

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 520 of 2001

NATIONAL BANK OF KENYAPLAINTIFF

VERSUS

GEORGE KIMANI NDUNG’U.....DEFENDANT

AND

WATTS ENTERPRISES.....1ST THIRD PARTY/2ND RESPONDENT

WAGLY AUCTIONEERS.....2ND THIRD PARTY/3RD RESPONDENT

RULING

Before me is an application by the defendant purportedly made under the provisions of Order XX1 Rule 54, Order X11 Rule 8 of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act. The defendant is seeking an order of this court to stay execution of the decree herein pending the hearing and determination of the application. He seeks a further order to compel Expeditious General Merchants, the agent of the plaintiff, to produce and furnish to the court accounts of the proceeds recovered after the sale of all moveable properties proclaimed and attached on 18th October 2001 by the said auctioneer in satisfaction of the decree herein. He further prayed for an order of the court to declare null and void the notification of sale issued by Messrs Watts Enterprises and Wagly Auctioneers seeking to dispose of the defendant’s property, being LR No. Ngenda/Karuri/T.191 Thika district. The grounds in support of the application are on the face of the application. The same is supported by the annexed affidavit of George Kimani Ndungu, the defendant. The plaintiff did not file any pleadings in response to the defendant’s application.

At the hearing of the application, I heard the submission made by Mr. Macharia on behalf of the defendant. Upon evaluating the facts in support of this application, it is clear to the court that the defendant’s application is misguided. The plaintiff sued the defendant seeking judgment for the sum of KShs.1,347,824/15. The plaintiff claimed the amount was in respect of the balance of the sum which had been advanced to the defendant. The defendant failed to enter appearance within the requisite period. Judgment was entered in default of appearance. Execution was levied against the defendant. The auctioneer seized the defendant’s properties and apparently sold them to satisfy the decree. The defendant made an attempt to set aside the said ex-parte judgment. The application was dismissed on 6th November 2001 for want of prosecution. It now appears that the defendant had charged his property to the plaintiff to secure the loan whose default led to the filing of the present suit by the plaintiff.

The plaintiff now wishes to exercise its statutory power of sale by selling the defendant’s parcel of land. Two auctioneers have issued redemption notices to the defendant. Upon receiving the said notices, the defendant rushed to this court seeking to stop the said sale. The provision under which the defendant made the present application relates to objection proceedings after attachment in execution of the decree. It is not applicable in the circumstances of this case. It is evident that the defendant has no pending suit against the plaintiff. He did not file a counterclaim to the present suit. There is no pending suit which can entitle this court have jurisdiction to grant the orders sought. This court cannot issue orders on applications filed *in vacuo*.

Secondly, it is apparent that the defendant is confused as regard the nature of his cause of action. The plaintiff is seeking to realize its security by selling the property which was charged to it by the defendant. The present suit is a recovery process independent of the plaintiff's right to realize the security by exercising its statutory power of sale pursuant to the instrument of charge. If the defendant was aggrieved by the plaintiff's exercise of the said statutory power of sale, he is at liberty to file a suit against the plaintiff, independent of the present one. The cause of action in the present suit is completely different from the cause of action the defendant is unprocedurally seeking to canvass in the present application.

From the foregoing, it is clear that the defendant's application is misconceived. The same is for dismissal. It is hereby dismissed but with no orders as to costs. The defendant is at liberty to go back to the drawing board and approach the court in the proper manner contemplated by the law.

DATED at NAIROBI this 22nd day of OCTOBER 2008.

L. KIMARU

JUDGE