



REPUBLIC OF KENYA

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

Civil Case 265 of 2007

JOSEPH SIRO MOSIOMAPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA1ST DEFENDANT

PETER CHEGE MUGO.....2ND DEFENDANT

WINNIE GATHONI CHEGE3RD DEFENDANT

PRINCIPAL REGISTRAR OF TITLES4TH DEFENDANT

RULING

The application for my determination is dated 25th May, 2007 by the Plaintiff/applicant. It is brought under Order 39 Rules 1(a), 2, 2A and 3 of the Civil Procedure Rules and Section 52 of the Indian Transfer of Property Act. The prayers that were canvassed before me are prayers No.2, 3 and 5.

Prayer No.2 seeks;

“That the 4th defendant be ordered to stay the process of registration of the transfer by the 1st defendant of L.R. No.12325/13 Hill view Estate Lower Kabete, Nairobi (IR No.35951) to the 2nd and 3rd defendants and a charge for Kshs.12,500,000/= in favour of the 1st defendant by the 2nd and 3rd defendants pending the hearing of this application interparties or until further orders of this Honourable court”.

Prayer No.3 seeks;

“An order be made under Section 52 of the Indian Transfer of Property Act 1882 as amended by the Indian Transfer of Property (amendment) Act 1959 that during the pending of this suit the property known as L.R. No.12325/13 Hill view Estate Lower Kabete Nairobi (IR No.35951) be not sold, transferred or otherwise dealt with by the defendants except on authority of this Honourable court”.

And lastly prayer No.5 seeks;

“A temporary injunction do issue restraining the 1st defendant, its servants, agents,

employees and all persons acting on its behalf or instructions from selling by private treaty charging, transferring or in any other way dealing with L.R. No.12325/13, Hill View Estate Lower Kabete Road, Nairobi (IR No. 35951) pending the hearing and determination of this suit or until further orders of the court”.

The plaintiff who is the registered owner of the suit property avers in his supporting affidavit, that by a charge dated 29th May, 1985, he charged his property to secure a loan of Kshs.600,000/= advanced to him by the 1st defendant. He claims that he paid over Kshs.2 million to the 1st defendant on account of the facility which is more than enough to redeem and offset the amount advanced. He complains that the 1st defendant loaded illegal amounts into the loan account making the account impossible to repay and settle the loan account. He asserts that the 1st defendant was at one time demanding a figure of Kshs.3.7 million as full and final settlement of the loan account but the figure was later adjusted without his authority and/or consent.

It is the contention of the plaintiff that the defendant is selling the suit property to the 2nd and 3rd defendants by way of private treaty at a gross under value of Kshs.14 million. And that the defendants are acting discreetly and fraudulently without any notice to him. The plaintiff also complains that no valid statutory notice was ever served on him to give rise to statutory power of sale. And that the acts of the 1st, 2nd and 3rd defendants smacks of fraud and conspiracy to defeat the rights of the plaintiff.

The application was opposed by the 1st, 2nd and 3rd defendants. The response of the 1st defendant is contained in the replying affidavit by **Mr. Joseph Kania**, the manager legal services who depones as follows: That the applicant applied for and obtained a loan facility from the 1st defendant for Kshs.600,000/= which facility was secured by a legal charge over the suit premises. That it was an express provision of the charge instrument that the applicant would repay the said principal sum together with interest thereon at the initial rate of 13.5% per annum. It was a further express term of that agreement that the bank would from time to time vary the rate of the said interest by giving notice to the applicant.

The deponent contends that the plaintiff did not service the loan diligently and he defaulted in the payment of the loan facility, thus the bank made various demands asking him to regularize the account. And in a bid to secure its interests, the bank issued several statutory notices pursuant to the provisions of the law and of the charge instrument. The deponent also attached the statutory notices dated 27th November 2000, 10th February 2003 and 1st September, 2004 with the relevant certificates of postage. The plaintiff then made several proposals to settle the loan account but nothing was forthcoming at the time, the property was alleged sold to the 2nd and 3rd defendants.

It is the contention of the 1st defendant that it has been exceedingly been considerate to the plaintiff and that it did not sell the charged property as had been advertised on several previous times in order to give the applicant the opportunity, to redeem his property. And that the bank has at all material times acted in good faith by giving the plaintiff sufficient and ample time to redeem his property.

According to **Mr. Kania**, the plaintiff had on numerous occasions admitted his indebtedness to the 1st defendant and made offers to liquidate the outstanding sum but he failed to honour his proposal as borne out in the various correspondences sent to the bank. He then says that as the 1st respondent's Manager of Legal services that as at 12th April 2007 the plaintiff had not made any payments as promised, hence the bank was compelled to take steps to realize its security. And with a view to sell the suit property, the bank undertook a valuation on 16th February 2006 through **Crystal Valuers Limited** who pegged the forced value at Kshs.12.5 million and the open market value at Kshs.15 million. It is the position of the 1st defendant that the property had been sold at Kshs.14 million, hence the application lacks merit.

The reply of the 2nd and 3rd defendants has been captured in the replying affidavit of **Mr. Peter Chege Mugo**, the 2nd defendant herein filed in court on 4th July 2007. He says that he severally visited the offices of the 1st defendant at **Rehani House** within Nairobi over a period of 3 years to inquire on properties available for sale to interested purchasers. And that he had no personal relationship with any staff of the 1st defendant and that all his actions, visits and inquiries were in good faith as an interested purchaser.

He contends that sometimes during the month of April 2007 he received a telephone call from a **Mr. Martin**, an official of the 1st defendant's agent of express business solutions with information that a house of his specification was available. He then visited the suit offices of the 1st defendant and noticed the suit property was being offered for sale. He was shown the house by an agent from **Express Business Solutions** and as a result developed an interest to purchase the said property.

On 16th April 2007, the 2nd defendant then made an offer to purchase the suit property for Kshs.13.5 million. The offer was rejected on the grounds that it was low but he enhanced his offer to a sum of Kshs.14 million which was accepted by the bank. The bank then made enquiries on the employment of the 2nd defendant. It is further contended by the 2nd defendant that on 19th April 2007, he noticed an advertisement for sale of the suit property in the Daily Nation newspapers and visited the offices of the 1st defendant and requested to be given a letter of offer, which was given to him. The 2nd defendant then made 10% deposit of the purchase price and thereafter obtained financial accommodation from the 1st defendant to finance the balance of the purchase price.

On 27th April 2007 the 1st defendant approved the loan application in favour of the 2nd defendant and his wife. The 2nd defendant was then asked to pay stamp duty, legal fees for preparing the charge and premium for insurance which he paid. The 2nd defendant further avers that he is an innocent purchaser of the suit property for value and that he had no knowledge or notice of the dispute if any, between the plaintiff and 1st defendant, therefore pleads that the application be disallowed.

The Advocates for both sides then made lengthy submissions based on the facts and the law applicable to the dispute. The advocates also cited several authorities to buttress the case of each side.

Let me start by saying that I have to weigh the submissions and facts of each side in the light of the well known and settled principles for the grant of interlocutory injunction. It is a requirement in law that a person seeking an injunctive relief must show the existence of a prima facie case with a probability of success at the trial. Secondly a court will not normally grant an interlocutory injunction unless it can be shown that the applicant is likely to suffer an injury which cannot adequately be compensated in damages. Lastly if the court is in doubt as to the existence, presence or otherwise of a prima facie case, it is bound to decide the case on a balance of convenience.

In my view it is also essential to appreciate that an injunction is an equitable remedy and that the court would decline to grant the same if it is shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval and expectation of an equity court. Further it is clear in my mind that at this interlocutory stage, I am not in a position to make definite findings of facts or conclusions of law which may have the effect of prejudicing the task of the judge who would ultimately hear and determine the dispute, unless it is important in reaching a decision.

In my understanding there are certain issues which are undisputed by both sides. The bank says that the plaintiff has not demonstrated a prima facie case with a probability of success

because the sum due to it has been admitted, since the plaintiff made letters admitting default and making proposals and offers to settle the debt. According to **Mr. Munge** Advocate, the bank sent several statutory notices and upon service, the plaintiff made proposal to settle the debt, which he did not fulfill at all. And that it is only after he had realized that there is a buyer to the property that he opted to rush to court to seek an injunction.

It was the submission of **Mr. Munge** Advocate that through a letter dated 25th October 2006, the plaintiff made a proposal to settle the debt at Kshs.3.7 million as a full and final settlement, which was accepted but he was unable to pay the proposed sum. **Mr. Munge** Advocate contended that the plaintiff is a party who has come to court with unclean hands and cannot therefore be rewarded by a court of equity with an equitable remedy. He then referred me to the case of **Kihara v Barclays Bank (K) Ltd Milimani Commercial Court case No.33/02, where Ringera J** as he was then held;

“On the plaintiff’s entitlement to an injunction assuming that the application is a competent one, I must say the following. The plaintiff has not disputed the validity or the terms of the charge pursuant to which the bank seeks to exercise its statutory power of sale. He has not disputed that he is in default of loan repayment or that he has been served with the requisite statutory notice”.

On the strength of the above legal proposition, **Mr. Munge** learned counsel for the defendants submitted that the plaintiff having offered his property as a security and having admitted that he was in default, he cannot at this time stop the bank from exercising its statutory power of sale. And since the bank has the option of selling the property either through a private treaty or public auction, it cannot be faulted for the way it acted in this transaction under determination.

I think the able submissions of **Mr. Munge** Advocate has clearly crystallized the issues for my determination. Before I address the debt, circumstances that gave rise to the debt, default and admissions allegedly made by the plaintiff, I think it is essential to tackle the sale of the suit property to the 2nd and 3rd defendants. In my understanding no law permits or gives financial institutions, a blanket power and/or discretion to deal in the charged property in the manner it seems fit because there is a default and admission of the debt. If that were the position of the law, financial institutions would become like a dangerous stray dog which would attack without any recourse.

In my understanding, charges and mortgages are creations of statues and have the effect of subjecting the property so burdened to some inhibitions and/or restrictions which have the potential to defeat the registered proprietor’s rights of ownership. Mortgages and charges both serve the same purpose and are in the nature of encumbrances that play a significant role in the capitalist mode of production. The two documents perform certain functions in an economy, thus gives the poor and less endowed a hope and/or opportunity of getting funds in a situations which is not usually within their reach and/or power. It means the obligations of the parties is to some extent defined in the instrument, hence the duty of the court is to safeguard and protect the interest of both sides within the confines of the law without undermining the contractual document between the parties.

There is no dispute that the plaintiff applied for and obtained a loan facility from the 1st respondent for a sum of Kshs.600,000/=, which facility was secured by a legal charge over the suit property sometimes in 1985. The plaintiff claims that he paid a sum of Kshs.2 million in satisfaction of the loan advanced to him. It was an express provision of the charge instrument that, the applicant would repay the said principal sum together with interest thereon at the initial rate of 13.5% per annum. It is alleged that it was a further express term of that agreement that the bank would from time to time vary the rate of the said interest by giving notice to the applicant.

It is clear and beyond doubt that the plaintiff did not service the loan diligently and he defaulted

in the payment of the loan facility. And as a result the bank made various demands to the plaintiff demanding regularization of the loan account. In a bid to secure its interests the bank issued statutory notices pursuant to the provisions of the law and of the charge instruments, i.e.

- (1) Letter dated 27th November, 2000,
- (2) 10th February, 2003 and
- (3) 1st September, 2004.

It is the contention of the bank that due to the applicant's proposal, it did not exercise its statutory power of sale since 1997 when the respondent began falling into arrears. And that it did not sell the charge property as had been advertised on several previous times, in order to give the applicant the opportunity to redeem his property. It is also contended that sometimes in February 2004, the bank offered the applicant the option to pay a sum of Kshs.3.7 million as full and final settlement of the debt, which the applicant was unable to perform.

The bone of contention has been captured in paragraph 15, 16, 17 and 18 of the replying affidavit of **Mr. Joseph Kania**, Manager legal services of the 1st defendant/respondent. According to **Mr. Kania** as at 12th April 2007, the plaintiff had not made any payments and the bank was compelled to take steps to realize its security. The said letter informed the plaintiff in part that;

“kindly take notice that pursuant to our notices already served on you, we have identified a purchaser of our security and we are proceeding with the sale for recovery of our full debt now standing at Kshs.5,995,838/= as per the attachment redemption statement”.

The above letter dated 12th April 2007 is in agreement with the averments by **Mr. Peter Chege Mugo** that in the month of April 2007 he received a telephone call from a **Mr. Martin** an official of the 1st defendant's agent, **Express Business Solution** with information of the availability of a good property that met his specification, which is the suit property herein. On 16th April 2007 the 2nd defendant made an offer to purchase the suit property for Kshs.13.5 million but it was rejected on the same day. He then gave a further enhanced offer of Kshs.14 million, which was accepted by the bank.

According to the 2nd defendant he was given a letter accepting his offer which stipulated that he should pay 10% deposit and the balance within a period of 90 days. He subsequently paid the deposit of Kshs.1,400,000/=. The balance was secured through a loan over the suit property from the 1st defendant. It is the contention of the 1st defendant that on 19th April 2007, he found an advertisement for sale of the suit property in the daily Nation newspaper and he visited the offices of the 1st defendant and requested to be given a letter of offer in respect of the earlier offer he made to the bank.

The question is therefore whether the plaintiff is entitled to an order of injunction in the circumstances the bank tried to exercise its authority over the suit property. In my view the minds of the bank officials and the purchaser must be directed to the fact their relationship, action and conduct would have the drastic effect of depriving the owner of the suit property. Therefore they must totally and individually ensure that everything concerning the sale is above board. The owner must be given a fair amount of time/notice that his property is about to be sold to a 3rd party because of his default.

In my understanding the mortgagee/chargee has a statutory right to sell the charge property by private treaty upon the borrower defaulting on the payment of the loan advanced. Let me add that a mortgagee exercising his power of sale pursuant to the provisions of section 69(1) of

I.T.P.A. may do so by private treaty or public auction. The choice is usually with the bank but since sale by private treaty is a mode of disposal of the suit property, the conduct of the chargee and the conditions of the market at the time the sale was conducted must be properly examined by the court. It is important to address whether the chargor made previous attempts to frustrate the sale of the suit property by public auction or that the bids submitted at the public auction had failed to meet the reserve price and that the price paid or to be paid in the private sale greatly and significantly surpasses the reserve price.

The Transfer of Property Act Section 69 provides;

“69(1) A Mortgagee or any person acting on his behalf where the mortgage is an English mortgage to which this section applies shall, by virtue of this Act and without the intervention of the court have power when the mortgage-money has become due, subject to the provisions of this section, to sell or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not and either together or in lots by public or private treaty subject to such conditions respecting title or evidence of title or other matter as the mortgagee thinks fit...”

My interpretation of section 69(1) of the Transfer of Property Act is that a mortgagee whose money has become due is empowered to sell the mortgaged property either together or in lots, by public auction or by private contract. My understanding is that **there can be no sale by private treaty when there has been no previous attempts to sell the subject property by public auction**. I agree that a mortgagee exercising his power of sale pursuant to the provisions of section 69(1) of the Transfer of Property Act may do so by private treaty but there must be evidence/testimony that there were previous attempts to sell by public auction which was unmeritoriously thwarted by the mortgagor. There must be evidence that the bank has been unsuccessful in previous attempts because of the conduct of the mortgagor, hence the private sale is done due to the conduct of the mortgagor to frustrate the salutatory power of sale.

It seems to me that under Section 69(1) of the Transfer of Property Act, **a mortgagee cannot at his convenience deal with the mortgaged property in the manner he deems fit unless the conduct of the mortgagor is wanting. The words used is shall have powers to sell without the intervention of the court, when the mortgage money has become due provided the first option is exercised which is by public auction**. Section 69(1) of the Transfer of Property Act does not use the words either but by public auction or by private treaty. The section also uses the words to sell or to concur with any other person in selling, therefore my view is that the first option, which is mandatory is by public auction. And unless there were previous attempts which failed due to the conduct and action of the mortgagor, then there is absolutely no reason to revert to sale by private treaty. It is therefore my judgement that a plain reading of section 69(1) of the Transfer of Property Act does not automatically and at the first attempt give a right to the mortgagee to sell by private treaty.

The trial court will in my view be called upon to pronounce on whether the circumstances of this case, the 1st defendant could realize the security in the manner it purported to do so. Once again I acknowledge that the mortgagee had the option to sell the suit property by a private treaty but can that negate the rights of the mortgagor to redeem his property in a fair and lawful manner. The bank through letter dated 12th April 2007 notified the applicant that it has identified a purchaser of the security. This particular letter was written almost 2 years after the letter dated 23rd September, 2005 asking the plaintiff to pay the loan outstanding. On my part, I do not think the letter dated 12th April 2007 amounts to a proper and sufficient notice. And in any case there is no evidence that it was delivered to and/or received by the plaintiff. My humble view is that a mortgagee cannot exercise the statutory power of sale unless and until a notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the mortgage money for three months after such service. That

was not done by the 1st defendant, before the private sale was undertaken by the bank. In my view that is a prima facie breach of section 69(1) of the Transfer of Property Act on the part of the bank.

It is also important to note that the circumstances surrounding the sale of the suit property to the 2nd and 3rd defendants smacks of some improper activities at the offices of the 1st defendant. The 2nd defendant says that in the month of April 2007 he received a telephone call from one **Mr. Martin** an official of the 1st defendant's agent. To me the relationship between **Mr. Martin** of **Express Business Solutions** and the 1st defendant is not clear and transparent. It is also peculiar to note that the initial offer, enhanced offer, acceptance and the subsequent recharging of the suit property by the 1st defendant took a very short time. That looks suspicious to a reasonable bystander interested in justice. One may be tempted to say that there was deceit and deception which needs proper investigation.

One other issue which raises eyebrows is that the suit property was advertised after the 2nd defendant had given a concrete offer to purchase the property for a sum of Kshs.14 million. The property was advertised for Kshs.15 million with no proper details, yet the 2nd defendant avers that on 19th April 2007, he noticed an advertisement for sale of the suit property in the Daily Nation after which he visited the offices of the 1st defendant and requested to be given a letter of offer. It is curious to note that the letter of offer was given on the same day, as the 2nd defendant requested. There was no agreement for sale showing that the suit property had been sold in an exercise of statutory power of sale by the 1st defendant, to the 2nd and 3rd defendants. In my humble view a sale whether by public auction or by private treaty requires that there must be an agreement for sale encompassing all the terms and condition to be fulfilled by the parties.

From the circumstances in this case, I do not think the 2nd and 3rd defendants can be properly called purchasers of title without notice of the issues between the plaintiff and 1st defendant. There is ample and uncontroverted evidence to show and/or demonstrate that the two purchasers acted in a manner to smell some underhand dealings. I do not think their alleged innocence in the dealing of the suit property is a true reflection of what amounts to innocent purchasers for value.

I do not think a court of equity can allow the defendants to deprive the plaintiff of his property in the suspicious manner surrounding the alleged sale of the suit property. I also think the equity of redemption faced with the clear circumstances in this case would say that the power of redemption had not arisen in favour of the 1st defendant. I do not agree with **Mr. Munge** Advocate that the 2nd and 3rd defendants are normal citizens of this country who had a normal contract and dealing with the 1st defendant. As stated the two purchasers acted in abnormal manner in concert with the agents of the 1st defendant to clog and/or fetter the redemptions rights of the plaintiff. The speed and urgency of the whole transaction mitigates against the innocence of the bank and the two purchasers. I am therefore satisfied that the bank did not act in the best interest of the plaintiff. I am also satisfied that the bank had no powers to sell the suit property by private treaty when it made no previous attempts to sell by public auction.

In short it is my decision that where a party has an option to sell by public auction or by private treaty, it must endeavour to sell by the more practical, justifiable and profitable method. I think a sale by public auction would most times attract a better price than a sale by private treaty. In my humble view where the debt is far below the value or where the value of the property is far greater than the amount owing in the loan, the mortgagee must sell by public auction. Secondly the method of private treaty can only be employed after an exhaustive and previous attempts of sale by public auction has failed either;

- (1) Due to the conduct of the mortgagor or
- (2) That the public auction could not attract the best price.
- (3) Previous attempts had failed to attract the best price.
- (4) That the sale by private treaty is to the best interest of the chargor/mortgagor.

It is therefore my decision that the plaintiff's equity of redemption has not been extinguished, since the power to sell the suit property was improperly or irregularly exercised by the 1st defendant.

In short having addressed my mind to the issues that were canvassed before in the light of the guiding principles in the grant of an injunction, I am persuaded to hold that the plaintiff has shown several prima facie issues which entitle the grant of the orders sought.

On damages, **Mr. Munge** Advocate submitted that the suit property was sold for 14 million, while it was advertised for Kshs.15 million. The plaintiff came up with a valuation of Kshs.24 million. According to **Mr. Munge** Advocate the loss suffered by the plaintiff is quantifiable therefore an injunction ought not to be granted, since the 1st defendant is financially able being one of the largest financial institutions for development and purchase of houses.

On his part **Mr. Weda** Advocate for the plaintiff submitted that the plaintiff would suffer irreparable loss if the transfer is effected. And that it is not good enough for the 1st defendant to say that it is rich enough to compensate the applicant.

On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction. I note that the property was sold for kshs.14 million, while the plaintiff attaches a market value of Kshs.24 million. The 2nd and 3rd defendants borrowed over 13 million in the purported purchase of the suit property. At the time of the alleged sale the debt outstanding was between 3.7 million and 5.9 million, which is far below the value of the suit property. In the circumstances, I am of the view that the plaintiff would suffer irreparable loss if an injunction is refused.

Lastly on the balance of convenience, I think the same tilts in favour of the plaintiff and I am not in doubt as to the clear rights of the plaintiff which has been violated by the 1st defendant. The plaintiff's Advocate urged me to grant prayers No.2, 3 and 5 on the face of the application dated 25th May, 2007, which I do. The costs shall be in the cause. I direct parties to list the suit on priority basis within 90 days. Pre-trials must be completed within the next 45 days.

Dated, signed and delivered at Nairobi this 14th day of February, 2008.

M. A. WARSAME

JUDGE