



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 54 of 2007

HEZEKIAH GICHERU MWANGI.....PLAINTIFF/APPLICANT

Versus

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT/RESPONDENT

JOSEPH K. KAROKI T/A MUIBAU AGENCIES..2ND DEFENDANT/RESPONDENT

RODRICK NGUGI.....3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff as owner of property **MAKUYU/KIMORORI/BLOCK I/1603** obtained a financial facility from the 1st Defendant and as security gave his said property to be charged. The Plaintiff obtained from the 1st Defendant Ksh.2,680,000/=. The charge instrument which was prepared by the 1st Defendant provided that the property secured an amount of Kshs.3.2 million. The Plaintiff admits that after making some initial payments towards that facility he defaulted. The 1st Defendant, it is pleaded in the Plaint, advertised for the sale of that property by public auction without having given statutory notice to the Plaintiff. It is pleaded further that before the stated sale the Plaintiff's wife negotiated with the 1st Defendant and offered to pay that facility by monthly installments of kshs.25,000/=. That the 1st Defendant accepted that proposal whilst awaiting the final approval by the 1st Defendant's Board of Directors. That despite that agreement the 1st Defendant proceeded with the sale and sold the property to the 2nd Defendant for Kshs.2,491,000/=. This sale, the Plaintiff pleaded, was tainted with malice, collusion and fraud and was null and void. In the particulars of fraud the Plaintiff stated:

- That no statutory notice was served upon him contrary to Section 74 of the Registered Land Act.
- That the property was sold without service of the notification of sale upon the Plaintiff contrary to Rule 15 of the Auctioneers Rules 1997.
- That the property which was sold for Kshs.2,491,000/= was below the offer made by the Plaintiff of Kshs.3.5 million.
- That the 1st Defendant accepted the 3rd Defendants personal cheque for the payment of the 25% deposit of the purchase price.
- That the 2nd Defendant misled the Plaintiff's wife and son by saying that the offer made by the 3rd

Defendant was subject to approval of the 1st Defendant.

- That in carrying out the auction the 2nd Defendant did not follow the correct procedure
- That the Plaintiff's wife continued to pay the amount agreed towards the loan, that is, Ksh.20,000/= per month and accordingly the 1st Defendant was not entitled to sell the property.
- That the 1st Defendant had clogged the equity of redemption of the Plaintiff.
- That the amount reflected in the charge instrument did not correspond to the amount lent to the Plaintiff.
- That the 1st Defendant accepted the Plaintiff's offer to pay Kshs.3.5 million and despite that agreement proceeded to sell to the 3rd Defendant.

The Plaintiff therefore prays for judgment for declaration that the sale conducted on 18th October 2006 was invalid, illegal and null and void. On so declaring that, the Court would grant an injunction stopping the transfer of property to the 3rd Defendant. The Plaintiff further prayed for an order of delivery of security documents relating to the property on the Plaintiff making payment to the 1st Defendant for Kshs.3.5 million. The Plaintiff also sought a declaration that the charge instrument is defective. The Plaintiff has now approached this Court for a temporary injunction by his application by way of Chamber Summons dated 5th July 2007. In the grounds and in the supporting affidavit the Plaintiff reiterated the pleadings as set out herein before. He further stated in his affidavit that the 1st Defendant accepted a proposal made by his wife to settle the amount due and by the time the property was sold his wife had paid Kshs.486,000/=. His wife Jerusha Njeri Mwangi also swore an affidavit in support of the application and she reiterated that her proposal to pay had been accepted and confirmed that she had paid in total to the 1st Defendant Kshs.486,000/=. In this regard she annexed receipts of payments made to the 1st Defendant. It ought to be noted that those receipts indicate that the payments were made by the Plaintiff. The wife to the Plaintiff further stated that she was present when the auction took place on 18th October 2006. She stated in her affidavit that the auctioneer was unable to confirm that the property would be sold to the 3rd Defendant until confirmation was received from the 1st Defendant. There is another affidavit in support of the application sworn by the Plaintiff's son namely Fred Mwangi. He confirmed that he too was at the auction and repeated the averments of his mother that the 3rd Defendant was not declared as the highest bidder because confirmation was awaited by the 1st Defendant.

The 3rd Defendant swore an affidavit in reply and stated that on the auction day 18th October 2006, he attended the 2nd Defendant's office for the purpose of participating in the auction. He got to know about the auction through the press advertisement. That the only other person who was bidding for the property was the Plaintiff's son Fred Mwangi. He confirmed that he finally gave the highest bid of Kshs. 2,491,000/=. He stated that he had not had any dealings with any of the parties before the auction day. He confirmed that he made his final payment towards the purchase price through his advocate. He described himself as an innocent buyer for valuable consideration. He stated that if an injunction was given he would be prejudiced.

The 1st Defendant by its replying affidavit confirmed that the Plaintiff defaulted in his repayments of his loan. He referred to the Plaintiff's letters whereby the Plaintiff had requested the 1st Defendant to proceed to sell the suit property by auction. The first letter is dated 25th August 1999 and is in the following terms:

“RE; HCCC NO. 3084 of 19995 NGIMU FARM LIMITED VS HEZEKIAH GICHERU MWANIG & ANOTHER

.....
.....*Ours is therefore*

to demand that you urgently proceed to realize your security forthwith as no order barring yourselves from so doing if the plaintiffs wishes to restrain you from doing so, they shall have to move the court again for such orders. Such a second motion will have no merit given the fact that the previous one has not yet been prosecuted for the last three years.

Kindly do confirm that are proceeding accordingly.

Yours faithfully

MEREKA & COMPANY”

The second letter is dated 15th July 2004 and is in the following terms:

“RE: Loan Account No. 261762

Notice of Recall of loan issued under The AFC Act Chapter 323 Laws of Kenya

act for HEZEKIAH GICHERU MWANGI and your letter dated 30th June 2004 has been placed in our hands with instructions to deal as appropriate.

Our client has informed you on numerous times and for a couple of years that you should realize your security and recover whatever has been outstanding on his account. He cannot understand why you have dragged your feet for so many years. Once again, we are instructed to urge you to move with speed to realize the security. We are further instructed to put you on notice that our client will not be liable to pay the hefty interest and penalty charges accrued on his account over the years as a direct result of your inability, reluctance and/or sheer ignorance to realize the security timorously.

Yours faithfully

Kagwimi Kangethe & CO.”

The 1st Defendant further in the replying affidavit stated that a concession was given to the Plaintiff which reduced the amount payable by him to Kshs.5,219,732/=. That despite that concession the Plaintiff failed to make payment and consequently the 1st Defendant gave the Plaintiff a foreclosure notice dated 30th June 2004. That notice was exhibited in the replying affidavit. Further it was stated that the Plaintiff’s wife although proposed to pay the Plaintiff’s debt, failed to honour the proposal. The 1st Defendant was categorical that it did not agree that the account be cleared by payment of Kshs.3.5 million. In respect of the allegation by the Plaintiff that the property was sold for under value the 1st Defendant referred to the annexed valuation which showed that the property could fetch at a forced sale Kshs.2.4 million.

The 2nd Defendant also filed a replying affidavit and stated that the Plaintiff was served with the 45 days notification of sale. This notice was served by registered post and personal service. On the day of auction in his office were the 3rd Defendant and the Plaintiff’s wife and son. That it was only the son who gave his bid. The 3rd Defendant was eventually declared the highest bidder and he paid the 25% of the purchase price by personal cheque. After the sale the 3rd Defendant was issued with a signed purchase agreement and with a certificate of sale. The 2nd Defendant concluded by saying that the sale was procedurally conducted.

It ought to be noted that the Plaintiff’s application is for an injunction to stop the Defendant’s dealing with the suit property and to restrain them from selling, trespassing or transferring the same. The principles of granting an injunction are well known and were enunciated in the celebrated case of **GIELLA -V- CASSMAN BROWN & CO. LTD. [1973] E.A.** Those principles were in the following terms:

“an applicant must show a prima facie case with a probability of success;

An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury when the court is in doubt, it will decide the application on the balance of convenience;

What the court needs to consider is whether the Plaintiff has shown a prima facie case with probability of success. The 1st Defendant has exhibited the statutory notice that was served on the Plaintiff dated 30th June 2004. That letter was received by the Plaintiff and this was confirmed by the Plaintiffs then advocated by his letter dated 15th July 2004. That letter is quoted herein before. So the Plaintiff was indeed served with the statutory notice by virtue of that notice. If the Plaintiff was to argue that he was entitled to another notice after some negotiations had taken place there would be no legal justification for that other notice. This indeed was the holding of the case of **MBUTHIA -V- JIMBA CREDIT FINANCE CORPORATION AND ANOTHER [1986]-1989] E. A.** as follows:

“It is clear that section 74 did not impose on the chargee the giving of more than one notice and there is no sound policy reasons why he should be obliged to give fresh notice to the charger any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in their right mind would suspend a projected sale as a matter of favour or indulgences to a defaulting mortgagor.”

The 2nd Defendant annexed to his replying affidavit the 45 days notification of sale sent to the Plaintiff and thereby annexed the certificate of posting of a registered article. That notification of sale therefore was served by registered post. It was incumbent upon the Plaintiff to prove to this Court that he did not receive that letter by making enquiries through the post office in respect of its receipt. The burden of proof was upon the Plaintiff to so prove. See **Section 107(1)** of the Evidence Act which provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

There is no evidence provided by the Plaintiff showing that the sale of the property for Kshs. 2,491,000/= was an under sale. Indeed the evidence before court shows that the property was sold for a higher value than had been given by the valuer. Similarly the Plaintiff did not prove to the Court that the 1st Defendant had accepted the amount of Kshs. 3.5 million in settlement of this loan account. Even if there was such agreement the Plaintiff certainly has not made that payment. There is no basis in the Plaintiff’s allegation that the sale was invalid because the 3rd Defendant made a payment of the deposit by personal cheque. There is also no evidence that the 2nd Defendant deceived the Plaintiff’s wife and son at the auction. It has also not been proved that the said wife and son made an offer which is higher than the 3rd Defendant. Accordingly in the Court’s view the Plaintiff has failed to show a prima facie case with a probability of success. The Court rejects the argument that the sale was undertaken despite the offer by the wife to pay the debt. The wife was not a party to the contract between the Plaintiff and the 1st Defendant. Similarly the fact that the charge instrument provided for an amount higher than that which was loaned does not nullify that instrument. After all by the time the sale took place the loan was higher than the charge instrument provided. Accordingly that argument also is rejected. The Plaintiff in presenting the present application did not argue that the award of damage would not suffice. Accordingly since the Court that it is not in doubt in respect of the two principles of injunction, the Court will not proceed to consider the third principle of the balance of convenience. The Plaintiff’s application by Chamber Summons dated 5th July 2007 is hereby dismissed with costs to all the Defendants.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 13th day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE