REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 609 of 2006

MARTIN MUIRURI NDUNG'U…….....……..1ST PLAINTIFF

EDITH WANJIKU MUIRURI…….....……..2ND PLAINTIFF

VERSUS

HOUSING FINANCE OF KENYA.....….....….1ST DEFENDANT

MARTIN MUNGAI MBURU……...……...……..2ND DEFENDANT

CAROLINE WANJIKU NGANGA……...……...…….3RD DEFENDANT

R U L I N G

The plaintiffs seek an injunction to restrain the defendants from dealing with or interfering in any manner with the suit property L.R. 209/8524/155.

The plaintiffs' case is that they had bought the suit property for KShs. 3,400,000/=. Out of that sum, the 1st defendant financed the plaintiffs', to the tune of KShs. 1,840,000/=. And as security for the said facility, the plaintiffs executed a legal charge, which was registered against the title to the suit property.

The 1st plaintiff says that he serviced the loan facility for a period of 2 years, upto 2004, when he lost his employment. As a consequence of the plaintiffs' failure to service the loan, in 2004, the 1st defendant served the plaintiffs with a statutory notice dated 24th July 2004.

Following receipt of the said statutory notice, the plaintiffs engaged the 1st defendant in negotiations, which culminated in the 1st defendant re-scheduling the loan, on 1st November 2005.

A significant feature of the said re-scheduling was that the facility would be repaid over a period of 13 years and 6 months, with effect from November 2005.

Bearing that fact in mind, the plaintiffs say that they were surprised to receive a letter from the advocates for the 2nd and 3rd defendants, asking them to vacate the suit property. The said defendants said that the property had been sold to them.

The plaintiffs say that they were surprised because that was the first communication to them, ever since the facility was re-scheduled in November 2005, which indicated anything about the sale of the suit

property. Prior to that date, (3rd October 2006), the 1st defendant had never given any indication of an intention to realise the security.

Therefore, the plaintiffs' contention is that the 1st defendant deliberately misled them to believe that they (plaintiffs) had much more time and opportunity to redeem the suit property,whereas the said defendant was selling-off the property, through private treaty.

Indeed, the plaintiffs submitted that the 1st defendant had failed to give any statutory notice pursuant to Section 69 of the Transfer of Property Act. The argument advanced by the plaintiffs was that following the re-scheduling of the loan, in November 2005, the 1st defendant was obliged to issue a fresh statutory notice, if it intended to realise the security. In effect, the plaintiffs hold the considered view that the statutory notice dated 26th July 2004 could not form the basis for a lawful exercise of the 1st defendant's statutory power of sale, after the facility was re-scheduled in November 2005.

Another issue raised by the plaintiffs was that unless the injunction orders were granted, they would suffer irreparable loss, which could not be compensated in damages.

It was said that as the plaintiffs reside in the suit property, together with their family, their loss would be irreparable if they were to be forced out of their only family home.

Finally, the plaintiffs believe that the balance of convenience is in their favour, as the 2nd and 3rd defendants are said to be in a position in which they could be easily compensated in damages. The reason which the plaintiffs gave for that contention is that the 1st defendant had paid itself off. In effect, the loan facility would not be increasing. If anything, the 1st defendant said that it was holding over KShs.2,000,000/= to the credit of the plaintiffs.

In answer to the application, the 1st defendant submitted that it was important to take note of the contents of the statutory notice dated 26th July 2004. In particular, the court's attention was drawn to the following words, which constitute the last paragraph of the statutory notice;

"**TAKE NOTE that any proposals made if acceptable and any payments made by you subsequent to the date of this notice shall be accepted without prejudice to our rights."**

That statement is deemed, by the 1st defendant, to permit it to realise the security without giving any new statutory notice to the plaintiffs.

Therefore, as far as the 1st defendant was concerned, the agreement embodying the re-scheduling of the loan facility did not take away the legal force of the statutory notice which had preceded it.

Indeed, the 1st defendant feels that the said agreement, which is dated 31st October 2005, further advances its belief that there was no need for another statutory notice prior to the realisation of the security. The said defendant points out that it was a term of the agreement dated 31st October 2005, that if the plaintiffs fell into arrears, the company could proceed to exercise its statutory powers of sale.

According to the 1st defendant, it did not need to give any other notice, because the agreement dated 31st October 2005 did not so stipulate.

Whereas the agreement did not stipulate that the 1st defendant would be required to give any notices before it could realise the security, I also find that it did not purport to exclude the need to give notices.

The relevant clause in the agreement reads as follows;

"**THAT pursuant to your aforesaid request and instance, the company has agreed to reschedule the**

account on the mutual understanding that in case of the account falling back into arrears, the company shall proceed at once to exercise its rights as stipulated in the charge/mortgage document."

On the face of it, the rights which the 1st defendant reserved, to be exercised at once, in the event that the plaintiffs' account fell back into arrears, are those rights that are stipulated in the charge/mortgage document.

That still begs the question whether or not the charge instrument did clothe the 1st defendant with a right to realise the security without giving to the chargors any statutory notice.

To my mind, that is an issue which requires careful consideration, because it may require the court to address the question whether or not parties to a charge or a mortgage instrument, could contract out of the provisions of statute.

There would also be a further question whether or not the plaintiffs and the 1st defendant herein purported to contract themselves outside the provisions of the Transfer of Property Act.

On a prima facie basis, I hold the view that when the parties to the agreement dated 31st October 2006 agreed that the chargee could, if the chargors fell back into arrears, proceed at once to exercise the rights bestowed upon the chargee, under the provisions of the instrument of charge; they intended to be bound by the terms of the charge dated 9th April 2002.

According to the chargee, clause 7 of the said charge instrument empowered it to sell the suit property, without any concurrence with the chargors, provided that the chargors had made default.

The said clause reads as follows;

"**Provided that if default be made by the chargor in payment of any monthly instalment or other payment hereby covenanted to be made or if default be made by the chargor in the observance or performance of any of the covenants or obligations herein expressed or implied (other than for payment of money) the chargee may without any previous notice to or concurrence on the part of the chargor:-**

(i) Enter upon the Charged Property and execute or cause to be executed any repairs, alterations additions or other work thereto or thereon but so that the chargee in acting under this power shall not be deemed to be a mortgagee in possession or become liable as such.

(ii) Exercise all statutory powers conferred on chargees by the Indian Transfer of Property Act 1882 or any Kenya Act amending the same."

It is thus clear that it is only in respect to the entry onto the suit property, for purposes of executing repairs, alterations, additions or other works, that the chargee did not need to give prior notice to the chargors .

To my mind, although it may appear that also for purposes of clause 7 (ii), the chargee did not need either the concurrence of the chargors or to have given them prior notice, the chargee's rights to realise the security would have to be in accordance with the statutory provisions of the Indian Transfer of Property Act or any Kenya Act amending the same.

And under Section 69A of that Act, the chargee is not entitled to exercise his statutory power of sale until he had served a 3 months' statutory notice upon the chargor. Alternatively, the right to exercise his statutory power of sale would only accrue if interest was in arrears and remained unpaid for 2 months, from the date it became due. And the other alternative is when the chargors or any person concurring in the making of the charge, was in breach of some provision of the said instrument.

In this case, the 1st defendant's position is that the plaintiffs were in default, and were well aware of that fact. Therefore, the 1st defendant contends that it did not need to issue any statutory notice to the chargors.

The fact that the alleged default is one for non-payment of the mortgage instalments means that, on a prima facie basis, the chargee ought to have issued notice, if the chargee was to comply with the express terms of Clause 7 of the mortgage instrument.

One such notice was issued on 26th July 2004. But thereafter the chargers entered into an agreement dated 31st October 2005.

As already pointed out hereinabove, the court needs to give due consideration to the contents of the said agreement to ascertain if it could or could not make it alright for the chargee to realise the security without having to issue a new statutory notice.

That question gains even more significance in the light of the peculiar circumstances of this case. And when I make reference to peculiar circumstances, I have in mind the fact that the suit property appears to have been sold to the 2nd and 3rd defendants in August 2006.

Notwithstanding the said sale, which was conducted by the 1st defendant, through private treaty, the 1st defendant thereafter wrote to the plaintiffs as follows;

(i) On 1st September 2006, they said that the rate of interest would be reduced from 17.75% per annum, to 15.75% per annum, with effect from 1st October 2006.

(ii) On 19th September 2006, they said that the plaintiffs should complete their "Declarations of Good ealthHealth Forms", for insurance purposes.

(iii) On 1st October 2006, they said that the plaintiffs still had some 170 months to the date of redemption of the loan.

(iv) On 3rd October 2006, the 2nd and 3rd defendants said to the plaintiffs that they should vacate the suit property, as those two defendants had purchased it from the 1st defendant

When the plaintiffs sought the intervention of the chairman to 1st defendant, the said defendant informed them that the suit property had been sold by private treaty, in September 2006.

Given the fact that the 1st defendant had written 3 letters to the plaintiffs, between 1st September 2006 and 1st October 2006, through which the message was to the effect that the property was still intact, and in the plaintiff's hands, there is little wonder that the plaintiffs should have the strong feeling that the 1st defendant tried, (successfully) to cause the plaintiffs to have a false sense of security, whereas their property had already been sold off.

The 1st defendant attributes its said letters to a mistake, on its part. However, I do share the plaintiffs' viewpoint in that regard, and find that on a prima facie basis, the said explanation is too simplistic.

Perhaps the 1st defendant has also not noted that whereas in its letter dated 26th October 2006 they told the plaintiffs that the property had been sold in September 2006, the "Transfer **by Chargee"** is dated 30th August 2006.

As a transfer instrument is usually drawn after the parties had executed a contract for sale, and also after the purchaser had made a part-performance, (say by paying the agreed deposit sum, towards the purchase price), it would be interesting to ascertain exactly when the sale to the 2nd and 3rd defendants took place.

For now, I am satisfied, on the basis of the material before me, that the plaintiffs' assertion as to fraud is not hollow.

Of course, the 1st defendant might yet be able to ultimately persuade the trial court that it had made a genuine mistake, when it wrote those three letters. But for now, it does appear that the said defendant has a lot of explaining to do.

Meanwhile, the 2nd and 3rd defendants find solace in the provisions of Section 23 of the Registration of Titles Act, which stipulates that a certificate of title should be taken by all courts as conclusive evidence of ownership. Accordingly, as the registered owners of the suit property, the 2nd and 3rd defendants submitted that the plaintiffs could not legitimately seek to remain on the said property.

Indeed, the said defendants pointed out that the only reason why they had not responded to allegations such as fraud, was that no such allegations had been directed against them.

Of course, it is well settled in law that a purchaser of a property that is being sold by a chargee, is not obliged to make any inquiries as to the manner in which the chargee exercises the power.

Secondly, the mere fact that a chargor was still in occupation of a property which had been sold by the chargee, is not a good enough reason, in itself, for depriving the purchaser the right to take possession thereof. If anything, the registered proprietor of an immovable property is entitled to the enjoyment of the exclusive possession thereof, unless the said registration of proprietorship could be set aside on the basis of fraud, to which the registered proprietor was a party.

In this case, the plaintiffs have asserted that the sale of the suit property was "illegal, null and void", as the sale was carried out without the chargors being served with any demand or statutory notice. It was also alleged that the sale price was a gross undervalue.

If those two assertions were ultimately proved by the plaintiffs, the sale would nonetheless not be set aside; as the plaintiffs would then only become entitled to compensation, through an award of damages.

However, in this case, the plaintiffs have also asserted that the defendants were guilty of fraud and misrepresentation. It is said that the said defendants colluded, so as to enable the 2nd and 3rd defendants buy the suit property at an undervalue. It was suggested that the 2nd and 3rd defendants acted fraudulently by buying a property which they did not even take time to view before they went ahead to buy it.

As the 2nd and 3rd defendants conceded having not responded to the assertions of fraud, on a prima facie basis, the said assertions remain uncontroverted, for now.

Accordingly, I have no alternative but to hold that the plaintiffs have made out a prima facie case against the defendants, for fraud and sale at an undervalue.

Therefore, as fraud is capable of vitiating the title of the 2nd and 3rd defendants, it is imperative that the subject matter of the suit herein be preserved until the suit was heard and determined. The 2nd and 3rd defendants are thus restrained, by an injunction issued herein, from any further dealings with the suit property until the suit is heard and determined.

However, as the property is said to be charged to the 1st defendant, as security for a loan facility to the 2nd and 3rd defendants, the said defendants should nonetheless proceed to honour their obligations under the requisite charge.

Finally, so as to secure the interests of all the parties to these proceedings whilst awaiting trial, the 1st defendant is directed to either convert the plaintiffs' account into an interest-earning account, or alternatively to place the funds therein to another interest-earning account, whereat the funds would

continue to grow.

The costs of the application are awarded to the plaintiffs.

Dated and Delivered at Nairobi, this 22nd day of February 2007.

FRED A. OCHIENG

JUDGE