



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE 524 OF 2006
KITAVI INVESTMENT COMPANY LIMITED.....PLAINTIFF
VERSUS
CO-OPERATIVE BANK OF KENYA LIMITED & ANOTHER....DEFENDANTS
RULING

The application dated 19.9.2006 seeks one principal order and that is an interlocutory injunction to restrain the 2nd defendant from evicting the plaintiff from or taking possession of the property known as Title Number Nairobi/Block 90/245 Loresho (hereinafter called the suit property) from the plaintiff and from selling, transferring, disposing of or in any way alienating the suit property. The brief facts leading to this application are as follows:-

The plaintiff applied for and obtained a loan of Kshs.10,000,000.00 in or about July 1998 from the 1st defendant. The plaintiff offered the suit property as security for the said sum and a first legal charge was registered over the property in favour of the 1st defendant. There was default on the repayment of the said loan and the 1st defendant in exercise of its statutory power of sale served a statutory notice of sale dated 15.11.2000 and did in fact sell the suit property to the 2nd defendant.

The 2nd defendant then instituted HCCC No.685 of 2006 seeking the eviction of the plaintiff. The suit was filed at the Central Registry of this court. In that suit the 2nd defendant sought a mandatory injunction to compel the plaintiff to vacate the suit property. Those proceedings provoked these proceedings.

From the affidavit evidence and the submissions addressed to me by counsel the plaintiff makes the following primary complaints. That the charge document was defective and was not enforceable as a security; that the statutory notice served was defective, null and void for failure to comply with mandatory provisions of the law with the consequence that the 1st defendant's statutory power of sale had not arisen; that in the premises the 1st defendant did not pass any or any good title to the 2nd defendant, that the 1st defendant unilaterally varied the terms of the charge and the variation disentitled the 1st defendant to exercise its statutory power of sale.

The 1st defendant in its response to the complaints made by the plaintiff contended that the charge document was properly executed and complied with the law in all aspects and further that the issues raised by the plaintiff were an afterthought as the same had not been raised in HCCC No.579 of 2003 which was filed by the plaintiff and which was dismissed by the court. The 1st defendant further

contended that as the plaintiff defaulted in repayment of the loan it exercised its statutory power of sale and sold the suit property by public auction and in so doing complied with the law in all aspects. In its view the auction sale was properly conducted under the strick letter of the law and a good title passed to the 2nd defendant. In the premises the 1st defendant contended that the plaintiff's application was not based on solid legal principles and should be dismissed.

The 2nd defendant on his part contended that he is the registered proprietor of the suit property having bought the same at a public auction held by Garam Investments on behalf of the 1st defendant on 19.1.2006. As the registered proprietor he had instituted the said HCCC No.685 of 2006 for vacant possession. In that suit he had lodged a notice of motion for a mandatory injunction to compel the plaintiff to vacate the suit premises which motion was fixed for hearing on 13.7.2006 but was not heard on merit as the plaintiff objected to the same. The objection was however dismissed and the suit is pending hearing at the Central Registry. In the 2nd defendant's view, this suit offends the provisions of Section 6 of the Civil Procedure Act and should be stayed pending the hearing of HCCC No.655 of 2006. The 2nd defendant further argued that the plaintiff's right to redeem the suit property was lost when he purchased the same at the auction pursuant to the provisions of Section 72 (1) of the Registered Land Act.

In the premises the 2nd defendant prayed that he be struck out as a party in this suit and the injunction against him be discharged.

Having considered the application the affidavits filed both in support and in opposition to the application and further having considered the submissions made to me by the counsels appearing and the authorities cited, I take the following view of this matter. Section 77 (3) and 4 of the Registered Land Act read as follows:-

“77 (3) A transfer by a chargee in exercise of his power of sale shall be in the prescribed form and the Registrar may accept it as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

(4) Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge or on account of any other encumbrance to which the charge has priority (other than a lease easement or profit to which the chargee has consented in writing).

It would appear that by dint of the above provisions of the RLA, the 2nd defendant obtained an indefeasible title to the suit property. I say so because the plaintiff in its plaint dated 19.9.2006 and filed simultaneously with this application does not impute any impropriety to the 2nd defendant. The supporting affidavit filed on behalf of the plaintiff and sworn by Lydiah Antoinette Lubanga, the plaintiff's director does not blame the 2nd defendant at all. The only action complained against regarding the 2nd defendant was the institution of HCCC No.685 of 2006 in which the 2nd defendant sought to recover possession. It cannot be gainsaid that the 2nd defendant as the registered proprietor of the suit property was lawfully entitled to seek possession of the suit property. He has done so by instituting HCCC No.685 of 2006. The filing of that suit cannot in my view be described as a threat that would entitle the plaintiff to seek the interim injunctive relief sought in this application and more so in a separate suit.

The plaintiff relied upon the Court of Appeal decision in **Ochieng and Another Ltd. vs. Ochieng and others [1995-98] EA 264** for proposition that a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold. That decision in my view turned on its own special facts. The 2nd defendant in this case is clearly protected by the provisions of Section 77 (3) and (4) of the Registered Land Act quoted above and that statutory protection in my view may only be taken away if impropriety is imputed upon him. No such imputation has been made in this case in the plaint and application.

During the preparation of this ruling I came across another Court of Appeal majority decision supporting the position taken by the plaintiff. That is the case of **Mbuthia vs. Jimba Credit Finance Corporation & Another [1988] KLR 1** in which Platt and Masime, JJA held that under the Registered Land Act Section 77 (4) the title of the mortgagor does not pass until registration. However as the appellant had acted promptly in seeking to preserve the status quo before innocent purchasers for value had been involved an injunction would issue. The Court of Appeal's majority decision seemed to treat a purchaser who had not registered his interest differently from a purchaser who had concluded the conveyance by registration of the transfer in his name. It is illustrative however that the entire bench was in agreement that the equity of redemption is lost on the completion of a valid agreement for a valid sale is not allowed to continue until conveyance nor until registration. The dissenting judgment of Apaloo, J.A (as he then was) in my respectful view found favour in the later decision of the same court in **Captain Patrick Kanyagia & Another vs. Damaris Wangechi and 2 others – C.A. No.150 of 1993 (UR)**. The Learned Judge delivered himself thus:-

“Some doubt was expressed in argument whether Subsection 1 of Section 77 of the Act (RLA) which confers a power on the charge to sell the property with an apparent immediate divesting of the chargor's title is not in conflict with subsection 4 of the same section which transfers the chargor's interest to the purchaser only after registration. For my part I see no such conflict. As I see it on the acceptance of a bid at an auction there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection 2 of the Act.”

The learned Judge then continued as follows:-

“... The Registrar may accept it i.e. the transfer as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

Thus the question of setting aside the sale against a bona fide purchaser for value as the appellant sought in his plaint does not arise.”

In the end the learned Judge was of the view that the superior court Judge was right in denying the injunction sought by the appellant as he had found that the appellant would not succeed in his claim to nullify the sale at the trial.

That view received support in the later case of **Captain Patrick Kanyagia and Another vs. Damaris Wangechi and others (supra)**. Shah, J.A. who delivered the leading judgment said as follows at page 11 of his judgment:-

Although Apaloo, J.A. (as then was) differed with Platt, J.A. and Masime, Ag. J.A. (as they then were) (in the Mbuthia vs. Jimba Credit Finance Corporation) case) in the end result, all three Judges were ad idem on the issue as to the extinguishment of the equity of redemption upon the execution of a valid contract of sale in the exercise of Statutory Power of Sale. That is the law when the land is held under Registered Land Act (Cap 300).”

The Learned Judge proceeded to hold that the Kanyagia's who were purchasers at an auction sale such as the one herein obtained a good title to the subject property and the mortgagor's remedy if any lay in damages as against the mortgagee. The learned Judge was categorical that no duty was cast on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.

In the premises I am satisfied prima facie that the plaintiff's right of redemption has been lost. The plaintiff has therefore not shown a prima facie case with a probability of success at the trial. This finding is sufficient to dispose of this application. However before concluding this matter I will briefly consider the other complaints made by the plaintiff.

On the validity of the charge and the statutory notice of sale, I am unable to appreciate the objections raised in respect of the same at least prima facie. The documents are exhibited by the 1st defendant in its supplementary affidavit as “MBI” and “MBV”. The 1st defendant’s Senior Legal Officer who made the affidavit swore that the charge document was voluntarily signed by the plaintiff and the contents thereof, were explained to its director. I have perused the same and I am satisfied again on a prima facie basis that the challenge made against it would not vitiate the same. I have also perused the said statutory notice. I detect no defect in the same. The notice was in my view valid. It required the plaintiff to pay the mortgage debt within the period permitted by statute and sale of the suit property was threatened at the expiry of 3 months from the date of service of the notice. Service of the notice is not challenged. In the premises the decision in **Ochieng and Another vs. Ochieng and others** and **Trust Bank Ltd. vs. Eros Chemists [2000] 2 EA 550** do not advance the plaintiff’s case at all. In the former case the Court of Appeal found that the bank had failed to prove posting of the notices of sale and in the latter case the Court of Appeal found that a valid statutory notice had not been served.

With regard to the complaint that the 1st defendant unilaterally varied the terms of the charge, I have detected no such complaint in the plaint which is the foundation of the plaintiff’s application. In any event the complaint in the supporting affidavit with regard to the alleged variation appears to be a dispute over the amount due which normally is not a basis for the grant of an interlocutory injunction.

The plaintiff admits its indebtedness to the 1st defendant. There is no doubt that it was in default of repayment of the same. Having found that the mandatory statutory notice was served, I have no doubt that the 1st defendant’s statutory power of sale arose and was exercised. These findings buttress my earlier finding that the plaintiff has not shown a prima facie case with a probability of success at the trial. Having taken that view of the matter it is strictly unnecessary for me to consider the other conditions for the grant of an interlocutory injunction set out in **Giella vs. Cassman Brown & Company Ltd. [1973] EA 358**: whether the plaintiff could adequately be compensated in damages or the balance of convenience.

Finally an injunction is an equitable remedy. The conduct of the plaintiff is therefore of primary consideration. The plaintiff was indebted to the 1st defendant and when the 1st defendant sought to exercise its statutory power of sale the plaintiff filed HCCC No.579 of 2003 which it failed to prosecute. When the 1st defendant succeeded in the exercise of the said power of sale and sold the suit property to the 2nd defendant the plaintiff instituted this suit which suit is being used to resist the 2nd defendant’s exercise of his rights as a proprietor in HCCC No.685 of 2006 – instead of seeking relief in that suit. This conduct of the plaintiff in my view does not show a desire to do equity. In the end the plaintiff’s application dated 19.9.2006 and filed on the same date against the defendant has no merit and is dismissed in its entirety with costs.

DATED and DELIVERED at NAIROBI this 6th day of June 2007.

F. AZANGALALA

JUDGE

6/6/07