



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 667 of 2005

JOSEPH KINUTHIA KURIAPLAINTIFF/RESPONDENT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT

JANE TIKHWI MUYUNDO.....2ND DEFENDANT

R U L I N G

The plaintiff's application is brought under section 3A of the Civil Procedure Act and Order XXXIX Rules 1, 2 and 3 (1) of the Civil Procedure Rules.

The plaintiff seeks an order to injunct the defendants from remaining in the suit property (LR No. 3777/806) or dealing in any way with it.

Although the plaintiff's prayer is seeking a mandatory injunction to dispossess the defendant of the suit property, it transpired during the hearing, that the defendants have not taken possession at all. The plaintiff did not seek to amend its prayer and since the court does not deliver itself of orders, which will be in vain, that aspect of the plaintiff's prayer will not be considered hereof.

The only aspect of the plaintiff's prayer which remain relates to injuncting the defendant from dealing in any way with the suit property.

Before delving into the arguments presented before me it is important to state that, if indeed as accepted by counsels, that the plaintiff is still in possession of the suit property then counsel for the plaintiff in his certificate for urgency committed a travesty in the statement thereof for he stated:

“The 2nd defendant/respondent has unlawfully and forcefully taken possession of the suit property.....”

There seems to be no truth in that statement and being a statement made by an officer of this court it is more abhorrent.

The plaintiff's argument in support of this application was that the sale of the suit property to the 2nd defendant was procured by fraud and conspiracy and that the plaintiff at the hearing of the suit will seek a declaration that, that sale was null and void. The plaintiff contended that there was fraud because an offer for repayment of the loan was made on behalf of the plaintiff, and indeed kshs 569, 000 was made to the

1st defendant. That the suit property was sold by private treaty and at under value and even after the sale was conducted the 1st defendant represented to the holder of the power of attorney, of the plaintiff, that the sale had not been conducted. Plaintiff relied on the case SAJABI – V – AMRELIWALLA [1956] EACA 71. Where it was held that:

“Although a mortgagee who sells the mortgaged premises is not a trustee for the mortgagor, he must sell in good faith and at a reasonable price. A sale by private treaty is not unlawful but is extremely unusual and will, if conducted in secret, attract suspicion.”

Plaintiff also relied on the case ZE YU YANG – VS – NOVA INDUSTRIAL PRODUCT [2003] 1 EA 362; where the judge held:

“The title issued to the purchaser cannot be impeached whatsoever except on ground of fraud.”

The deponent of the affidavit in support of the application accepted that the plaintiff had defaulted in the repayment of the facility granted by the 1st defendant, whose security was a charge over the suit property.

The plaintiff referred to two proposal that were made to the 1st defendant; firstly the plaintiff offered to subdivide the suit property, and to sell a portion with a view to using the sale proceeds; secondly the holder of power of attorney of the plaintiff offered to purchase the suit property for shs 2 million.

The plaintiff argued that he had shown a prima facie case with a probability of success. That further that he was bound to suffer irreparable loss in that on the suit property lived his 90 years old father and that his late mother’s grave was on that property.

The 1st defendant opposed the application and began by stating that neither of the defendants could be restrained because they were not in possession of the suit property.

1st defendant referred to the statutory notice served upon the plaintiff dated 31st December 2003.

That the plaintiff had previously filed another suit against the 1st defendant at Nakuru High court, namely HCCC NO. 69 of 1998.

That the plaintiff comes to the court of equity, yet is indebted to the 1st defendant; he offers to sell part of the suit property to enable him clear the loan yet now claims he will suffer if he vacates the suit property, on being given condition attached to his proposal for subdivision or conditions attached to the offer to buy the suit property for kshs 2 million he failed to meet those conditions.

1st defendant stated that all the plaintiff had done was to raise issues but had failed to show a prima facie case with a probability of success. The issues raised by the plaintiff were, that there were on going negotiations when the sale took place, but the 1st defendant denied that such negotiations were taking place; on the allegation that the sale to the 2nd defendant was done in secret, 1st defendant referred to the statutory notice served on the plaintiff; that the suit property was sold at under value, that is at kshs 2 million yet its value was kshs 4.2 million, 1st defendant responded by saying that the plaintiff, through his family members had offered to buy the suit property for kshs 2 million. 1st defendants relied on the case MRAO LTD – V – FIRST AMERICAN BANK OF KENYA & OTHERS [2003] KLR 125, in defining prima facie case. The case defined it as:

“A prima facie case in a civil application includes but is not confined to a “*genuine and arguable case.*” It is a case 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 part as to call for an explanation or rebuttal from the later.”

Having concluded that the plaintiff had not established a prima facie case the 1st defendant submitted that the plaintiff's remedy, if any, was in damages. That under section 69B (1) & (2) the purchaser's title could not be impeached. That since the suit property had been sold to the 2nd defendant the plaintiff's equity of redemption had been extinguished.

The 2nd defendant's counsel began his submissions in opposition by stating that the allegations of fraud or wrong doing, if any, did not touch the 2nd defendant. That both the plaint and the supporting affidavits did not touch on the said defendant. That since an allegation of fraud or conspiracy needed direct evidence the pleadings had failed to disclose such evidence and accordingly the burden had not been discharged. 2nd defendant in this regard relied on the case, GRANT – V – KENYA COMMERCIAL FINANCE COMPANY LTD CIVIL APPEAL NO. 227 OF 1995, where the court of appeal stated:

“.....there was no allegation in the pleadings or affidavits in the superior court that there was conspiracy between the 1st respondent on the one hand and the second and third respondents as purchasers on other hand. There is no suggestion that the purchasers had any notice of any irregularity or impropriety in the exercise of the power of sale so as to lose the protection provided by section 69 B (2) of the Transfer of Property Act aforesaid.”

2nd defendant quoted the case of CENTRAL KENYA LTD – VS – TRUST BANK LTD & 4 OTHERS CIVIL APPEAL NO. 215 of 1996 in support of the argument on the sanctity of title.

“.....the transfer.....of the suit property exercising their statutory power of sale as chargees in favour of Flori culture gave to it an indefeasible title and right to immediate possession.”

Having summarised the argument as herein above, is the court, having in mind those argument able to say that the plaintiff is entitled to the injunction to stop the defendants dealing with the suit land.

It is necessary to respond to the arguments raised hereof to be able to ascertain whether the plaintiff is entitled to an injunction.

The plaintiff's claim that the defendants committed fraud and conspiracy is not supported by the evidence presented before court. The plaintiff was served with a statutory notice of sale and there was no evidence presented by the plaintiff to prove that the plaintiff complied with that notice. Indeed it was admitted on behalf of the plaintiff that the plaintiff defaulted in repayment of his loan facility.

The plaintiff, through his holder of attorney offered to repay the facility, which offer was accepted by 1st defendant but only three payments were received by the 1st defendant, and those statements were not sufficient to clear the outstanding amount. The plaintiff therefore did not prove fraud against the defendants in that regard or in regard to other proposals made on his behalf.

Even if fraud was proved I am of the view that in view of section 69 B (1) and 2 TPA and section 23 RTA the plaintiff's remedy lies in damages, this is because the purchaser's title cannot be impeached. I also agree with the finding of Justice Nyamu in ZE YU YANG – V – NOVA INDUSTRIAL PRODUCTS LTD (Supra) that; **“all sins of omission or commission have been heaped on the head of the former mortgagee or chargee.....cannot be transferred to the purchaser.....”**

On the issue of irreparable loss, the fact that the plaintiff's 90 year old father lives on the suit property or the fact that his late mother's grave is on the suit property, much as they move one to show sympathy, they do not qualify as basis of showing that there would be irreparable loss to justify an injunction being granted; particularly when the 2nd defendant is now the registered owner of the suit property.

I accept the defendant's argument that the plaintiff cannot be heard to suggest that the suit property was sold at under value, that is at KShs 2 million since the plaintiff, or his family members had offered to purchase the property for the same price.

The plaintiff is filing the present suit did not disclose that he had previously filed a suit at Nakuru High Court against the 1st defendant. The plaintiff in the present plaint made a declaration that there were no previous suit between himself and the defendants. Even after disclosure, by the 1st defendant, that there was a previous suit the plaintiff did not disclose the status of that previous suit. The court therefore is not sure whether there an abuse of the court process in the filing of the present suit.

Curiously this suit was filed by the person in receipt of the plaintiffs power of attorney. That indeed is stated, in the plaint, and in the supporting affidavit, but the supporting affidavit, did not annex the said power of attorney, to enable the court certify that indeed such a power exists.

If the court was to sum up the plaintiff's case it would say that the plaintiff did not discharge the burden necessary to satisfy the known principles of granting an injunction but more than this the plaintiff's evidence is riddled with statements that are not supported by any evidence, for example the plaintiff stated that the sale took place when there was an agreement to pay the debt. The plaintiff could only show three payments and did not prove full settlement of the loan debt. On the whole in considering the plaintiffs case it displays an attempt to grab at twigs when one is sinking.

In the court's view the plaintiff does not merit the orders sought. The application therefore dated 29th November 2005 is hereby dismissed with costs to both defendants as against the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 2nd June 2006

MARY KASANGO

JUDGE