REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 633 of 2004

THUGI RIVER ESTATE LTD.…….....……1ST PLAINTIFF

P. K. MUITE…….…….....……....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD….....…...1ST DEFENDANT

AND

UNIKEN MARKETING SERVICES LTD……...PROPOSED 2ND DEFENDANT

WA-GATHARU LIMITED…….....…….PROPOSED 3RD DEFENDANT

RULING

The issue for determination by this court in this application is whether the plaintiffs can restrain by means of an interlocutory injunction the persons who purchased the suit properties pursuant to the

exercise of the statutory power of sale by the defendant. The other issue for determination is whether the plaintiffs can enjoin the said purchasers to the present suit by seeking leave of the court to amend their pleadings.

The facts of this case are more or less not in dispute. It is common ground that the plaintiffs charged their properties i.e. LR No. 8747, Thika and LR No.12882/35, Karen to the defendant to secure certain financial accommodation. It is not disputed that the plaintiffs defaulted in repaying the said loan. The plaintiffs dispute the rate of interest charged by the defendant. The plaintiffs are of the view that the defendant charged the rate of interest, penalties and other charges that were not in compliance with the law. The plaintiffs filed the present suit seeking, basically, the court's determination of the amount which the plaintiffs ought to pay after accounts have been taken. It is further common ground that before and after the suit was filed, the plaintiffs entered into negotiations with the defendant with a view to amicably resolving the matter out of court. The negotiations appear to have taken place for a considerable period of time. Correspondences were exchanged. The 1st plaintiff wrote a letter to the managing director of the defendant on the 11th December 2001. The material part of the said letter states as follows:

"*That in the event of payment not being made on or before 31st January 2002; it is both in my and the bank's interest that the charged properties be sold by private treaty by estate agents of your choice. In this connection, I reiterated my willingness to sign all the necessary papers/documentation to facilitate such sale."*

The plaintiffs made an offer to the defendant to redeem the suit properties by paying the sum of KShs.150,000,000/= in full and final settlement of the debt owed. The offer of the plaintiffs was rejected by the defendant.

It is further common ground that in exercise of its statutory power of sale by mortgagee, the defendant sold the two suit properties by private treaty. LR No. 12882/35, Karen was sold to Uniken Marketing Services Limited for the sum of KShs.35,000,000/=. The defendant stated that it obtained the best possible price for the property since in accordance with the valuation report, the forced sale value of the property was KShs.24.5 million. The plaintiffs dispute this fact. They submitted that the said property was sold at a price that was undervalued to an extent that it amounted to fraudulent exercise of the statutory power of sale by the defendant. It is further not disputed that the defendant sold by private treaty LR. No. 8747/Thika to Wa-Gathagu Limited. The property was sold for KShs.82,000,000/=. According to the defendant, the forced sale value of the property was KSh.50,000,000/=. As expected, the plaintiffs raised a red flag concerning the price that the said suit property was sold. They were of the view that the property was sold at a price that it did not reflect its true market value. It is further common ground that after the said sale by private treaty, the suit properties were registered in the name of the said purchasers. It is these purchasers, namely Uniken Marketing Services Limited and Wa-Gathagu Limited that the plaintiffs seek to enjoin as 2nd and 3rd defendants respectively in the present suit.

Prior to the hearing of the application, the parties to this application, including the proposed 2nd and 3rd defendants, agreed by consent to file written submissions. At the hearing of the application, I heard oral submissions made by Mr. Kilukumi for the plaintiffs, Mr. Ojiambo for the defendant, Mr. Havi for the proposed 2nd defendant and by Mr. John Mburu for the proposed 3rd defendant. The plaintiffs, who are still in possession of the suit properties, essentially wish to have the *status quo* now existing in respect of the suit properties be maintained pending the hearing and determination of the suit. The plaintiffs further wish to amend their plaint to reflect the new developments that have taken place since the suit properties were sold and transferred to the proposed 2nd and 3rd defendants.

The plaintiffs further invoked the doctrine of *lis pendens* in support of their application for the said *status quo* to be maintained. On the other hand, the proposed 2nd and 3rd defendants do not wish to be enjoined to the present suit. They insist that, having purchased the suit properties in a valid sale by a mortgagee in exercise of its statutory power of sale, their titles cannot be impeached. They reiterate that, the only remedy available to the plaintiffs is to seek compensation by suing the defendant for damages. On its part, it was the defendant's case that it had acted lawfully when it exercised its statutory power of sale

and, in the circumstances, the plaintiffs cannot challenge the sale and transfer of the suit properties to the proposed 2nd and 3rd defendants.

Can the plaintiffs impeach the sale and transfer of the suit properties to the proposed 2nd and 3rd defendants by challenging the defendant's exercise of its statutory power of sale pursuant to the mortgagee instrument? I think it is now settled law that where a mortgagee sells a property (*which was charged to it*) pursuant to its statutory power of sale, the equity of redemption of the mortgagor is extinguished. The equity of redemption of the mortgagor is extinguished at the fall of the hammer in a sale by public auction or where, in a sale by private treaty, when it is established that the mortgagee has entered into a valid sale agreement with a purchaser. (See Patrick Kanyagia vs. Damaris Wangechi & Others CA Civil Appeal No. 150 of 1993 (*Nairobi)* (*Unreported*). In the present application, it is clear that although the plaintiffs have raised serious issues concerning the validity of the valuation reports that were relied on by the defendant to sell the suit properties, that fact alone cannot make this court to reach a determination to the effect that the proposed 2nd and 3rd defendants ought to be enjoined to the suit. It is evident that the plaintiffs beef is with the defendant. The plaintiffs can amend their pleadings to reflect the changed circumstances on the ground but cannot seek to enjoin the proposed 2nd and 3rd defendants to the present suit. The court was persuaded that it was the plaintiffs who had earlier agreed with the defendant for the suit properties to be sold by private treaty in the event that the plaintiffs were unable to re-pay the amount then outstanding within a specified period.

I think it is now settled law that the doctrine of *lis pendens* as set out in Section 52 of the Transfer of Property Act is not applicable where there was no prohibitory order issued by the court preventing all dealings in the suit property at the time of the sale and transfer. (See Francis Mureithi Githuku vs. Patrick Kiarie Kagwanja & 3 others Nairobi HCCC No.456 of 2005 (*unreported*)). I decline to take the broad definition of the doctrine of *lis pendens* as proposed by the plaintiffs. The plaintiffs relied on the legal treatise Mulla, The Transfer of Property Act 1882, 9th Edition, at page 367 where the learned author stated as follows:

"*(3) Lis pendens*

The section enacts the doctrine of lis pendens which is expressed in the maxim 'ut lite pendente nihil innovetur.' It imposes a prohibition on transfer or otherwise dealing of any property during the pendency of a suit, provided the conditions laid down in the section are satisfied. The scope of the section is discussed in the undernoted cases. The principle on which the doctrine rests is explained in the leading cases of Bellamy vs. Sabine, (1857) DeG & J586) where Turner, LJ said:

'*It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."*

The position in Kenya as regard the application of the doctrine of lis *pendens*, in my view, is that for a party to rely on the said doctrine, he must establish that a prohibitory order was issued by the court restraining any dealings in respect of the suit property pending the hearing and determination of the suit. In the present application, it was evident that there was no court order restraining the defendant from exercising its statutory power of sale during the pendency of the suit. The plaintiffs cannot therefore rely on the said doctrine in their bid to impeach the transfer of the suit properties to the proposed 2nd and 3rd defendants.

Further, under Section 69B(2) of the Transfer of Property Act, the title of a purchaser of a property sold by a mortgagee in exercise of its statutory power of sale cannot be impeached with the sole purpose of reversing the said sale and transfer. The only remedy available to the mortgagor is to seek compensation by way of damages against the person who improperly or irregularly exercised the said statutory power of

sale. In the present application, the plaintiffs remedy is against the defendant. They cannot seek to enjoin the purchasers of the suit property in the suit. That the title of a purchaser cannot be impeached by the mortgagor has been given judicial approval by various courts. For instance, Ochieng J held in Nairobi HCCC No. 224 of 2005 Sande Investment Limited & Others vs. Kenya Commercial Bank & others *(unreported*), in a similar case to the present, one at page 10 of his Ruling as follows;

"*That being the case, I do not see how the plaintiffs intend to go round the provisions of Section 69B of the Transfer of Property Act. I think that the plaintiffs may only be able to make a claim for compensation, by way of damages, as against the mortgagee. This decision is arrived at on the basis of the undisputed fact that the suit property had already been sold and transferred to the 5th defendant. The plaintiff did produce copies of the extract of title, as an exhibit marked "SOR7", which clearly showed that the suit property was transferred to Westlands Residential Resorts Limited, on 31st December 2004. Furthermore, as the title of the purchaser is not impeachable, it would appear that there would be no need of enjoining the 5th defendant into this suit."*

The Court of Appeal in Grant vs. Kenya Commercial Finance Company Limited & others [1995] LLR 4098 held that once a mortgagee has exercised its statutory power of sale and transferred the suit property to the purchasers pursuant to the provisions of Section 69B of the Transfer of Property Act, the only remedy available to the mortgagor is to sue the mortgagee for damages.

In the present application, it is common ground that the proposed 2nd and 3rd defendants are the duly registered owners of the suit properties having purchased the same from the defendant, a mortgagee exercising its statutory power of sale. It was evident that the plaintiffs were seriously aggrieved in the manner in which the suit properties were sold by the defendant. The plaintiffs have challenged the said sale. I think the plaintiffs are at liberty to pursue their claim for damages against the defendant. The plaintiffs no longer have any right to property in respect of the suit parcels of land that can be protected or preserved by this court. The *status quo* as it exists now is that the proposed 2nd and 3rd defendants are the registered owners of the suit properties. That is the *status quo* that this court is mandated to be preserve.

I therefore find no merit with the plaintiffs' application dated 25th June 2008. The application seeking to enjoin the proposed 2nd and 3rd defendants into this suit is hereby dismissed. As purchasers of the suit properties, the proposed 2nd and 3rd defendants' titles cannot be impeached under Section 69B of the Transfer of Property Act. They are not necessary parties to these proceedings. The plaintiffs are granted leave to amend their plaint in terms of the proposed amended plaint provided that any reference to the proposed 2nd and 3rd defendants *(as the defendants in the suit)* is deleted. The said amended plaint shall be filed and served within fourteen (14) days of today's date. The defendant shall be at liberty to file a response thereto within fourteen (14) days of service.

The application for injunction, lacking in merit, and for the reasons stated above is hereby dismissed. The defendant and the proposed 2nd and 3rd defendants shall have the costs of the application. The interim orders granted are hereby vacated.

DATED at NAIROBI this 22nd day of OCTOBER 2008.

L. KIMARU

JUDGE