



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

Civil Suit 164 of 2006

SAMUEL KIMANI WAINAINA
.....PLAINTIF

VERSUS

HOUSING FINANCE CO. OF KENYA LIMITED.....
DEFENDANT

RULING

The plaintiff application is brought Notice of Motion under Order XXI Rule 79 and Order XXXIX 1,2 and 5 of the Civil Procedure Rules, and section 3A of The Civil Procedure Act.

The plaintiff seeks the following orders:

“* That this Honourable court be pleased to set aside the sale by public auction of L.R. NO. RUIRU/KIU BLACK 3/1579 Kahawa Sukari by Dolphin Auctioneer which property registered in the name of the plaintiff which sale was scheduled for 19th November 2005 (now past) that the Honourable court be pleased to issue an injunction prevent the defendant its agent and/or servant namely Dolphin Auctioneers from finalizing the said sale by public Auction.”

The plaintiff in his plaint stated that on or about 22nd July 1999 he secured a mortgage of kshs 1, 738, 500 secured by property **RUIRU/KIU BLOCK 3/1579 KAHAWA SUKARI**, hereinafter called the suit property.

On 5th September he stated he received a notification of sale of the suit property. That before the said service of Notification the defendant had agreed to transfer the said mortgage to the plaintiff’s daughter and therefore stop the sale of the suit property. To carry out that transfer it had been agreed that the daughter of the plaintiff would pay kshs 200, 000 as processing fees.

In paragraph 9, thereof, the plaintiff averred:

“The plaintiff avers that on or about 17th November, 2005, he visited the defendant’s office at Rehani House, Nairobi where it was agreed that upon him depositing the earlier agreed kshs 200,000 the existing mortgage would be considered for transfer to Anne Kimani the plaintiff’s daughter.”

Thereafter the plaintiff pleaded that despite that payment the defendant caused the sale of suit property. That the said sale was fraudulent and in breach of implied agreement and the said sale has caused the plaintiff loss.

The above being the basis of the plaintiff's claim the plaintiff in bringing the present application has delved into matters not pleaded in the plaint. Some of such matters are that; the defendant credited the amount of kshs 200, 000 into an account that was not the plaintiffs original account. That the defendant wrongly charged 26% interest rather than 10% that ought to have been charged to the plaintiff which was the rate chargeable to University of Nairobi pensionable workers, the plaintiff having been such a worker. These issues amongst others cannot be considered since the same are not pleaded in the plaint.

The only issues the plaintiff raised and ones, which the court will consider, related to the transfer of the mortgage to the plaintiff's daughter and the valuation of the suit property. The plaintiff's counsel argued that the defendant having received the payment of kshs 200, 000 the plaintiff's equity of redemption was availed to the plaintiff. In regard to the valuation the plaintiff deponed in his affidavit.

“That the suit premises has since been developed and can fetch upto kshs 7 million in the open market.....”

The plaintiff's counsel in argument stated that the plaintiff does not deny owing the defendant money.

Plaintiff's counsel argued that the plaintiff had shown a prima facie case with a probability of success. Counsel sought the court to consider the definition of what a prima facie case is as defined in the case MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125, as follows:

“.....what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Although the plaintiff argued that this suit property is the plaintiffs residential home and accordingly he would suffer if it was sold, that argument did not find its origins in the plaintiff and cannot therefore be considered.

The plaintiffs application was opposed by the defendant.

The defendant began by arguing that the application had been brought through the wrong procedure. Defence stated that the procedure for an application under Order 39 Rule 1, 2 and 5 is chamber summons as opposed to a Notice of Motion. That although the plaintiff had come under Order 21 Rule 79, the same Rule related to sale by execution of a decree, which was not the case here.

Defence was also of the view that the prayer seeking, at interlocutory stage, seeking orders to set aside the sale by public auction was not available to the plaintiff. That even the prayer of injunction was not available since it was, by its terms, permanent injunction and was not sought pending the determination of the suit.

On the substance of the application defence stated that the plaintiff had not denied being in default of his payments; that the defendant had served statutory demand on the plaintiff; that the defendant had on 18th November 2005, sold at the public auction, the suit property to Mr James Kagonia Warui, who had not been joined as a party in this suit; that the plaintiff's daughter who had request to take over the mortgage was given up to 15th July 2005 to pay kshs 200, 000 as a sign of commitment to take over the mortgage, which money was not received by the stated date and accordingly the defendant was entitled to sell the property by public auction.

Defence argued that under section 77 of the R.L.A., the plaintiff could only claim damages after the auction of the suit property.

The above summarises the parties arguments.

The plaintiff in the present application and in oral submissions argued on matters that were not pleaded in the plaint as aforesaid. Those argument will collapse for failing to have their foundation in the plaint.

The plaintiff's argument that the equity of redemption was availed to him once the defendant agreed to receive kshs 200, 000 from his daughter fails on several grounds. Firstly the agreement for his daughter to take over the mortgage, the plaintiff has no privity to plead that agreement, if indeed it was an agreement. Secondly for the court to hold that there was an agreement, oral, to suspend the power of sale, relating to the payment of shs 200, 000, cannot be acceptable for indeed that would be in breach of section 98 of the Evidence Act, which forbids oral evidence to contradict a written contract. The charge instrument, which confers the defendant with power to sell the suit property was in writing and the court would accept any term thereof to be contradicted only by another written document. In any case the defendant had indicated a deadline within which payment ought to have been made, but the same was not so paid. This argument thereof is defeated and fails.

On the issue of valuation, the plaintiff failed to produce a valuation to disprove the value placed by the defendant. In the plaint all that the plaintiff pleaded was that the property was sold at under value. It was incumbent upon the plaintiff to show the court that indeed the sale was under valued by showing a valuation report, which showed a different amount. Section 107 of the Evidence Act lays that burden on the plaintiff.

On the argument raised by the defendant on the procedure followed in the application, the court rejects defence argument. The plaintiff, presumably, since he sought what was tantamount to mandatory injunction, came also under section 3A of the Civil Procedure Act. Under Order 50 Rule 1, an applicant can only move by chamber summons where it is so provided by the rules, under which he moves. Where the rules do not provide the produce, the applicant should move by Notice of Motion. In this case Section 3A of the Civil Procedure Act does not provide the procedure to be followed, accordingly the plaintiff was right to have come under Notice of Motion.

I am in agreement with the defendant that the plaintiff's application will fail for having failed to join the buyer who purchased the suit property in a public auction on 18th November 2005, to this suit. The said buyer, who will be affected by any of the orders made hereof, must be made a party and thereby be afforded an opportunity to defend his interest.

Defence argued that section 77 only affords the plaintiff on award of damages once the property was sold by public auction. The court rejects that argument. Section 7 of R.L.A. provides:

“.....any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.”(Underlining mine)

That section is clear that it does not state that the only remedy available to the plaintiff is damages, but rather it provides that his remedy in damages is only against the person exercising the power of sale. This section therefore does not bar a claimant to seek other reliefs other than damages, where the chargee has wrongly exercised its power of sale.

But that as it may be the court does hereby find that the plaintiff has failed to demonstrate a prima facie case with a probability of success and is therefore not deserving the prayers sought.

I do also find that the prayers as drafted by the plaintiff were in capable of being granted for indeed the court cannot give final orders at interlocutory stage and therefore the court cannot set aside the sale by public auction. The court also cannot give a permanent injunction at an interlocutory stage but rather an injunction application such as the one being considered hereof can only be granted pending the determination of the suit. The plaintiff's application therefore, must and does fail.

The order of the court is that the Notice of Motion dated 8th December 2005 is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 26th June 2006.

MARY KASANGO

JUDGE