



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

Civil Case 443 of 2008

JOHN BUNDI MAGIRI..... PLAINTIFF

VERSUS

CO-OPERATIVE BANKK OF KENYA LTD.....1ST DEFENDANT

ISABEL WARUGURU MWANGI.....2ND DEFENDANT

RULING

On 31.10.2008, Application dated 29.11.2008 was argued before the court by Mr. Mulandi. At this time he knew that the subject matter of suit Plot No. Nairobi/Block 82/2190 owed by Applicant had already been sold to 2nd Defendant. However, he submitted the court ought to grant order as prayed under prayer 3 in the application namely to restrain the first and second Defendants from interfering with the Plaintiff quiet possession of the said parcel of land. The grounds set out are that the first Defendant has illegally sold the Applicants land without issuing Statutory Notice and that a notice to vacate has been issued by 2nd Defendant.

However, the Applicant admits being indebted in the sum of Kshs.1,665,029.00 which he promised to repay after recovering proceeds of his claim in HCCC No.1170/2003 which is yet to be finalized.

That since September 1999 he never heard from 1st Defendant until about 16.07.08 when he received a Notice to Vacate from Advocates Gadhia & Mucheru because 2nd Defendant had purchased the house sometime in January 2007.

From what is stated above, since the year 1999 the Applicant has never made any payment towards his indebtedness.

In his further affidavit paragraph 15, the Applicant says “***it is true that statutory power of sale had accrued.***” The Applicant alleges that his property was sold at kshs.225,000.00 but it shows it was sold at 900,000 /=-.

Now, considering the admissions and non payment of anything for such a long time and the uncertainty of winning the case pending, Nairobi HCCC No.1170/2003, is it reasonable to say that there are no prospects of the Applicant ever paying the debt? In the Appeal No.39 of 2002, judgment of Kwach JA where the Hon. JA stated “***If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times, for instance challenging contractual interest rates, Banks will be crippled if not driven out of business altogether and no serious investors will bring their capital in country whose courts are a haven for defaulters.***”

The law is as stated in Halsbury Laws of England Vo. 32(4th Edition) paragraph 725 “*When a mortgagee may be restrained from exercising power of sale, the mortgagee will not be restrained from exercising his power of sale because the amount due is disputed or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagee claims to be due to him unless on the terms of the mortgage the claim is excessive.*”

As things stand here, there is no offer that has been forthcoming since 1999. And therefore the sale has taken place. According to the authorities well known by Counsel on both sides, the Court of Appeal has settled the matter that where the charged property has been sold the title of the buyer is impeachable but any claim for irregular exercise of power of sale may be compensated in damages.

However, it is acknowledged that a court cannot countenance irregularities, fraud and dishonesty and therefore where there is evidence of such activities the court will take action. This is why Counsel for Applicant stated that he is aware of cases where sales and transfers in such circumstances are cancelled.

It is the reason why he submits that the purchaser in this case ought to be restrained pending completion of the suit.

I have examined the 2nd Defendants Affidavit and statement of Defence and it is clear that she purchased in an auction and there is no evidence of collusion on her part such as would warrant her sale being cancelled.

In the circumstances, I do not see any reason to keep her from the property she is the registered owner. The application is dismissed with costs to 2nd Defendant.

It is so ordered.

DATED this 25th day of November, 2008.

JOYCE N. KHAMINWA

JUDGE