



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

Civil Suit 248 of 2006

IRENE JOYCE JEPKEMOI CHUMO PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. DEFENDANT

RULING

The plaintiff appeared before me on 2nd November 2006, to canvass her application dated 25th September 2006.

Through that application, the plaintiff was seeking an interim injunction to restrain the defendants from selling, disposing off, transferring or alienating the suit property L. R. No. NAIROBI/BLOCK/62/564, AYANY ESTATE, KIBERA, NAIROBI. It is the wish of the plaintiff that the injunction, if granted, should remain in force until the suit is heard and determined.

When canvassing the application, Mr. Thuita advocate for the plaintiff, indicated that his client was also seeking an order to restrain the 2nd defendant from evicting her from the suit property. She says that she had learnt that the 2nd defendant had intentions of selling-off the suit property to a third party, so as to defeat the equity of redemption.

According to the plaintiff, the property was valued at Kshs.6,000,000/=. The said property was advertised for sale, in the media, on 2nd May 2006. The sale itself was scheduled for 25th May 2006.

In order to safeguard the suit property, the plaintiff filed this suit on 15th May 2006, and she also filed an application for an injunction.

On 22nd May 2006, this court issued an injunction order, putting-off the sale, on condition that the plaintiff paid Kshs.150,000/= before the time of the scheduled auction on 25th May 2006.

Meanwhile, the court reserved its ruling on the substantive application, indicating that it would be delivered on 11th July 2006.

According to the plaintiff, her advocate who attended court on 22nd May 2006, heard that the sum of Kshs.150,000/= was to be paid by 11th July 2006. Therefore, the plaintiff did not meet the condition, which required her to pay the money before the scheduled time of the auction on 25th May 2006.

On 5th July 2006, M/s L. M. Ombete & Company Advocates, who were then acting for the plaintiff, wrote to the advocates for the 1st defendant, informing them that the plaintiff had obtained the banker's cheque for Kshs.150,000/=. The plaintiff wished to know whether to deliver the cheque to the 1st defendant directly or through their lawyers. The plaintiff also suggested to the 1st defendant that the two parties should meet, with a view to agreeing on monthly instalments in respect to the balance of the loan.

On 7th July 2006, M/s Iseme, Kamau & Maema Advocates wrote back to the plaintiff's advocates, and told them that they would seek their client's instructions. They also said that the meeting which had been proposed by the plaintiff could only be arranged after the 1st defendant had given instructions thereon.

The next event in this saga was the ruling which was delivered by this court on 11th July 2006. By the said ruling, the court dismissed the plaintiff's application dated 15th May 2006.

As at the date of the ruling, the plaintiff says that she still did not have any idea that the suit property had been sold by the 1st defendant. According to her, it was not until 23rd August 2006 when the 2nd defendant wrote to the occupants of the suit property, that she first became aware of the alleged sale to the said 2nd defendant.

The plaintiff then conducted a search at the lands office, which revealed that the suit property had been transferred to the 2nd defendant, for a consideration of Kshs.3,000,000/=.

Thereafter, on 30th August 2006, the plaintiff says that she was shown a letter, which the auctioneer who had allegedly sold the property on 25th May 2006, had written to one of the tenants of the suit property. The auctioneer notified the tenant that he was an agent of the 2nd defendant, for purposes of collecting rent.

In the light of that pronouncement by the auctioneer, that he was the agent of the 2nd defendant, the plaintiff believes that the relationship was suspect.

Secondly, because the 1st defendant had valued the suit property at Kshs.6,000,000/= in June 1999; and also because the plaintiff had asked Lloyd Masika Valuers to value the property; and they said that it was worth Kshs.10,000,000/=, the plaintiff finds that the sale at Kshs.3,000,000/= was a clear indicator of fraud.

Thirdly, it was contended that the 2nd defendant was not an innocent purchaser for value. The reason for so stating was that, as far as the plaintiff was concerned the chronology of the sale transaction was suspect. It was pointed out that the Rents Clearance Certificate was issued on 2nd August 2006, whilst the City Council of Nairobi issued its statement of Rates payment on 11th August 2006. Meanwhile, the Commissioner of Lands had issued his consent for the sale of the suit property on 9th August 2006.

All those steps appear to have been taken after the transfer had been registered on 7th July 2006. If the registration took place in those circumstances, the Registrar would have violated the provisions of Section 86 of the Registered Land Act, which stipulates as follows;

"The Registrar shall not register any instrument purporting to transfer or to vest any land, or a lease of land, situated within the are of a rating authority unless there is produced to the Registrar a written statement by the authority that all rates and other charges payable to the authority in respect of the land for the last twelve years have been paid, expressed to be available until the day upon which, or until a day not earlier than that upon which, the instrument was registered"

In the face of the application, the 2nd defendant submitted that the plaintiff was not entitled to an injunction, after she had failed to meet the condition, requiring her to pay Kshs.150,000/=:, in order to stop

the sale.

It was submitted that the failure of the plaintiff's advocates to inform her correctly, as to the date by which the money was to be paid, could only be a basis for a claim against the said advocates.

As far as the 2nd defendant was concerned, the plaintiff had only made wild allegations regarding irregularities of the auction, fraud and mala fides. The 2nd defendant describes them as wild because, in his view, the plaintiff was in no position to know what transpired at the auction, as she neither attended it nor had she quoted any sources who had attended the auction.

To the extent that the plaintiff had asserted that the auction was conducted in secrecy or that the 2nd defendant was not the highest bidder, the comments of the 2nd defendant do appear to hold water.

And as regards the allegation that the transfer of the suit property was conducted too hastily, the 2nd defendant points out that the auction was conducted on 25th May 2006, and the transfer was registered on 17th July 2006. He therefore believes that it was wrong to suggest that there had been any haste in the registration.

Finally, the 2nd defendant stated that a sale at an undervalue was not evidence of fraud or malafides. He also submitted that, in any event, a sale at an undervalue could not be the basis for the grant of an injunction. In his view, an injunction could only be given if the applicant could not be compensated in damages.

Those submissions are said to find backing from the decision in **KITUR –VS- STANDARD CHARTERED BANK & 2 OTHERS [2002] 1 KLR 630**, and also in **OOKO –VS- BARCLAYS BANK OF KENYA LTD. [2002]2 KLR**

In the **KITUR case**, the Hon. Tunya J. held that:

"the mere fact of a sale below a reserve price is not by itself evidence of a fraud or malafides on the part of the chargee."

And in the **OOKO case**, the Hon. Ringera J. (as he then was) said;

"The second condition is that an interlocutory injunction will not normally be granted unless the applicant can show that he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the applicant to do that."

Before I delve into an analysis of the material presented before me, I must first make it clear as to why the 1st defendant did not participate in the proceedings before me.

In my understanding, it was because, on 13th October 2006, the Hon. Kasango J. dismissed the application dated 25th September 2006, insofar as the same was in relation to the 1st defendant. Therefore, the application was only alive as against the 2nd defendant.

For the sake of completeness of record, it is important to point out that as against the 1st defendant, the application was dismissed on the grounds that it was res judicata.

As regards the 2nd defendant, he holds the view that as the registered owner of the suit property, he now has a constitutional right to do as he should please, with the said property. He believes that the plaintiff ought not to be granted an injunction to restrain him from enjoying the said constitutional right.

Although it is true that the legitimate owner of a property has a right to dispose of it as he may choose to do, in this case, the plaintiff is asserting that the acquisition of the suit property was illegitimate, insofar

as it was tainted with fraud.

There is no explanation which has been tendered by the 2nd defendant to enable the court appreciate why a property said to be worth Kshs.10,000,000/=, was bought by him for Kshs.3,000,000/=.

Secondly, the defendant has offered no explanation for the fact that he was registered as the new owner of the property almost one month before there was produced a Rates Clearance Certificate from the City Council of Nairobi.

In other words, I understand the plaintiff to be complaining about the sequence of the events, rather than the speed. For now, there is no attempt to justify the registration of the transfer prior to the issuance of the Rates Clearance Certificate.

Therefore, if the court were to assume that the 2nd defendant had legitimately acquired title to the suit property, I would have overlooked an apparent transgression of Section 86 of the Registered Land Act. Of course, I am alive to the fact the said transgression, if proved, would be as against the Registrar of Lands, and not as against the 2nd defendant.

But then again, the said Registrar would not have registered the transfer without a presentation of the transfer instrument, by the 2nd defendant. Therefore, on the face of it, the 2nd defendant would need to explain to the court why he presented the transfer instrument long before he obtained the Rates Clearance Certificate.

Whilst the plaintiff continues to challenge the legitimacy of the title held by the end defendant, it would defy logic to allow the 2nd defendant pass title to third parties.

The process of unraveling any subsequent transfers, if the plaintiff were to finally succeed in the suit, would be very cumbersome indeed. Therefore, I hold the view that it is in best interest of justice to preserve the subject matter of the suit herein in its current form, until such time as the suit was heard and determined.

In other words, the transfer to the 2nd defendant should remain in place, but he must not further alienate it in any manner whatsoever. He is not to sell it or charge it.

The reasons for so holding is that;

"Fraud is far- reaching; for centuries the rule has been that fraud unravels all ...

Purely equitable fraud, on the other hand, merely entitles the victim to rescind the transaction procured by or tainted with it, and to regain the position in which he was before the injury."

- per "Snell's Equity", 13th Edition, at page 607.

In this case, the 2nd defendant has not stated that he had capacity to compensate the plaintiff. Instead, he said that plaintiff had not made the point that the 2nd defendant would be incapable of compensating her.

The position is that the plaintiff deponed that if the sale of the suit property were allowed to stand, she would suffer irreparably. That must surely imply that as far as the plaintiff was concerned, the loss of the suit property could not be compensated.

How did the plaintiff demonstrate, even on a prima facie basis, that the loss she would suffer could not be compensated in damages? In my understanding, she did make available a valuation report by Lloyd Masika Limited dated 8th September 2006. The said report placed the value of the suit property at Kshs.10,000,000/=. By so doing, the plaintiff effectively assessed the loss which she would suffer, if the

sale herein were allowed to stand, yet the plaintiff then succeeded in her suit.

In effect, it is arguable that such loss as the plaintiff may suffer was, in theory, capable of being compensated in damages.

But the more fundamental issue is whether, if the 2nd defendant were ordered to pay compensation in the sum of about Kshs.7,000,000/= he would have the ability to meet it. That question is significant because if the plaintiff was not able to recover such funds from the 2nd defendant, the loss of the plaintiff would not have been compensated.

As the 2nd defendant has not indicated that he has financial ability to meet such compensation as may be awarded to the plaintiff, I believe that it is in the best interest of justice that the suit property should not be alienated to third party.

In any event, the 2nd defendant has stated, on oath, that he has no intention of selling or charging the suit premises. Therefore, an injunction which ensured that the suit property was neither sold nor charged would not prejudice the 2nd defendant.

Accordingly, the 2nd defendant shall now be restrained by an injunction, from charging, selling or alienating the suit property. He will also be restrained from evicting the plaintiff from the suit property, if the plaintiff is in occupation of any portion thereof.

However, the title to the said property shall remain in the name of the 2nd defendant.

These orders shall remain in force until the suit is heard and determined.

However, the 2nd defendant will be entitled to collect the rents from the suit property, provided that he maintains a meticulous record thereof, a copy of which he will make available to the plaintiff every month.

Finally, the costs of the application dated 25th September 2006 shall be in the cause.

FRED A. OCHIENG

JUDGE

Dated and Delivered at Nairobi by Justice Hon. Lady M. Kasango, this 24th day of January 2007.

M. KASANGO

JUDGE