



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

Civil Appeal 302 of 2004

TABERA CLEARING AGENCY LTD.....PLAINTIFF/RESPONDENT

VERSUS

SOUTHERN CREDIT BANKING CORPORATION.....DEFENDANT/APPLICANT

R U L I N G

By a chamber summons dated and filed on 23rd of July, 2007, Southern Credit Banking Corporation (hereinafter referred to as the applicant) has come to this court under Order L rule 7 of the Civil Procedure Rule, Section 3A of the Civil Procedure Act and Sections 133 and 138 of the Registered Land Act seeking orders as follows:

1. That the District Land Registrar Kiambu do forthwith and unconditionally remove the caution registered against LRNo. Kabete/Lower Kabete/70 by Grace Wanjiku and or any other person.
2. That upon the removal of the said caution the District Land Registrar, Kiambu to forthwith and unconditionally effect a transfer of the said property to Burnaby Properties Ltd and or its nominees.
3. That cause of this application be provided for.

The application is based on grounds stated on the body of the application and the affidavit sworn by Wilfred Oroko the manager, legal Services of the applicant.

In a nutshell it is contended that the applicant granted a loan to Tabera Clearing Agency Ltd the respondent herein, on the security of LR No. Kabete/Lower Kabete/70 (hereinafter referred to as the suit property) which was registered in the name of Grace Wanjiku. Following default on the part of the respondent to repay the loan the applicant excised its statutory power of sale and sold the suit property to Burnaby Properties Ltd. Grace Wanjiku objected to the transfer of the suit property to Burnaby properties Ltd and lodged a caution against the title. As a result, the Land Control Board Kiambu refused to grant consent for the transfer of the property.

Following a successful judicial review application in HC. Misc. Application No. 1488 of 2005, the decision of the Land Control Board was quashed. The District Land Registrar has however refused to remove the caution lodged against the Title by Grace Wanjiku. The Land Control Board in turn has declined to grant the necessary consent for the transfer of the property until the caution is removed.

It is contended on behalf of the applicant that the said caution is irregular as only a person other than a registered proprietor of that title can impose a caution. It is further contended that Grace Wanjiku having duly executed the charge in favour of the applicant, she cannot purport to restrict any dealing in respect of the charge property by the applicant. The court was therefore urged to order the removal of the caution, and order the unconditional transfer of the suit property to Burnaby property Ltd or its nominees.

In response to the application Albert Thande the director of the respondent company swore a replying affidavit. It was contended on behalf of the respondent that the issues regarding the loan advanced to the respondent, the security and the exercise of the applicants alleged statutory power of sale were contentious issues in this suit which were yet to be determined. It was maintained that the suit property is agricultural land subject to the Land Control Act and cannot be transferred without consent from the Land Control Board.

It was further contended that in HC. Misc.App. No.1488 of 2005 the high court had refused to grant the order of mandamus to consider and grant the consent to transfer the suit property without questioning the legality of the public auction. It was maintained that the applicant was simply trying to circumvent the statutory requirements of Cap 302 by seeking to have a transfer effected without the consent of the Land Control Board.

It was also contended that the orders sought were against Grace Wanjiku a person who was not party to these proceedings. It was submitted that Section 133 of the Registered Lands Act, merely deals with withdrawal and removal of caution and according to section 133(3) of the Registered Land Act it is possible for a registered proprietor to lodge a caution. It was submitted that the alleged transaction was void for want of Land Control Board Consent. In this regard *Karuri vs Gituru 1981, KLR 247* was relied upon. It was maintained that the judgment of the court in *HC. Misc. Application. No. 1488 of 2005* did not constitute an order granting the consent of the Land Control Board. The court was therefore urged to dismiss the application as lacking merit.

Having carefully considered this application I do find that the caution which the applicants seek to have removed against the Title of the suit property was allegedly placed by Grace Wanjiku who is not a party to this suit. It would not therefore be proper to make orders which may be detrimental to Grace Wanjiku without her being given a hearing.

Secondly it is evident that as per the amended plaint filed in this suit on the 11th of August, 2006 the propriety of the exercise of the applicant's statutory power of sale and the sale of the suit property are the subject of this suit. An order to the applicant to effect the transfer of the suit property to Burnaby properties Ltd or its nominees will clearly preempt the suit.

Further it is evident that the applicant has to date not secured consent of the Land Control Board for the sale of suit property and there is therefore an issue as to whether the sale transaction is still valid.

For these reasons I come to the conclusion that the orders sought by the applicant cannot be granted. Accordingly the chamber summons dated 23rd July, 2007 is dismissed with costs.

Dated this 8th day of May, 2008

H.M. OKWENGU

JUDGE

Delivered in the presence of: -

Kipkorir H/B for Amolo for Applicant

H/B for Kingara for Ongicho respondent