



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
Civil Case 152 of 2009

KENYA COMMERCIAL BANK..... PLAINTIFF

VERSUS

ZAHERALI KARIM KURJI.....DEFENDANT

R U L I N G

This application has been brought by way of notice of motion under Section 69 of the Transfer of Property Act, Rule 11 (1(x) of the Auctioneers Rules, 1997, Section 3A of the Civil Procedure Act, Order L rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The application seeks the following orders:

1. That this Honourable Court be pleased to compel the Respondent either by himself, his agents and/or servants to allow the Applicant to enter into LR No. 209/7/1, Maisonnette No. 13 Nairobi through its servants or agents to inspect and value the said Property pursuant to the charge registered over the property.
2. That the Honourable Court be pleased to order that the OCS Parklands Police Station do supervise the implementation of Order 1 above.
3. That the costs of this application be provided for.

During the hearing of the application, M/s Ondari for the Applicant, sought the assistance of the court to compel the respondent to allow her client to access the property – LR No. 209/7/1 – Maisonnette No. 13, Nairobi so that they can inspect and value the same. Further to the above, she also submitted that though the defendant/respondent holds the lease to the property the same was later charged to Kenya Commercial Bank or the sum of Kshs. 5,750,000/-.

According to Ms. Odari, a further charge dated 3rd August, 2001 was registered to secure a sum of Kshs. 5,750,000/-. Besides the above, the learned counsel referred the court to Clause 2(e) where the respondent agreed that he would permit the applicant's valuers or surveyors to inspect the property and report to the applicant. Apart from the above, she also informed the court that on 27th January, 2000 the respondent issued a statutory notice to the respondent claiming the sum of Kshs.13,618,943/95 as a result of the respondent's breach of the charge and further charge. Consequently, on 21st December 2005, the

applicant instructed Zenith Valuers to undertake a professional valuation of the property with a view of ascertaining the open market price of the property and to recommend a reserve price in the event of a forced sale. However, the said Valuer later reported that they had been denied access to the said property. Though the same Valuer went back again to value the property, he was denied access for the second time. In addition to the above, the learned counsel referred the court to Rule 11 (1) (b) (x) of the Auctioneers Rules [1977] that requires a bank (or lender) to quote a reserve price based on a valuation carried out, not more than 12 months prior to the proposed sale. She emphasized that the charge has a duty to act honestly and to obtain the true market value of the property. In support of her submission, she quoted the case of **Kenya Commercial Bank vs. Osebe [1982] LLR 66 (CAK)**.

According to the learned counsel, the respondent has not only breached the provisions of the charge but has also breached the provisions of the statute that the applicant should obtain the true market value of the property. She also pointed out that the longer the applicant is denied the right to realize the charged property, then the higher the amount continues to accrue. In conclusion, the learned counsel went at length to explain the reasons why they withdrew Miscellaneous Cause No. 623 of 2008.

On the other hand, Mr. Wainana for the respondent has opposed the application while relying on the replying affidavit of the Respondent. According to him the application, together with the main suit are defective in law.

Further to the above, Mr. Wainaina also submitted that earlier, the applicant had filed a notice of motion where the parties were the same. However, on 2nd April 2009, the respondent was served with a notice of withdraw. As far as the learned counsel is concerned, the proceedings in Misc. Application No. 623 of 2008 are still pending. In addition to the above, he also submitted that if the application is allowed it will determine the suit without the suit being heard. Further to the above, he also submitted that after the respondent was served with the plaint and summons he filed a defence and hence the case should go for trial since the same cannot be dealt with summarily. Apart from the above, the learned counsel also submitted that if the application was seeking to value the property, the Defendant would not have control of the same. In conclusion, he submitted that there was no evidence that the applicant had ever approached the respondent with the view of valuing the property.

This court has carefully considered the application together with the lengthy submissions by the two learned counsels. Clause 2(e) of the Charge states as follows:

“Permit the Lender at any time after the first two years of the creation of this security and thereafter at two yearly intervals should the Lender so require to instruct a surveyor or valuer to inspect and report on the Charged property at the Chargor’s expense and all moneys paid by the Lender for that purpose shall be deemed to be expenses property incurred by the Lender in relation to this security.”

In the case of **CUCKMERE BRICK CO. VS. MUTUAL FINANCE LIMITED [1971] 2 ALL ER – 633 C. Salmson J.** held as follows:

“I accordingly conclude, both by principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.”

Apart from the explicit position of the law and case law, I do not see how the respondent would be prejudiced in the event that the suit premises are valued. The arguments by the respondent’s counsel that his client will lose control of the property after valuation, is not only untenable but also fallacious. That apart, his argument that the respondent was not aware of any attempt at valuation does not seem to be

credible or genuine.

In view of the above, I hereby concede to the application in terms of prayers No. 1 and 2. Costs to the applicant in any event.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of:

Kipng'eno for Ms. Odari – Plaintiff's Counsel

N/A for Defendant's Counsel

MUGA APONDI

JUDGE

20TH NOVEMBER, 2009