



REPUBLIC OF KENYA

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

CIVIL SUIT 84 OF 2008

LOUIS ROGER OUANDJI..... PLAINTIFF

VERSUS

BANK OF INDIA.....1ST DEFENDANT

TRACTOR BELL LIMITED.....2ND DEFENDANT

RULING

The plaintiff filed an application pursuant to the provisions of **Order XXXIX Rules 1 and 2** of the **Civil Procedure Rules** and **Section 63(c) and 3A** of the **Civil Procedure Act** seeking orders of temporary injunction to restrain the defendants by themselves or their agents from transferring, alienating, disposing, selling or otherwise dealing with LR. No. 330/417 pending the hearing and determination of the suit. The plaintiff further prayed for an order of the court freezing the plaintiff's loan account No.4150272003 held by the 1st defendant AT its Nairobi Branch.

The grounds in support of the application are on the face of the application. The plaintiff contends that the 1st defendant had on 8th February 2008 purportedly exercised its statutory power of sale under the mortgage instrument over LR. No.330/417 (*hereinafter referred to as the suit property*) by selling the suit property or part of it in total breach of the law. The plaintiff contends that the 1st defendant failed to comply with the provisions of **Section 69(1)** of the **Indian Transfer of Property Act**. He complained that he was not served with a valid statutory notice before the 1st defendant purported to exercise its said statutory power of sale. He states that the 1st defendant failed to abide by the terms of the loan agreement by not disbursing only the agreed sum of KShs.60,000,000/= but instead disbursing the sum of KShs.50,912,320/80. The plaintiff was of the view that the 1st defendant's right to exercise its statutory power of sale by mortgagee had not accrued. The plaintiff contends that the 1st defendant was guilty of fraud and had acted in extreme bad faith. He states that the 2nd defendant had proceeded and participated in the sale and auction even after having notice of the irregularities and breaches of the law. The plaintiff was of the view that the 1st defendant lacked legal capacity to enter into any agreement with the plaintiff or execute any legal mortgage. He urged the court to intervene to prevent the 1st defendant from completing the said sale transaction. The application is supported by the annexed affidavit of Louis Rogers Ouandji. He swore a further affidavit in support of his application.

The application is opposed. The 1st defendant's advances manager, Ashok Kumar Pathak swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the 1st defendant had exercised its statutory power of sale after the plaintiff had defaulted in repaying the loan that was advanced to him. He deponed that the 1st defendant had complied with all the statutory requirements

before exercising its statutory power of sale. He swore that the 1st defendant had served the plaintiff with the requisite statutory notice through his last known postal address and had further issued the redemption notice before advertising the suit property for sale. He deponed that the property which was sold was a subdivision of the suit land parcel of which had been so subdivided with the consent of the plaintiff. He deponed that the public auction was conducted in accordance with the law as the suit property was sold to the highest bidder. He was of the view that the 1st defendant, having complied with the law in the exercise of its statutory power of sale, it was now available to the plaintiff to challenge the said sale. He urged the court to dismiss the application with costs.

The 2nd defendant also opposed the application. It filed notice of preliminary objection which was heard and disposed of by Okwengu J. It also filed grounds in opposition to the application. Njama Wambugu, a director of the 2nd defendant swore a replying affidavit in opposition to the application. In essence, it was the 2nd defendant's contention that the court had no jurisdiction to entertain the plaintiff's claim against the 2nd defendant since the plaintiff's suit was based on an alleged breach of a mortgage agreement between the plaintiff and the 1st defendant which the 2nd defendant was not privy nor party to. The 2nd defendant contends that it purchased the suit property in a legally convened public auction and therefore its purchase of the suit property could not be impeached. The 2nd defendant states that the plaintiff had no cause of action against it in view of provisions of **Section 69B** of the **Transfer of Property Act**, and the plaintiff's remedy, if any, lay in seeking damages against the 1st defendant. The 2nd defendant contends that it would suffer prejudice if the orders sought by the plaintiff are granted since it already has proprietary interest in the suit parcel of land. The 2nd defendant was of the view that since the plaintiff had quantified the damages it would likely suffer, damages was an adequate remedy in the circumstances and therefore injunction ought not to issue. The 2nd defendant contends that the balance convenience tilts in its favour since it had acted in good faith when it purchased the suit property. It urged the court to dismiss the plaintiff's application with costs.

The 1st and 2nd defendants filed skeleton submissions before the hearing of the application. At the hearing of the application, I heard the submissions made by Mr. Kamande on behalf of the plaintiff, by Mr. Karanja on behalf of the 1st defendant and by Mr. Havi on behalf of the 2nd defendant. I have carefully considered the said rival submissions made. I have also read the pleadings filed by the parties to this application in support of their respective opposing positions. I have also considered the authorities cited by the parties in support of their respective opposing arguments. The issue for determination by this court is whether the plaintiff established a case to entitle this court to find in his favour and grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an order of injunction are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420.**)”*

In reaching determination whether to grant the interlocutory injunction sought, this court has to consider whether there was a valid mortgage agreement which was entered between the plaintiff and the 1st defendant. The second issue for determination is whether the plaintiff mortgaged the suit property to secure the loan that was advanced to him; Thirdly, whether the plaintiff breached the terms of the mortgage by failing to repay the loan that was advanced to him thus necessitating the 1st defendant to exercise its statutory power of sale; Fourthly, whether the 1st defendant issued the statutory and redemption notices before purporting to exercise its statutory power of sale; And fifthly, whether the property in the suit property passed to the 2nd defendant during the public auction thereby extinguishing the plaintiff's equity of redemption; And lastly, whether the plaintiff made a case to entitle this court

grant the interlocutory injunction sought.

As regard the first issue, it is not disputed that the plaintiff applied to the 1st defendant for an advance of a loan of KShs.60 million. The plaintiff offered the title in respect of LR No. 330/417 as security. It appears that the apartments which the plaintiff intended to construct on the suit property were to be constructed on part of the suit land and not on the entire parcel of land. The plaintiff and the 1st defendant agreed to subdivide the suit land resulting in the creation of two parcels of land namely, LR No.330/1290 and LR No. 330/1291. It is not disputed that the 1st defendant favourably considered the plaintiff's loan application and disbursed to him up to the sum of KShs.50,912,302/80.

It is further not disputed that the suit property was mortgaged to secure the said loan amount. It is further not in dispute that the plaintiff defaulted in repaying the loan that was advanced to him resulting in the 1st defendant's exercise its statutory power of sale. An issue that was passionately argued by the plaintiff is whether the 1st defendant had legal capacity to sell part of the mortgaged property in exercise of its statutory power of sale. I have looked at the applicable law and I have not found any law that prohibits a mortgagee, in the exercise of its statutory power of sale, from disposing or selling part of the mortgaged property in order to secure repayment of the amount that it had advanced to the borrower. The fact that the 1st defendant sold part of the mortgaged property did not impeach the said sale by public auction.

The plaintiff complained that he was not served with the requisite statutory notice before the 1st defendant purported to exercise its statutory power of sale. It was the plaintiff's contention that the said statutory notice was sent to the wrong postal address. He further complained that the said statutory notice sent to him when he was out of the country. The plaintiff annexed a copy of the entries made in his passport in support of his assertion that he was out of the country when the said statutory notice was purportedly issued to him. In response, the 1st defendant annexed a copy of the statutory notice which was sent to the plaintiff by registered post. The said statutory notice is dated 22nd August 2007. It annexed to the affidavit of Ashok Kumar Pathak as annexure "AKP6". The certificate of posting was annexed as annexure "AKP7". The postal address in the said statutory notice is P.O. Box 41479, Nairobi. The plaintiff contends that his postal address is P.O. Box 40479, Nairobi. In his pleadings filed in court, the plaintiff uses the address P.O. Box 54627, Nairobi.

I had occasion to peruse the application the plaintiff made to the 1st defendant to be advanced the loan and also the mortgage instrument which was executed between the plaintiff and the 1st defendant. In both documents, the plaintiff stated his postal address to be C/o P.O. Box 41479, Nairobi. The plaintiff's complaint that the statutory notice was not served upon him because it was sent to the wrong address is not therefore supported by evidence. It was evident that the plaintiff was given the requisite statutory notice in accordance with **Section 69 of the Transfer of Property Act**. He was required to redeem the mortgaged property by paying the amount demanded by the 1st defendant within three (3) months of the said notice. The fact that the plaintiff was out of the country at the time of the notice is not a factor to be considered by the court in determining whether or not the 1st defendant complied with the law regarding the issue of the statutory notice. Upon perusal of the entries made in the plaintiff's passport, it is evident that the plaintiff returned to the country in the month of September 2007. It was inconceivable that he was unaware that the 1st defendant intended to realize the security in view of his failure to repay the loan that was advanced to him. I do therefore hold that the 1st defendant established to the required standard of proof that it complied with the law by issuing the requisite statutory notice to the plaintiff.

As to the redemption notice, Ashok Kumar Pathak annexed to his affidavit a copy of the redemption notice which was issued by Mssr. Dalali Traders, a firm of auctioneers to the plaintiff. The said redemption notice was served upon the plaintiff on 7th December 2007. The plaintiff acknowledged receipt of the redemption notice by signing on a copy of the same. The plaintiff did not deny that the said redemption notice was served on him. The only issue that the plaintiff raised in regard to the said redemption notice is that it referred to a parcel of land known as LR.330/417 instead of the suit property. The court earlier explained that the property which was sold is a sub-division of LR. No.330/417. Even if this court were to hold that the property had been misdescribed in the redemption notice, it is trite law that

a misdescription of the property in the redemption notice cannot render invalid the subsequent sale by the mortgagee in exercise of its statutory power of sale. What is of import is that the redemption notice put the plaintiff on notice to the effect that within forty five (45) days of the issuance of the said redemption notice, the mortgaged property would be sold unless the plaintiff redeemed the property by paying the amount demanded by the bank. It is therefore evident that the plaintiff was aware that the 1st defendant intended to realize the security by selling the suit property. There is no evidence on record to suggest that the plaintiff made any effort to redeem the suit property by settling the amount that was demanded by the 1st defendant. Although the plaintiff claimed that the 1st defendant had loaded penalty charges and unconscionable and oppressive interest rates on his loan account, that fact alone cannot constitute a ground to prevent the 1st defendant from exercising its statutory power of sale as a mortgagee.

There is no dispute that the 1st defendant sold the suit property in exercise of its statutory power of sale on 8th February 2008. The said sale was by public auction. The said sale occurred after the auctioneer had advertised the property for sale in one of the local daily newspapers. The plaintiff complained that the 1st defendant right to sell the suit property in exercise of its statutory power of sale had not accrued since the bank had failed to disburse the entire sum that it had agreed to advance to the plaintiff. What is however clear from the pleadings is that the plaintiff failed to repay the part of the loan that was advanced to him and as a result the 1st defendant exercised its statutory power of sale. The plaintiff cannot use the fact of the 1st defendant's failure to disburse the entire sum applied for in the loan application to impeach or question the 1st defendant's right to exercise its statutory power of sale.

Further, it was evident that at the fall of the hammer, the 2nd defendant was declared to the purchaser of the suit property. Its bid of the sum of Kshs.60.5 million was the highest bid and was accepted by the auctioneer. The 2nd defendant paid to the auctioneer the sum of Kshs.15.125 million as a deposit of the purchase consideration. A memorandum of sale was executed in evidence that the 2nd defendant's bid had been accepted. Although the suit property has so far not been transferred to the 2nd defendant, it is clear that the property in the said parcel of land has already passed to the 2nd defendant. The plaintiff cannot therefore claim that he is still the owner of the suit property. Once the hammer fell, the plaintiff was divested of the property.

The fact that the 2nd defendant is not already registered as the owner of the suit property does not render the agreement any less efficacious. As was held by the Court of Appeal in the recent case of **Bawan Roses Limited vs Barclays Bank of Kenya Limited CA Civil application No.178 of 2008 (UR 112/2008) (unreported)** page 8 of its ruling:

"It is not true that the agreement for sale dated 24th September 2008 is of no consequence. By the agreement of sale, the bank has divested itself of its rights as a mortgagee to the properties and conferred the rights to the properties, subject to completion, on the purchaser. This court has no jurisdiction in the presence proceedings to adjudicate on the legality or otherwise of the agreement of sale. The agreement of sale can only be questioned in an appropriate forum. In our view, until the agreement of sale is set aside, it has pre-empted the present application and rendered it futile."

Similarly the Court of Appeal in **Kanyagia & anor Vs Damaris Wangechi & 2 others CA civil appeal No. 150 of 1993** (unreported) Shah J. A held that:

"When does the title pass; or putting it another way: when does the right of redemption vested in the mortgagor come to an end? Section 60 of T.P.A (Transfer of Property Act) as amended by Act No. 20 of 1985 sets out the right of a mortgagor to redeem...It is clear therefore that Muchemi's equity of redemption came to an end when the Kanyagias signed the contract of sale and not later. However, it is not in dispute that even registration of the title of the suit property in favour of the Kanyagias has also been effected."

According to **section 69B (2) of the Transfer of Property Act**, a transfer made by a mortgagee in exercise of its statutory power of sale cannot be impeached on the grounds that no case had arisen to

authorize or warrant the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised. The only remedy available to any person who is aggrieved by the exercise of the statutory power of sale by a mortgagee is to sue for damages.

The plaintiff complained that the 1st defendant had sold the suit property at a price that was an undervaluation of the true value of the same. The Plaintiff annexed a letter of offer from an interested purchaser who indicated that he is willing to pay the sum of Kshs.100 million for the suit property. However, this court considered the possibility that said offer made infest with a pinch of salt since the same was made after the property in the suit parcel of land had already passed to the 2nd defendant. If the plaintiff is aggrieved that the property was sold at a value that did not reflect its true valuation, he is at liberty to pursue the issue by filing an appropriate suit against the 1st defendant for damages. As was held by the Court of Appeal in **Downhill Limited vs Harith Ali El-Busaidy & anor. CA civil appeal No. 254 of 1999** (unreported) at page 5 of its ruling:

“As far as we can glean from the pleadings, affidavits and the ruling itself, the borrower’s case was that the statutory power of sale had been improperly and irregularly exercised. Even assuming without deciding that these allegations were true, they could not give rise to any claim against the appellant by the borrower. The law gives him only one remedy against the mortgagee (the bank) and for the specific relief of damages. He is not entitled to any other relief.”

In the present application, it is clear that the plaintiff failed to establish a prima facie case to entitle this court grant him the interlocutory injunction sought. The plaintiff no longer has any proprietary rights over the suit property. The property in the said suit parcel of land passed to the 2nd defendant when the hammer fell during the public auction. If the plaintiff was aggrieved by the 1st defendant’s exercise of its statutory power of sale, then he is at liberty to pursue the 1st defendant for compensation by way of damages. He cannot reverse the sale of the suit property to the 2nd defendant. Further, it is clear that it is the 2nd defendant who would suffer prejudice if this court were to grant the injunction sought as it will be kept out of a property that it has already purchased in the public auction. The balance of convenience tilts in favour of the 2nd defendant.

The upshot of the above reasons is that the plaintiff application for injunction dated 20th February 2008 lacks merit and is hereby dismissed with costs. All the interim orders granted in favour of the plaintiff are hereby vacated.

Dated at Nairobi this 13th day of November, 2008

L. KIMARU

JUDGE