



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 177 of 2006

KANIKI KARISA KANIKI PLAINTIFF

- V E R S U S -

COMMERCIAL BANK LIMITED 1ST DEFENDANT

GIRO COMMERCIAL BANK LIMITED 2ND DEFENDANT

MATHANE – MALINDI ENTERPRISES 3RD DEFENDANT

RULING

The plaintiff was at all material times the registered proprietor of all that piece of land situate in Malindi Town and known as Plot No. 2363. On 6th June 1995 he mortgaged it to the first and second defendants for sums of Sh. 2,500,000/-, which the first and second defendants advanced to him. He claims in his plaint that by the year 2000 when he had repaid the principal sum in full there arose a dispute on the unconscionable interest that the defendants were charging leading to the filing at the Milimani Commercial Court by the first defendant of HCCC. No. 359 of 2000 against him to recover a sum of Sh. 6,070,398.96. Judgment in default of appearance was entered against the plaintiff. But upon his application the same was set aside on condition that he deposited Sh.1,000,000/-. His application for review of that sum downwards was argued on 24th June 2005 and ruling was to be delivered on notice.

While awaiting for that ruling he was surprised to learn that the defendants had sold his said piece of land to the third defendant. On enquiry he was given conflicting information as to the basis upon which the property had been sold. He learned that it had been sold for only Sh. 1,900,000/- which, according to him, was an undervalue as it had been valued at Sh. 6,750,000/- way back in 1995. He therefore filed this suit and sought in the main a declaration that the sale of the property to the third defendant whether under the power of sale in the mortgages or in execution of the decree in that case is null and void as he was not served with the statutory notice of sale or notified of the decree.

Contemporaneously with the filing of the suit he filed an application for injunction and obtained temporary orders restraining the third defendant from further selling the property or doing anything on it. This ruling is on the inter parte hearing of that application.

The first and second defendants did not file a replying affidavit but they filed a joint defence. In that defence they admitted that they sold the property to the third defendant by private treaty for Sh. 1,900,000/-. They denied that that was an undervalue as the forced sale value was sh. 1,600,000/-.

Regarding the statutory notice they stated that the same was given by the letter dated the 12th September 1996. They further stated that even if the power of sale was irregularly exercised by virtue of section 69B of the Transfer of Property Act the plaintiff's remedy only lies in damages. They did not participate in this application.

On his part the third defendant who will be most affected by the injunction if it is granted filed a defence and two affidavits. He claims that he is an innocent purchaser for value. He said he saw an advertisement pinned on the property offering it for sale after which he enquired and bought it. He annexed to his affidavit a copy of a letter dated 12th September 1996 which he was given by the first and second defendants as the notice of sale given to the plaintiff. He also denied the allegation that the property was sold to him at an undervalue.

Regarding this application the third defendant said that the same should be dismissed as the plaintiff has been indolent. Since July 2005 when he bought the property he has, with full knowledge of the plaintiff not only been receiving rent from tenants in it but has also expended over Sh. 6 million renovating it and adding an extra floor to it which is now almost complete. In the circumstances he strongly opposed this application for injunction as in his advocates' view the plaintiff has not even made out a *prima facie* case with any probability of success.

I have given due consideration to these pleadings and submissions. I have also considered the provisions of section 69A of the Transfer of Property Act which governs mortgages like the one in this case, registered under the Government Lands Act and which states when the power of sale can be exercised. I notice that its wording is different from that of section 74(1) of the Registered Land Act which governs charges registered under that Act. Whereas under section 69A of the Transfer of Property Act a mortgagee can exercise the power of sale without giving the statutory notice if interest on the mortgage money is in arrears for two months or the mortgagor has breached some provision in the mortgage instrument, under section 74(1) of the Registered Land Act service of the statutory notice is mandatory whether or not interest is in arrears or there is breach of any condition in the charge document. I do not wish to express any view on the two provisions.

In this case the statutory notice was admittedly not given as the letter dated 12th September 1996 gave the plaintiff only 14 days and does not therefore amount to a statutory notice.

As I have said the first and second defendants did not file any replying affidavit or participate in this application. As a matter of fact their advocate appeared and sought permission not to participate, as the order sought in the application will not affect his clients. In their defence they have not stated on what ground they exercised the power of sale; whether interest was in arrears or the plaintiff was in breach of some provision in the mortgage instrument. In the circumstances and as the plaintiff has alleged that the power of sale had not arisen I think a preservative order is warranted. Consequently I grant the order of injunction as prayed in paragraph 1 of the plaintiff's application dated 12th October 2006 until this suit is heard and determined. Costs of the application shall be costs in cause.

DATED and delivered this 25th day of May 2007.

D.K. MARAGA

JUDGE

25.5.2007

Before Maraga Judge

Anyanzwa for plaintiff

Wameyo for Kaburu

Court clerk – Mitoto

Court – Ruling delivered in court.

D.K. MARAGA

JUDGE