REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(COMMERCIAL COURTS)

CIVIL CASE 522 OF 2006

AMOS KANYURU KINANI ……..…….……...PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED….....1ST DEFENDANT

ISAAC KINUTHIA KIBE ..……2ND DEFENDANT

R U L I N G

On 19.9.2006, the plaintiff filed this case against the Defendants seeking inter alia injunctive reliefs. Simultaneously, with the filing of the plaint, he filed a Chamber Summons in which he also sought temporary injunctive reliefs pending the hearing of the suit on the basis of grounds set out in the chamber summons. The summons in chambers is supported by an affidavit sworn by the plaintiff. There is also a further affidavit sworn by the same plaintiff. The application is opposed and there are replying affidavits sworn by one Joseph Kania the 1st defendant's Manager Legal Services and the 2nd defendant.

The brief background facts of this litigation are as follows: In or about January 1999, the 1st defendant advanced to the plaintiff a loan of KShs.2,590,000/= on the security of L. R.No.13858/67 South of Ruiru Town in Kiambu District (herein "**the suit property"**). The plaintiff executed a charge over the suit property. According to the 1st defendant there was default of servicing the loan and as at 31.1.2006 the plaintiff was indebted to the 1st defendant in the sum of Kshs.2,538,334.30.

The 1st defendant then served the plaintiff with a Statutory Notice threatening to exercise its statutory power of sale over the suit property. The 1st defendant subsequently sold the suit property to the 2nd defendant by Private Treaty. The 2nd defendant was then registered as proprietor of the suit property and was documented accordingly.

The application was canvassed before me on 13.2.2007 by Mr. Kangethe, Learned Counsel for the plaintiff, Mr. Issa, Learned Counsel for the 1st defendant and Mr. Gichuhi, Learned Counsel for the 2nd defendant. I have considered the pleadings, the application, all the affidavits filed, the annextures thereto and the able submissions of counsel. Having done so, the following in my view are the primary issues debated by the counsels.

Whether or not the sale and transfer of the suit property is tainted with fraud. The plaintiff makes this serious allegation on the basis that in his view there is no evidence that the suit property was sold and transferred by the 1st defendant to the 2nd defendant for good consideration. That view is based on lack

of material demonstrating that the cheques purportedly given as consideration were ever honoured. The plaintiff makes reference to the statements exhibited which do not reflect that the 1st defendants accounts were credited with the payments allegedly made by the 2nd defendant and on the fact that despite the allegation that the suit property was sold for Shs.6 million, his account with the 1st defendant still reflects a debit balance. The plaintiff further takes issue with an entry of Kshs.4,017,646.50 made on 19/9/06 in his account with the 1st defendant yet the suit property was allegedly sold in July 2006. In his view if that entry was made from proceeds of the sale there was no reason why the 1st defendant delayed for about two months to credit his account. According to the plaintiff the state of his account suggested that the transaction between the 1st and 2nd defendant may not have been above board.

Related to the issue of accounts is the plaintiff's complaint that long after the suit property was allegedly sold the 1st defendant continued to communicate with the plaintiff as if no sale had taken place. Reference was made to the defendant's letter of 24.8.2006 addressed to the plaintiff's advocates. The ultimate sentence of the letter reads:-

"**we are proceeding with the intended/recovery action**

unless payment is received on account."

In response to that letter the plaintiff's advocates informed the 1st defendant that they would revert to them upon taking instructions. Unknown to the plaintiff the 1st defendant had already sold and transferred the suit property to the 2nd defendant. Annexture "AK6 (a) and (b), i.e. the transfer and the certificate of title confirm that position. The 1st defendant is a reputable financial institution. Its letter dated 24.8.2006 would in my view create the impression that the plaintiff's right of redemption was still alive. The 1st defendant was telling the plaintiff that despite the sale and transfer to the 2nd defendant it would still accept repayment of the loan sums at that stage and it could only accept the repayment if it could recovery the suit property to the plaintiff. Between the plaintiff and the 1st defendant it is the latter who knew that the suit property had been sold to the 2nd defendant. At the trial the plaintiff will be arguing that by the letter of 24.8.2006, the 1st defendant had waived its contractual relationship with the 2nd defendant and would recovery the suit property to the plaintiff on payment of sums due to it. Put another way the 1st defendant was telling the plaintiff that as on the 24.8.2006 their relationship of mortgagor and mortgagee was subsisting. The 1st defendant may in my view have been entitled to make the waiver. As between it and the plaintiff it knew the terms upon which it had dealt with the 2nd defendant. It had exclusive knowledge of the implied terms of the contract between it and the 2nd defendant, particularly as the 1st defendant did not sell the suit property by public auction.

In **Dixon vs. Kennaway & Co. [1900], CH 833** it was held as follows:-

"**If a man by his words or conduct willfully endeavours**

to cause another to believe in a certain state of things

which the first knows to be false, and if the second

believes in such state of things and acts upon his belief,

he who knowingly made the false statement is estopped

from averring afterwards that such a state of things did

not in fact exist."

In the premises, I am satisfied on a prima facie basis that as at 24.8.2006 the 1st defendant made a representation to the plaintiff that the suit property could be redeemed. The position the 1st defendant holds in our society is a crucial one and the society should be able to act upon representations made by it without fear that the representations may turn out to be a hoax. In the same vein it is expected that the 1st defendant in its dealings with its clients and indeed with the entire body politic it should act above board. I am of course alive to the provisions of Section 69 (1) of the Transfer of Property Act which section gives a mortgagee power to sell mortgaged property by private contract where the mortgage money has become due. Invariably, however because of the position the 1st defendant holds in our society the preferred option is one of sell by public auction. The reasons for taking that option are obvious. They include considerations of obtaining the best price on the market, notifying the mortgagor of the ultimate action that will lead to the permanent loss of his property, which may be his home or his lifelong investment and of course to avoid imputation of bad motive or want of good faith.

In the matter at hand, at the time of the sale by private treaty between the 1st defendant and the 2nd defendant, the 1st defendant was in active correspondence with the plaintiff. I have not been referred to any circumstance that made the sale by private treaty urgent save for the fact that the 1st defendant had a statutory power to sell the suit property by private treaty. But it also had a statutory right to buy in at an auction. Yet that particular statutory right is very rarely exercised – no doubt for the same considerations I have referred to above.

It has also emerged that despite the 1st defendant's deposition in its replying affidavit that it sold the suit property at its market value following a valuation of the same by M/S Tysons Limited, no valuation was in fact done before the said sale. The valuation report exhibited by the 1st defendant indicates that instructions to carry out the valuation were received on 2.8.2006 and the actual valuation was carried out on 8.8.2006. That was after the suit property had been sold to the 2nd defendant. Again statutorily, the 1st defendant did not require to have the suit property valued before the sale to the 2nd defendant but it still recognized the importance of such a valuation before the sale. In those circumstances it would, seem that the plaintiff's contention that the sale between the 1st defendant and the 2nd defendant was at an under value may be sustained at the trial.

In **George Gikubu Mbuthia vs. Jimba Credit Finance Corporation & Another – C.A. No.111 of 1986, (UR),** Platt, J.A. when faced with a situation such as this observed at pages 31, 32 and 33 of the judgment as follows:-

"**It would seem therefore that the issue for trial will**

be whether the suit was sold for such an under-value,

as would entitle the Court to set the sale aside and hence

prevent the transfer and registration of the land in the

name of the second defendant, ……..

In those circumstances, the question for the trial

Court would be whether the plaintiff could show

that the defendant had exercised his powers in a

fraudulent way. He could rely on the price alone

if he thought that at a little over half the true

value it was evidence in itself of fraud.

……

"**There was a dispute of fact to be resolved.**

"**Yet, the essence of the equity of redemption is**

to give a mortgagor a reasonable chance to

redeem and thus save the land."

Why should the purchaser be involved? Platt, J.A. resolved such a question thus:-

"**The second defendant complains that he has been kept**

out of his property for a long time. He is not involved ….

He relies on the statute which provides that he doe not

need to enquire into these matters and that irregularities

in the sale sound only in damages. He is right. But the

mortgagor is entitled to defend himself in order to see

that the sale is at a true market value."

It is illustrative that the Learned Judge of the Court of Appeal was considering an appeal from the High court which had refused an injunction where property had been sold at a public auction. In my humble view the observations of Platt, J.A. apply with even more force in the case at hand where there is no evidence that the 1st defendant before selling the suit property to the 2nd defendant ever examined the property market to establish the best price of the suit property as it was bound to act in good faith and have regard to the interests of the mortgagor.

The upshot of my consideration of the plaintiff's application is that I am satisfied that he has a prima facie case with a probability of success at the trial. I am also satisfied on a prima facie basis that damages would not be an adequate remedy for the plaintiff and even if I were to consider this application on the basis of balance of convenience, I would still hold that the same tilts in favour of granting the injunction. The property has been transferred to the 2nd defendant. He has not demonstrated in any wise that he will suffer serious prejudice if the property is preserved.

In the end I allow the plaintiff's application in terms of prayers 3 and 4 thereof.

Costs shall be in the cause. Each party has liberty to apply.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of March 2007.

F. AZANGALALA

JUDGE

Read in the presence of Kangethe for the plaintiff, Gachuhi for the 2nd defendant and Issa for the 1st

defendant.

F. AZANGALALA

JUDGE

2/3/07