



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

Civil Case 2342 of 2007

DR. PEREZ MALANDE OLINDO PLAINTIFF

VERSUS

DR. JOHN KARUNGAI NYAMU 1ST DEFENDANT

ELIZABETH WANGUI KARUNGAI 2ND DEFENDANT

SWARA HOMES LIMITED 3RD DEFENDANT

PIERRE VIL JOEN 4TH DEFENDANT

RULING

Application for an injunction

Dated 17 April 2008

I: Background

1. The applicant/plaintiff DR. Perez Malende Olindo was the original owner of Lands parcel 7792/3 IR 8225. He acquired this property in December 1968. From time to time he mortgaged the said property and paid his loan. Sometime in 1993 he mortgaged the said property to the Diamond Trust Bank (not party to the main suit) for 4 million. By year 1999 he had failed to pay the mortgage.

2. The applicant filed suit when he saw his property was being advertised in Hccc1230/99 and demanded to have accounts. The property was sold and transferred to the defendants herein. The plaintiff alleged fraud on the part of the bank. He sought an injunction restraining any further dealing in the property. The injunction was declared Res judicata. The suit Hccc246/06 which sought the setting aside of the sale was set aside.

3. The purchaser proceeds to transfer property to third parties. The plaintiff files Hccc2342/07 seeking orders restraining the purchasers from transferring occupy and or further dealing with the land. The issue of his eviction had been dealt with earlier.

4. By an application dated 17 April 2008 the plaintiff prays that the defendants be restrained from disposing the said property and or further sub-dividing the same.

5. In reply the 1 and 2 defendants stated that they had bought the land and have a title from the bank. They were entitled to make transfer as there was no orders restraining them from so doing. The 3rd defendant supported the submission by the 1 and 2 defendant. Fraud had not been proven in this matter. The plaintiff had not come to court with clean hands.

II: Opinion

6. This is a most unfortunate matter. The land and house in issue is a matrimonial home. It appears that it had been mortgage several times and paid for. The problem arose in the last mortgage when indeed the plaintiff/applicant is alleged having failed to pay the mortgage. The Diamond Trust Bank exercised its power to sell for non payment of the loan. The plaintiff/applicant has come to court severally seeking orders in various files for an injunction to restrain that sale.

7. The respondent's defendants rely on the case laws of

a) Central Kenya Ltd v Trust Bank Ltd & Others

CA 215/96 Kwach Tunoi Pall JJA

b) Vinette Dauphine Okola v Akech Okola & Others

HCCA 316/06 Kasanga, Azangalala JJ

c) Ze Yu Yang v Nova Industrial Products

(2003) EA LR 362 (Hccc9/2003), Nyamu, J.

d) East African Development Bank

v

Hyundai Motors Kenya Ltd

CA 194/04 Tunoi, Bosire Okubasu JJA

In which the principle is well set out. Namely, that once a Bank has exhausted its power of sale; and that the property is sold and transferred to a new purchaser the title of the purchase, shall not be impeached on the ground that no case had arisen to authorize the sale; that due notice was not given; or that the power was otherwise or improperly or irregularly exercised. Section 69B Transfer of Property Act.

8. The applicant is to demonstrate that a prima facie case has been made out. This has not been established. Being persuaded by the authorities before court I decline to grant the injunction sought. There will be costs to the defendants.

DATED THIS 12TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

F.Ashitabashi instructed by Ashitabashi & Co. Advocates for the plaintiff

R. Nadida instructed by Nadida & Co. Advocates for the 3rd defendant respondent – present

A. Wadabwa instructed by Wandabwa & Co. Advocates for the 4th defendant/respondent – present

S. Wanjohi instructed by Wanjohi & Co. Advocates for the 1st and 2nd defendants/Respondent - present