



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

CIVIL CASE 251 OF 2008

NYANJA HOLDINGS LTD.....1ST PLAINTIFF

GEORGE NJAU MBUGUA NYANJA..... 2ND PLAINTIFF

MRS ENID N. NYANJA.....3RD PLAINTIFF

VERSUS

CITY FINANCE BANK LIMITED.....1ST DEFENDANT

REDMARS HOLDINGS LIMITED.....2ND DEFENDANT

RULING

Chamber Summons dated 13.05.08 under Order 39.

The application was filed and certified urgent at the request of the Plaintiffs.

Orders sought are an injunction against 2nd Defendant from alienating selling, transferring, changing and /or offering the suit premises for security and /or any other such transaction until the hearing and determination of this suit.

Secondly, that the 2nd Defendant be restrained by a Temporary Injunction from trespassing, evicting and interfering with the Plaintiffs possession and occupation of the suit premises while pending the hearing and determination of this suit and for costs of the application. These orders are sought against the 2nd Defendant Redmars Holding Ltd.

The facts which are not disputed are that by a mortgage dated 08.10.1985 made between 2nd Plaintiff and the first Defendant, the property LR.7583/1 was given as security for a loan facility amounting to Kshs. 8 million. There was also another mortgage on plot No. 209/4796/3 to secure Kshs.3 million.

There was also another charge on Plot No.37/256/3 which is subject of another suit. It is also not disputed that the 2nd and 3rd Plaintiffs being directors of the 1st Plaintiff were guarantors in this charge with liability limited to a maximum sum of Kshs. 3 million only.

It is also admitted that the property No.758311 being the property of 2nd Plaintiff was sold to 2nd Defendant and has been transferred and registered in the name of the 2nd Defendant.

It is trite Law in this jurisdiction that the Equity of Redemption of the chargor/mortgagor is extinguished once the land subject of a charge is registered in the exercise of chargee power of sale in the name of a third party.

The case of *Vinette Daphine Okora –vs- Akichi Okora & 3 others, reported in (2006) eKLR* and *Elantra Properties Ltd. –vs- Paramount Universal Bank Ltd. and another (2007) eKLR* and other cases uphold this principle.

The disputed matters are as stated that the sale was under the private treaty and the property was at undervalue or a throw away price of Kshs.60 million and that the fact that conveyance was registered hurriedly in the land s office (within 3 days) was a sign of fraudulent scheme and that the property measuring 24.5 acres is also the Plaintiff's matrimonial/family house while an interim order was granted by court in HCC No.1965 of 1999, pending by Ochieng J., this appears not correct on reading that record. The supporting affidavit is sworn by George Njau Mbugua Nyanja. It is admitted that an interim injunction issued by court in HCCC No. 1965 of 1991 was discharged by Court, however a preservation order was granted by Hon. Justice Ochieng until hearing date. However, before the hearing dates the first Defendant sold the Karen property when that suit was still pending.

The 2nd Defendant bought the land at throw away price of kshs. 60 million and conveyance was hurriedly registered. The property estimated value is Kshs. 295 million according to valuation report No. "9NMN5". The property was sold by private treaty.

It is sworn that the sale was fraudulent. The amount secured under that property was only 8 million and the entire amount had been paid by Defendant amounting to Kshs. 54,712,130 /=-, see exhibit "9NMN6"

On the other hand, the first Defendant City Finance Bank Ltd has caused a Replying Affidavit to be sworn by its credit Manager Esther Karanja which confirms that the Plaintiffs Equity of Repetition was extinguished when the 1st Defendant in exercise of its powers of sale sold the property in question to the 2nd Defendant for a sum of Ksh.60 million. She confirms that there was a professional valuation and states that issue of the Plaintiffs valuation was not canvassed at the hearing before Justice Nambuye, she further says the loss is not irreparable and they can easily be compensated in damages. And for submissions that property was matrimonial home. She sees no basis because the property was subject of a charge.

Furthermore, there are other suits where the Plaintiffs have tried to restrain the Defendant from selling securities. In case number 993 of 2002 the Plaintiffs were ordered to pay 400,000 /- monthly but this order has not been complied with. The conclusion reached is that the Plaintiffs are impecunious. The orders sought here are against the 2nd Defendant, Redmars Holdings Ltd. Who registered the Plot No. LR.7583/1 Karen Estate. However the application is strongly opposed by 1st Defendant. In submissions, the Applicant firstly submitted that the subject matter of suit LR 7583/1 was transferred to the 2nd Defendant fraudulently. The property was sold at a throw away price of Kshs.60 million, a prime property in Karen Estate in the city of Nairobi. The price comes to Kshs.2.4 million per acre. He referred to a valuation at page 74 to 88 of the Plaintiffs application. The valuation is made by Horeria & Company, Registered Valuers dated 16.08.2007. The opinion of the valuers is that the then current market value free from all encumbrances was Kshs.295,500,000 /=- but the conveyance to the 2nd Defendant is stated at Kshs.60 million. It is considered an addition £ 40,000 was paid to hasten valuation. The document was registered within 3 days. Again no property is registered as a purchase before Government valuer has undertaken valuation. The fraud pleaded in the plaint ha not been seriously denied but only mere denials. The Counsel referred to order 6 Rule 9(1) where allegations are not controverted are deemed to be admitted.

On the issue of the valuation of property the purpose of which is to guide on reserve price no such valuation was filed but what is attached to affidavit of Karanja is inadmissible. It is not signed by director. They said "**access was denied.**" So the report was according to their imagination. It was not based on the actual examination of the property. Therefore, saying market valuation was 90 million this

is not the correct position and forced sale of Kshs.60 million is not true.

To rely on this valuation report was fraudulent. Counsel submitted that this issue alone entitles the Applicant to an injunction, then the property was sold by private treaty. How did the 2nd Defendant know that the property was for sale? In the replying affidavit of Pomesah Shah sworn on 22.05.2008, he stated on oath "That in August 2006 he saw an advertisement posted at Nakumatt Ukay Centre advertising sale of LR.7583/1. The estate agents Daryton Valuers directed him to the first Defendant where he met Ms Karanja who informed him that the property was available for sale. To this, the Counsel submitted that this was an elaborate scheme to deprive the Plaintiff of their property, and on this ground alone the injunction orders should be granted.

Also the Counsel submitted that the payment of Kshs.60 million is not shown whether it was by cash or how he paid. There is no sale agreement exhibited and this is contrary to provisions of contracts Act Cap 23 Laws of Kenya. No notice was served upon the Plaintiffs. The 1st Defendants through affidavit of Karanja paragraph 18 says that "the power of sale arises from a charge in favour of Plaintiff and a copy is annexed "Gnmw1) However this exhibit is a charge and not statutory notice under which the power of sale is granted upon issue of statutory notice. It is now admitted that no notice was issued to plaintiffs on the sale by Private Treaty and the sale was carried out when suit 1965/91 was pending hearing.

Furthermore, Section 52 T.P.A. as applied to Kenya provided in mandatory terms that no alienation of property during active pursuit of litigation in any court.

No money was owing due to 1st "Defendant" Paragraph 39 of supporting affidavit states that Plaintiffs paid money Kshs.54,712,136 /= Exhibit "GNMN6" shows that a statement of account (amended) by Muiro Kandia & Company. Certified Public Accountants shows that loan repayments amount to Kshs.54,712,136 /=. The 1st Defendant sold 3 other properties of the Plaintiff in similar circumstances.

There are shown statements at page 91-101 annexures to that exhibit. This evidence is not denied. No evidence shown by the 1st Defendant that any indebtedness was still outstanding at the time the property was sold. Authority number 12 ***Sharok Khar Mohamed Ali and another –vs- Southern Credit Bank & another No. HCC No.659/2007***. The Plaintiffs complained among other things that the bank failed to act honestly and sold the property below the market price. The property was sold by private treat. After lengthy analysis the court granted orders prayed for in that case.

The case of ***Russell Company Ltd –vs- Commercial Bank of Africa Ltd & another 1986 eKLR 633*** issue of interlocutory injunctions was raised and the discretion of the court in exercising such jurisdiction. In that case the court concluded that the appellant could be compensated in damages and refused to grant injunction or to extend pending appeal.

The court of appeal held :

1. that it was a misdirection for judge to describe suit as commercial undertaking for which the Plaintiff could be compensated in damages. The property was of vital concern to the Plaintiff and one of its managing director and it purpose was to provide either Revenue or shelter. Holding 3 had the Judge not misdirected himself, he would have found that the case under the 3rd principle in Guella – vs- Cassime Brown Company Ltd.

2. That when court is in doubt it will decide an application on the balance of convenience. This is a decision which would keep the possession of the property in the Plaintiffs pending final decision of the suit.

The other decision relied upon by the Applicants is in the case of ***Samuel Kiarie Muigai –vs- HFCK and another 1678 of 2001***, by Ringera J as he then was. Where the lender had failed to comply with the law in exercise of its power of sale. Ann interlocutory injunction was issued. In the case of ***Joseph Siro Mosioma –vs- HFCK and others HCC No.265 of 2007***. There was complaint that the property was sold

without regard to Section 52 I.T.P.A and by private treaty without informing the applicants and such acts were evidence of fraud “**The court was of the view that sale by private treaty when there has been no previous attempts to sell the security by public auction.**” The court found also that it was important to note that the circumstances surrounding the sale smacks of some improper activities. One may be tempted to say there was deceit and deception which needs investigation. The Court (Justice Warsame) found that the balance of convenience tilted in favour of the applicants. He proceeded to grant orders.

In further submissions the Plaintiff Counsel said that under GLA and even Registration of Titles Act the transfer in such circumstances can be nullified. On the issue of *Res judicata* the decision and ruling of Hon. Lady Justice Nambuye was made before the 2nd Defendant was brought before the Court, therefore it cannot be said the matter is *res judicata* against him. Orders sought are fresh in this case.

On issue of compensation in damages this cannot be adequate remedy. The property has been home for many years. Its value is disputed and the court would follow the Plaintiffs valuation report as it appears more credible. The difference between Kshs.60 million and Kshs. 295 million is very substantial and in addition the amount borrowed was Kshs. 8 million only. There is evidence that Ksh.54 million has already been paid. This is a case in which investigation is required to ascertain what is the true value of the property and this can only be done at a trial. The Plaintiffs are in possession and they are not in a position to dispose of the land.

In opposition of the application, 1st Defendant has filed written submissions and has submitted that according to the Ruling in case number 1695 of 1991, it was held that the doctrine of *Lis pendens* does not apply to mortgages and therefore Section 52 I.T.P.A is not relevant. This Court is not bound by that Ruling, however, in the decision of Court of Appeal in the case of **Joseph Kinyua –vs- Baird**, the court held that the doctrine applies in both sales of land and mortgages.

The 2nd Defendant has denied fraud and the issues are joined. Furthermore, the property was sold under statutory powers of sale but it is to be noted that there is no answer or explanations what steps were taken under that power towards sale.

Let it also be noted that allegations of fraud can only be examined properly in a trial. In paragraph 16 of the plaint particulars of fraud are tabulated and evidence would have to be led in proof.

On the issue of valuation the 1st Defendant shows that the market value of property is disputed. Therefore the matter will be for hearing of evidence. The same with valuation reports there is dispute. However the 1st Defendant did not offer acceptable report of valuation which was made after inquiries because access to the property was not given. Counsel also relied on the authority of **Elantra properties Ltd –vs- Paramount Universal Bank Ltd. & others. HCC No. 707 of 2006** in which case Azangalala J. found that once the property was sold and transferred to a third party, remedy is in damages. The court relied on the interpretation of section 69 B of I.T.P.A which states that once the mortgaged property has been sold and transferred, the title of the purchaser shall not be impeached on grounds:

- (1) that no case had arisen to authorize the sale or
- (2) that due notice was not given
- (3) or that the power of sale was irregularly exercised.
- (4)

This piece of law does not include cases for the nullification of transfer on the grounds of fraud unfairness oppressiveness, dishonesty and deceit. The Plaintiffs says the full loan was paid and there is no satisfactory answer given by the chargee on this issue. The court is in the dark. He also relied on the case of **Vinette D. Okola –vs- Akichi Okola and 3 others** in the judgment of court there was reference to the case of **Zeyu Yang –vs- Nova Industrial Products HCC No. 9 of 2003** where it was said that where

fraud is found it was sufficient to nullify the sale. Also the case of **Jacinta Wanjuku Kamau –vs- Issac Kamau Mungai & another 2006 eKLR** where a wife was claiming against her husband. The court of Appeal found and stated as follows:

“No fraud or illegality was pleaded here and hence the 2nd Respondent out not to have been dragged into this domestic dispute between husband and his wife. The learned Judge considered all that was placed before him and came to the conclusion that the appellants claim was for dismissal. We have considered that evidence re-evaluated the same and have come to conclusion as did the learned judge that the appellants claim was indeed baseless.”

It is clear here that it is alleged fraud and particulars stated in the pleading, the sale of mortgaged property can be nullified. The law supports only where parties have acted without fraud and within the law.

On the issue of the payment of money, by the Plaintiffs the 1st Defendants was content to quote the old-time phrases ***“dispute on accounts not sufficient to restrain the chargee to exercise his power of sale.”*** No evidence was offered to show the truth or otherwise of the matter. The Plaintiffs have shown some documents showing they have paid off out of the loan the Kshs. 8 million and 3 million debt by paying approximately 54 million shillings.

For the purchaser of the property Mr. Musangi relied on his written submissions. The property was sold and everything was included, he said.” However, the prayers in the plaint are against 2nd Defendant a declaration that the sale is null and void, cancellation of conveyance made in favour of the 2nd Defendant and restoration of the suit property to the 2nd Plaintiff. These are prayers that the court can grant. The court is not powerless where there is sign of irregularities. I associate myself and agree with the opinion expressed by Hon. J. Warsame in his ruling.

After perusing all the materials laid before the court and authorities and the oral and written submission made by all Counsel, it appears to me that there are two principles which can be applicable here. On the issue of Res judicata the prayers sought are against 2nd Defendant who has not been a party in these proceedings before. The issues now canvassed are new not raised before and could not have been raised before.

I find the matter is not res judicata. The other principle that is argued and is supported by one side is that the Plaintiffs are not entitled to any injunction but their remedy lies in damages since the property has already transferred. On the other hand the Plaintiffs say and they are supported by some authority that the transfer herein is void and should be cancelled because of fraud.

I have considered all these issues and I find that there is no in this case entirely without possibility of a success in the Plaintiffs case and that compensation in damages is not appropriate remedy. In the circumstances due to the difference in valuation reports and other matters stated above. On the balance of conveyance it is my finding that for the time pending hearing the suit the Plaintiffs who are in possession carrying on their usual activities should continue in possession until further orders of Court.

I therefore grant orders sought against the 2nd Defendant until determination of this suit with costs to Applicants to be paid by both Defendants.

It is so ordered.

DATED this 13th day of November 2008.

JOYCE N. KHAMINWA

JUDGE