



**Thande v Co-operative Bank of Kenya & 2 others (Civil Suit 265 of 2008)
[2009] KEHC 1926 (KLR) (Civ) (18 September 2009) (Ruling)**

AGGREY PETER THANDE v CO-OPERATIVE BANK OF KENYA & 2 others [2009] eKLR

Neutral citation: [2009] KEHC 1926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 265 OF 2008

MK KOOME, J

SEPTEMBER 18, 2009

BETWEEN

AGGREY PETER THANDE PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA 1ST DEFENDANT

BUERI LTD 2ND DEFENDANT

LANDS REGISTRAR, KIAMBU 3RD DEFENDANT

RULING

1. By the pleadings filed by the plaintiff, he admitted that he borrowed a sum of Kshs.5, 000,000/= from the first defendant in the year 1996. The first defendant created a legal charge over the plaintiff's property known as Limuru/Ngecha/1120 as security for the loan. The plaintiff defaulted in payment and the defendant filed High Court Civil case No.508 of 2003 Milimani Commercial Court seeking to recover the loan. Consent was entered between the plaintiff and the defendant on 12th June, 2006 in the following terms:-
 1. Judgment be and is hereby entered in favor of the plaintiff against the defendant the sum of Kenya Shillings Nine Million One Hundred Thousand (Kshs.9, 100,000/=) plus costs of the suit to be borne by the defendant.
 2. The said judgment amount of Kenya Shillings Nine Million One Hundred Thousand (Kshs.9,100,000/=) to be liquidated by the defendant as follows:-



- (a) An immediate payment of Kenya Shillings Five Hundred Thousand (Kshs.500, 000/=) which the plaintiff confirms receipt.
 - (b) July, 2005 to December 2005 – Kshs.150, 000/= per month.
 - (c) January, 2006 to June 2006 – Kshs.200, 000 per month.
 - (d) July, 2006 to December 2006 – Kshs.150, 000 per month.
 - (e) January, 2007 to December, 2007 – Kshs.250, 000/= per month.
 - (f) January, 2008 to October, 2008 – Kshs.260, 000 per month.
3. Each monthly payment to become due and payable on the first day of the month.
 4. IN default of any one installment on its due date then the judgment amount shall revert to the original amount outstanding on the loan which is Kshs.37,472,097/= and the plaintiff shall be at liberty to execute against the defendant for the said sum of Kshs.37,472,097/= plus costs.
2. The plaintiff paid a sum of Kshs.3, 200,000/= but fell in arrears. According to correspondence annexed to this application, the plaintiff was renegotiating payments when the first defendant advertised his property for sale. The property was supposed to be sold on 2ndMay, 2008 but it was not sold, and was re-advertised for sale on 20thMay, 2008. The plaintiff filed a Notice of Motion on 17thMarch, 2009 in which he sought for a temporary order of injunction restraining the defendants or their agents from alienating, disposing or dealing with his property known as Limuru/Ngecha/1120 until the determination of this suit. The plaintiff also sought for a mandatory order of injunction to compel the first and second defendants to transfer the suit premises back to the applicant.
 3. This application was urged before me. It is premised on the grounds that the sale by the first defendant was declared null and void by this court but the first defendant transferred the suit premises when there was an order maintaining the status quo. The application is also supported by the affidavits of the plaintiff.
 4. Basically the plaintiff contends that the purported sale of the suit premises pursuant to a statutory power of sale was a nullity because at the time the sale was undertaken, the defendant had filed a suit in which the above consent was recorded. The consent was never set aside, thus the first defendant could only have sought for execution of the decree, but not to revert to the sale of the charged premises. Counsel referred to the ruling by Khaminwa J delivered on 15thJuly, 2008 where the court held that the first defendant did not have a statutory power of sale.
 5. Moreover, there was an existing order of injunction which was issued on 20thMay, 2008 by Lesiit Jin the following terms:-

“The application was certified urgent yesterday, the application is considered. The applicant has sworn that the parties had entered into a compromise agreement in which the plaintiff was to pay money in installments.

The plaintiff will be granted in terms of prayers 3 on conditions:

1. the plaintiff deposits Kshs.4 million with the Court within 21 days from today,
and
2. The plaintiff files a personal undertaking as to costs.”



6. A perusal of the court record shows that the plaintiff did not deposit the sum of Kshs.4 million within 21 days as ordered by the court and on 24th June, 2008, Lesiit J made the following orders:-

“The injunction granted on 20th May, 2008 was on condition Kshs.4 million was deposited within 21 days from the date of order. This was not complied with. There was a second condition that the plaintiff files a personal undertaking as to costs. This has not been filed. In the circumstances, there is no injunction in place. The defendant’s application was filed before the 21 days given within which plaintiff was to comply with the condition for injunction was over which was premature. It is now overtaken by events for lack of compliance. The same is marked withdrawn with costs in the cause”.

7. According to the plaintiff the sale to the second defendant is illegal and was carried out fraudulently when the first defendant knew of the injunction and knew of the existence of another suit where a consent order was recorded. The defendant did not have a good title to pass over the suit premises and the court should therefore issue a mandatory order of injunction. The second defendant cannot claim to be an innocent purchaser for value. He was aware of the court proceedings and the title should be cancelled and he be refunded his money. The third defendant, who is the Registrar of Lands Kiambu, was served with the proceedings herein but has not filed any response.
8. This application was vigorously opposed by counsel for the first and second defendants. Counsel for the first defendant submitted that the plaintiff failed to comply with the schedule of payment as per the consent order entered into in HCCC No.508 of 2003. Pursuant to the default clause, the 1st defendant was entitled to recover the loan. The plaintiff also failed to disclose that he admitted having defaulted as per the letters annexed to the replying affidavit by Regina Anyika. Two letters have been annexed written on behalf of the plaintiff’s then advocate M/s. Ngata Kamau in which he was seeking for further indulgences to stop the sale intended on 29th April, 2008.
9. The first defendant had a right to proceed and sale the charged property which was held as security. The consent order did not discharge the suit premises. Counsel further submitted that the ruling by Khaminwa J was obiter dictum because under Section 74 of the Registered Lands Act there is no provision that if parties enter a consent order the chargee’s right is extinguished. The plaintiff has been abusing the court because an interim order of injunction was granted on condition that he should deposit a sum of Kshs.4 million within 21 days. That order for injunction lapsed after 21 days when the plaintiff failed to deposit the sum of Kshs.4 million.
10. The first defendant also moved the court on 24th June, 2008 and the court confirmed the orders of injunction automatically lapsed. On 26th June, 2008, when there were no orders of injunction in place, the first defendant executed a transfer of charge under the statutory power of sale. Between 26th June, 2008 and 10th July, 2008, the relevant transfer documents were in the hands of the second defendant. The second defendant was not at the time a party in this suit. The order of status quo issued by Khamniwa Jon 10th July, 2008 was made the same day the transfer was registered yet the status quo on 10th July, 2008 was that a transfer had been lodged. Moreover, the only parties to the suit were the plaintiff and the first defendant. If the plaintiff’s complaint is noncompliant with the order of the court the remedy available is by way of contempt proceedings.
11. The conditions for granting an interim order of injunction well settled in the oft cited case of Giella V Cassman Brown Ltd. In this case, the plaintiff is also seeking for a mandatory order of injunction which is granted in very clear cases because it is tantamount to entering a judgment without giving the defendant a chance to be heard on their defence. Moreover, according to counsel for the defendant, the plaintiff cannot be allowed to benefit from his own default.



12. Counsel for the second defendant also opposed this application and relied on the replying affidavit by Joseph Muchiri Kihanya sworn on 26th March, 2009. He submitted that this application is res judicator because Kimaru J. issued a temporary order of injunction on 18th March, 2009 and those orders were discharged on 2nd June, 2009 thus the plaintiff cannot seek for the same temporary orders. The second defendant is an innocent purchaser for value. The certificate of official search shows the transfer was registered on 10th July, 2008 to the second defendant who was not a party to the suit. The statutory notices were duly issued and there is no allegation that the notice was defective therefore nothing affects the sale to the second defendant.
13. Having set out the summary of the rival submissions, this application seeks for interim orders of injunction and a mandatory order to compel the defendants to transfer the suit premises to the plaintiff. The principles upon which these orders can be granted are well settled. Firstly, the plaintiff has to establish a prima facie case with a probability of success. Secondly, irreparable harm which cannot be compensated for in damages would arise and if in doubt, the court can determine the matter on a balance of convenience. (See the case of Giella versus Cassman Brown Co. Ltd.)
14. The plaintiff is also seeking for a mandatory order; at this interlocutory stage, a mandatory order can be granted on the basis of very clear evidence and a very strong case. It is evident from the records that this matter has been dealt with by my sister Justice Khaminwa who determined a preliminary point by the ruling dated 15th July, 2008 and by Kimaru J by a ruling dated 11th March, 2009. For obvious reasons I do not intend to comment on those rulings which can only be dwelt with by the Court of Appeal, I will only deal with the application dated 16th March, 2009 on its own merits.
15. Applying the settled principles of injunctions in this case, I have to establish whether the plaintiff has a prima facie case with a probability of success. It is not in dispute that the plaintiff borrowed a loan of 5 million; he defaulted in the repayment of the loan. He entered into a consent settlement but also defaulted the terms of the consent that is when the first defendant realized the security by sale of the property through auction. The plaintiff contends that the first defendant's right to redemption by way of the exercise of the chargee's power of sale was extinguished by that consent order. I have read the consent order and with tremendous respect, the consent order did not discharge the charge over the suit premises. If the plaintiff had complied with the consent order and paid the sum agreed, that argument would hold.
16. The other issue to determine, is whether the property was sold in flagrant disobedience of a court order. The records of the court show that the plaintiff was given a conditional order of injunction on 20th May, 2008. He was ordered to deposit a sum of 4 million within 21 days. The plaintiff did not deposit the sum of 4 million within 21 days and that order was formally discharged by Lesiit Jon 24th June, 2008. The plaintiff having failed to comply with the order to deposit 4 million, that order must have lapsed after 21 days from 20th May, 2008. I am also alive to the fact that an order of injunction is an equitable remedy and a party coming to court must do so with clean hands.
17. In this case the plaintiff admits having defaulted in the loan repayment. He failed to comply with a consent order; he comes to court and obtains an order of injunction on conditions which he does not comply with. Is he entitled to an equitable relief by way of an order of injunction? I am afraid the plaintiff is not entitled to an equitable relief. The plaintiff admits having secured a loan, which he had not paid. He willingly used his title to secure borrowings and the natural consequences of his default, were well set out in the charge documents which he willingly executed. The bank under the terms of the lending was entitled to realize the charged property to recover the loan.



18. The plaintiff's complaint as I understand it has nothing to do with the issuance of the statutory notices and the requirements for advertisement. The plaintiff claim is that the 1st defendant did not have the statutory power of sale and the property was sold illegally. Bearing in mind the plaintiff defaulted in loan repayment, I am afraid he has not established a prima facie case with a probability of success. In any case his remedies lie in damages if indeed he succeeds in proving his case.
19. The other issue for consideration is whether the property was sold in flagrant disobedience of the court order issued on 20th May, 2008. The defendant contends that the transfer was signed on 26th June, 2008 and given to the second defendant who was not a party to this suit. I have gone through the records, I see an affidavit by the auctioneer who says that he conducted the auction on 20th May, 2008 and the property was sold at 11.00 am and he was served with an order of injunction at 1.55 pm on the same day after he had conducted the sale. The transfer itself was registered at the lands office on 10th July, 2008. On the 10th of July 2008, the second defendant was not a party to this suit when an order of status quo was issued. One also needs to understand what was; the status quo on the 10th July 2008 regarding the suit premises.
20. If the plaintiff's claim is that there was a breach of a court order, then this is a matter which could have been appropriately dealt with by way of an application for contempt of court. On the face of the record, I am not able to establish that the transfer was effected in contravention of a court order. Moreover going by these allegations, the matter of contempt can best be tried by viva voce evidence and other court room processes to establish the truth.
21. Based on the above reasons the applicant is not entitled to the orders sought and the application dated 16th March, 2009 is hereby dismissed with costs to the 1st and 2nd defendants.

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

M. K. KOOME

JUDGE

