffs application for injunction was dismissed.

It is also clear from the records that the 3rd defendant advanced money to the 2nd defendant to purchase the suit premises which was sold by the 1st defendant. It is not in dispute that there was no contract between the 3rd defendant and the plaintiff. It is trite that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party. There existed no direct contract between the plaintiff and the 3rd defendant thus there is no cause of action against the 3rd defendant. The plaintiff's remedy lies against the 1st defendant who is accused of having sold her property irregularly. The plaint does not disclose any cause of action against the 3rd defendant. Accordingly no useful purpose will be served by allowing this suit to proceed against the 3rd defendant.

Accordingly the application by the 3rd defendant is allowed and the suit as against the 3rd defendant is hereby struck out with cost against the plaintiff.

RULING READ AND SIGNED ON 18TH SEPTEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE