



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 287 of 2008

PETER NGANGA MUIRURIPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD. ..DEFENDANTS

R U L I N G

There is now before the court a Notice of Motion dated 9/9/2008 supported by affidavit of David Swao sworn on the same day and on grounds set out on the application for 3rd defendant and also a affidavit of 2nd defendant Chiera Waithaka sworn on 6/10/08.

The application seeks orders for the review of order given by this court on 21/7/2008 and on the grounds set out therein. It is also sought to discharge temporary injunction granted on 21/7/08 and substitute the same with an order striking out the plaintiff's suit.

I have perused the record, the ruling dated 21/7/2008 was made in respect of application dated 28/5/08 and the orders were in respect of that application. However on 30/6/08 when the application came up for hearing a Preliminary Objection was raised dated 26/6/08. The Preliminary Objection raised were:

1. Suit and application cannot lie against 3rd defendant for want of locus standi
- 2 That the prayers being sought in both plaint and application are in law incapable of being granted by this honourable court
3. That in any event the suit is an abuse of the process given the admitted existence of HCC No.1928 of 2000
4. This suit and application does not disclose any cause of action against 3rd defendant

On the point numbered 1 and 2 it was argued that the property in dispute had already been sold and transferred to the 2nd defendant "Chiera waithaka" and the suit property is now charged to 3rd defendant. The plaintiff's right to equity of redemption was lost as soon as first defendant exercised the chargee power of sale. The second defendant cannot be stopped from dealing with the property and his title is impeachable. The applicant's right was only in damages. The other defendants supported the submissions and added that since there was no prayer for permanent injunction in the plaint temporary injunction cannot be granted.

It was also submitted that suit is res judicata offending **Section 7 Civil Procedure Act** quoting **HCCC No.1928/1998** which was at that time dismissed. It is quite correct to submit that the ruling made on 21/7/08 did not consider the issues raised in the Preliminary Objection but proceeded to decide on the substantive application which was not argued before the court.

The basic principle of the rule of law is that a court must hear all the parties before pronouncing judgment on issues before it. For reason of the failure to comply with that principle, the said ruling made on 21/7/08 is hereby set aside and orders issued discharged. The court is informed ground No. (h) that **HCCC No.1928/2000** has been reinstated by the court (Hon. Justice Lesiit) on 13/6/2008. That suit is said to be between the plaintiff and the first defendant Housing

Finance Co. of Kenya Ltd and Taifa Auctioneers, agent of first defendant.

This suit was filed on 28/5/08 against HFCK as first defendant, Chiera Waithaka as second defendant and Barclays Bank of Kenya Ltd. The plaint was amended on 28/6/2008 introducing new grounds of non compliance with **Section 59 ITPA**, invalidity of the charge, fraud and collusion between the defendants to sell to 2nd defendant property by private treaty at undervalue, insider trading, breach of plaintiffs fundamental constitutional rights as given under **Section 70** thereof. In the first suit the plaintiff was complaining about failure to serve statutory notice and non compliance with **Section 15, Auctioneers Act** and the charges of non contractual rates of interest.

There are now two suits by the same plaintiff namely **HCC No.1928 of 2000** and **287 of 2008**. In such circumstances **Section 6** of the **Civil Procedure Act** prohibits a court to proceed with trial of a suit where the matters in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title where suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The marginal note reads, “stay of suit”. It is my view that the provisions of this **Section** do not call for dismissal of the present suit.

The amended plaint in this case challenges the 3rd defendant with collusion and insider trading restrictive trade practices, issues which have not yet been argued in court. My view is that there is an important point of law to be argued between the parties in this kind of suit namely ; has a chargor any right to see as to how the chargee deals with the charged property, notwithstanding that the equity of redemption has been extinguished.

The disclosed facts are that the value of the property in August 2000 was Kshs.7,000,000/= and the outstanding amount was Kshs.10,364,523.86. The amount advanced was Kshs.5,000,000/=. Then the property was sold for Kshs.18,000,000/=. The authorities relied upon by the defendants:

1. Civil Appeal No.150 of 1993 – Cap. Patrick Kanyagia and another vs. Damaris Wangechi and 2 others. In that case the court quoted Section 60 of ITPA as amended by Act No.20 of 1985 as setting out the right of a mortgagor to redeem.

“60. At any time after the principal money has become payable the mortgagor has a right on payment or tender. or to execute That any right in derogation of his interest transferred by this Section has not been extinguished by the act of the parties or by order of a court and is exercised before the mortgagee has under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property.”

It is clear then that the equity of redemption is extinguished when a mortgagee has entered into a valid sale agreement with a third party. What if the right to exercise power of sale was wrongfully exercised? The same court quoted Section 69 B (2) T.P.A states:-

“2. Where a transfer is made in exercise of the mortgagee statutory power of sale, the title of the purchaser shall not be impeachable on the ground:

- (a) that no case had arisen to authorize sale or
- (b) that due notice was not given or
- (c) that the power was otherwise improperly or
irregularly exercised

and a purchaser is not, either before or on transfer concerned to see or inquire whether a case has arisen to authorize the sale or due notice has been given or the power is otherwise properly and regularly exercised but any person damnified by unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

The defendants also referred to authority of Down Hill Ltd. vs. Herith Ali El Busaidy & City Finance Bank Ltd. – Civil Appeal No.254 of 1999. In that case there were allegations of fraud and collusion and undervalue. It was the judgment of Court of Appeal that the mortgagee remedy was in damages not injunction.

The third authority was John Mimugu Kariuki vs. Equity Building Society and 3 others. This was a High Court decision. Hon. Justice Fred A. Ochieng followed the Court of Appeal judgments above referred to and held: “the law as it stands expressly excludes the plaintiffs from seeking remedies from the (purchasers). Their remedy if any lies in

damages.” The judge proceeded to dismiss interlocutory applications against the defendants.

An examination of the original plaint and the amended plaint discloses that the plaintiff has not prayed for an award of damages. Therefore since the transfer of the suit property was registered on 20.3.08 and an agreement for sale was entered into on 20/2/2008 before this suit was filed the provisions of Section 69 B 2 comes into operation. The title of the 2nd defendant has become impeachable and no injunction can be issued against him.

In the circumstances the plaintiff is seeking for declarations in his plaints. Order 11 rule 7 provides that no suit shall be open to objection on ground that a mere declaratory judgment or order is sought thereby and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.

It is my view after consideration of the above that orders of injunction cannot be granted to the plaintiff as prayed in the application dated 28/6/08. Only declaratory judgment is sought. The plaintiff complains that his fundamental rights entrenched under the Constitution Section 70 are breached. However it is not clear in which way. The process governing the relationship of lender and borrower is set out by law and it has not been shown that that law is contrary to the provisions of the Constitution as far as the applicant is concerned. Upon examining the provisions of ITPA as it relates to the mortgagor and mortgagee, it is clear that once the mortgagor has lost his right of equity of redemption he has no other rights other than to sue for damages in appropriate case. Such an issue can be pursued in the first suit still in existence namely HCC No.1928 of 2000 above-mentioned.

In the circumstances, I uphold the Preliminary Objection by defendants and order this suit and application dated 28/6/08 to stand dismissed for being an abuse of process.

Each party to bear its own costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 13th day of October 2008.

JOYCE N. KHAMINWA

JUDGE