



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

Civil Case 668 of 2006

KENLINE AGENCIES LTD.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....ST DEFENDANT/RESPONDENT

JOHN GITHUA NJOGU.....^{2ND} DEFENDANT/RESPONDENT

RULING

By an amended Chamber Summons dated 21st December 2006, Kenline Agencies Ltd, the Plaintiff/Applicant has come to this court under Order XXXIX Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 64 of the Registration of Titles Act Cap. 281, seeking an order of interlocutory injunction restraining Housing Finance Company of Kenya Ltd. (hereinafter referred to as the 1st Respondent) from conveying or transferring to John Githua Njogu (hereinafter referred to as 2nd Respondent) or his nominee LR No. 209/11475 or in any manner interfering with the said land till this suit is heard and finalized.

The Applicant also seeks prohibitory order restraining the Respondents from registering any other or further documents against certificate of title registered at the Nairobi Land Registry as IR 17003 until further orders of this court.

The application is premised on the grounds that the Applicant who is the registered proprietor of land parcel No. 209/11475 (hereinafter referred to as suit property) took out a mortgage with the 1st Respondent in 1997, that without serving a statutory notice under Section 69 of the Transfer of Property Act, the Ist Respondent has been interviewing potential purchasers intending to convey the suit property in purported exercise of statutory power of sale. The applicant has now discovered that 1st Respondent clandestinely and fraudulently entered into a sale agreement by a private treaty with the 2nd Respondent even though 1st Respondent has no power in law to execute a transfer to the 2nd Respondent and the purported sale is illegal and invalid.

The application is also supported by an affidavit sworn by Jacinta Wanjiru Kigo on 30th November 2006 as well as a further affidavit sworn on 19th December 2006 the deponent avers that she is a Director of the Applicant. She maintains that the Applicant has repaid the loan advanced to it by 1st Respondent in full. Although she signed something similar to the charge document, the signature was not witnessed by the advocate nor did the advocate explain the purpose of the document to her, but that she was made to believe by her husband that she was signing a guarantee. Jacinta Wanjiru Kigo also deponed that she has made inquiries at the post office and has learnt that the letter containing the notice sent to the Applicant by the Ist Respondent was returned back to the Ist Respondent on 14th March 2005.

Mr. Njiru who appeared for the Applicant submitted that the 1st Respondent's statutory power of sale has not arisen as no notice was served as required under Section 69 (1) (9) of the Transfer of Property Act. In this regard He relied on the following authorities:

- ***Trust Bank Ltd vs Kiran Ramji Kotedia C. A. Civil Appeal No. 61 of 2000.***
- ***Nyangilo Ochieng vs. Fanuel B. Ochieng & Others C.A. Civil Appeal No. 148 of 1995.***
- ***Moss Ndungu Mungai vs the Co-operative Bank of Kenya Ltd HCCC 220 of 2004.***

Relying on the case of ***First American Bank of Kenya Ltd & Anor vs Grandways Venture Ltd C.A. Civil Application No. Nai 104 of 2002.*** Mr Njiru submitted that the charge which was the subject of the exercise of the statutory powers of sale was defective as Section 69 (4) of the Transfer of Property Act had not been complied with and that this was sufficient to establish a prima facie case. Mr. Njiru further submitted that the transfer to the 2nd Defendant was done in defiance of the court order stopping any registration of the suit land and offends Section 52 of the Transfer of Property Act. Relying on the case of ***Mawji vs. US International University & Another KLR [1976] 185*** Mr. Njiru urged the court to grant the prohibitory order so as to maintain the status quo.

The 1st Respondent objects to the application. Janet Mwaluma the Assistant Manager legal services has sworn a replying affidavit on 14th December 2006 and a Supplementary Affidavit on 15th January 2007. These form the basis of the 1st Respondent's objection to this application.

Janet Mwaluma depones that the applicant's proprietary interest in the suit property has been extinguished as the property has been sold to the 2nd Respondent in exercise of the 1st Respondent's statutory powers of sale. It is further deponed that the 1st Respondent's statutory powers of sale arose as the applicant was not servicing the mortgage and there was a sum of KShs. 13,613,601/45 due and outstanding as at 23rd November 2006, and that a statutory notice was served on the applicant through registered post. In her supplementary affidavit Janet Mwaluma maintained that the statutory notice served on the applicant through registered post to the applicant's address, was not returned back to the 1st Respondent as unclaimed.

The 2nd Respondent John Githua Njogu also filed a replying affidavit sworn on 16th January 2007 and a supplementary affidavit sworn on 13th February 2007. He maintained that the applicant had no cause of action against him as He was a bona fide purchaser for value. He maintained that the suit property having been sold to him in exercise of the 1st Respondent's statutory power of sale, the applicant's equity of redemption was extinguished and the application amounted to an abuse of the court process.

Mr. Issa who argued the application on behalf of both Respondents submitted that the 1st Respondent had proved that it served a statutory notice upon the applicant through registered post using the applicant's known address and that the applicant had not discharged the burden upon it to prove non-receipt of the notice at its address to which the notice was properly addressed. Referring to the case of ***Nyangilo Ochieng vs Fanuel B Ochieng & Others (supra)*** and the case of ***Ooko vs Barclays Bank of Kenya Ltd [2002] 2 KLR 394***, Mr. Issa submitted that there was prima facie evidence of service of the statutory notice. Mr. Issa further maintained that contrary to the applicant's assertions, the Charge was properly attested and Section 69 (4) of the Transfer of Property Act had no application. He submitted that since there was still an amount due and owing under the mortgage an injunction could only be granted in accordance with the decision in the case of ***Mrao Limited vs First American Bank of Kenya Limited & 2 Others*** i.e the applicant ought to deposit the full amount outstanding before an injunction can issue to them. Mr Issa further submitted that there was no cause of action revealed against the 1st Respondent, and that in any case the court cannot issue an order to restrain what has already happened, and that the applicant's remedy if any is an award of damages as against 1st respondent. Finally Mr. Issa submitted that Section 52 of the Transfer of Property Act was not offended as the process of sale and transfer of the suit premises started before the applicant came to court, and that none of the orders issued by the court

were served on the Land Registrar.

The application before me being one for an interlocutory injunction, it is necessary to consider the principles upon which the court can grant such an application. These are summarized in the renowned case of *Giella vs Cassman Brown & Co. Ltd* 1973 EA 358 as follows:-

“First, an application 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 (East African Industries vs Trufood [1972] EA 420) “

From the affidavit evidence that has been laid before me and alluded to above, I find that several issues have emerged. These include the following:-

- Whether the charge registered in favour of the 1st respondent against the suit property is lawful.
- Where the 1st Respondent's statutory power of sale has arisen that is to say whether there is any amount due and owing from the Applicant to the 1st Respondent in respect of the charge that would justify the exercise of the 1st Respondent's statutory power of sale.
- Whether the 1st Respondent served the Applicant with a valid statutory notice.
- Whether the 1st Respondent has already exercised its statutory power of sale such that the Applicant's equity of redemption has been extinguished.
- Whether the purported sale of the suit property to the 2nd Respondent was legal or null and void.
- What remedy if any is available to the Applicant.

The above list which of course is not exhaustive is sufficient to show that the applicant's case is arguable as there are triable issues which have been raised. However, as was stated by Bosire J.A in the case of *Mrao Limited v First American Bank of Kenya Ltd & 2 Others KLR [2003] 125* at page 138

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

I am mindful of the fact that this is an interlocutory application and therefore I should guard against falling into the pitfall of making conclusive findings regarding the issues in dispute. It behoves me however to consider some of the issues in order to establish whether prima facie there is an infringement of the Applicant's right or whether there is probability of success of the Applicant's case upon trial.

Although the Applicant maintained that the charge was not properly executed, it was conceded that the Applicant did obtain a loan of Kshs. 5 million from the 1st Respondent on the basis of the charge.

In her affidavit in support of the application Jacinta Wanjiru Kigo claimed that to the best of her knowledge the Applicant has fully repaid the loan; nevertheless there were no annexures to support this contention. In contrast the replying affidavit, Janet Mwaluma has not only annexed copy of the mortgage account showing that the account was in arrears, but she has also annexed copies of letters written by the Applicant's General Manager E. M. Muturi conceding that the account was in arrears and pleading for time to pay. Although a supplementary affidavit was filed in response to the affidavit of Janet Mwaluma, no attempt was made to deny these facts. Prima facie therefore there is evidence that the Applicant's mortgage account was in arrears. Even if I was to assume that the charge was not properly executed, the Applicant having enjoyed the loan facility by virtue of the defective charge and there being prima facie

evidence that the applicant has defaulted in the repayment, the applicant cannot come to seek an equitable remedy, when it is apparent it is not coming to court of equity with clean hands.

As regards the statutory notice, it is not denied that the same was sent by the 1st Respondent to the Applicant's known address through registered post, although it is claimed that the same was returned unclaimed. It is not explained why the letter should have been returned unclaimed when the address used was the Applicant's proper address which it has all along been using. Prima facie the 1st Respondent having sent the statutory notice through registered post to the Applicant's postal address, the Applicant is deemed to have received such notice unless it can prove otherwise. The allegation that Jacinta Wanjiru Kigo was informed by an unidentified person at the post office that the letter was returned back to 1st Respondent is not sufficient for this purpose. I find that the Applicant has not established the infringement of any right nor has it shown that its case has probability of success at the trial. Moreover even assuming that it is proved at the trial that the sale to the 2nd Respondent was null and void, the Applicant's remedy in law is only as against the 1st Respondent in damages. The case of ***Priscilla Korbrought Grant*** (Supra) refers. The Applicant has therefore failed to satisfy the conditions upon which an interlocutory injunction can be granted. For these reasons its application fails and same is dismissed with costs.

Dated and signed and delivered this 23rd day of March 2007.

H. M. OKWENGU

JUDGE