



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

Civil Case 476 of 2006

JOHN KISIGWA LUSESO.....1ST PLAINTIFF

PHILLORAH W. I. KISIGWA.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED1ST DEFENDANT

BASELINE AUCTIONEERS.....2ND DEFENDANT

GEORGE NYAKUNDI ONKOBA.....3RD DEFENDANT

R U L I N G

The plaintiff instituted this suit by a plaint dated 28.8.2006. That plaint was amended and the amended version was filed on 31.8.2006. The plaintiff claims the following reliefs:-

- (a) An order that during the pendency of this suit the suit property be not sold or put up for sale, either by public auction or private treaty transferred or otherwise disposed of or dealt with by the plaintiffs (?) until further orders of this court, alternatively an injunction restraining the defendants, their servants and agents from selling or putting up for sale either by disposing of or dealing with the property or interfering with the plaintiff’s occupation thereof until further order of this court.
- (b) An order of permanent injunction restraining the defendants whether by themselves or their servants or agents or Advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say from further advertising howsoever the plaintiffs’ piece of land known as L.R. No.209/8275/50 South C Nairobi (hereinafter “*the suit property*”).
- (c) A declaration that the Charge document dated 11.2.1994 is null and void and of no effect and not binding on or enforceable against the plaintiffs, that the plaintiffs are released and discharged from the said Charge and from any liability thereunder, that the property purported to be charged thereby is hereby discharged from the Charge and the plaintiffs are entitled to a re-conveyance of L.R.No.209/8275/50 South C Nairobi delivery upto them of the documents of title relating to the suit property freed, released and discharged from the charge.
- (d) An order directing the plaintiffs to deliver up to the plaintiffs the said document of title duly released and discharged from the charge.
 - (d) (i) An order directing the registrar of titles to cancel the transfer to the 3rd Defendant and to revert the same to the plaintiffs free from all encumbrances.

- (f) An order that the defendants forthwith concurs in doing all acts and things and executes all necessary deeds and documents in order to effectuate the orders aforesaid.
- (g) General damages.
- (h) Such other or further orders as the court may deem fit to grant.
- (i) Costs.

The foundation for the plaintiffs' claim is pleaded in paragraphs 5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,30,31,32 and 33 of the amended plaint. From the averments in those paragraphs of the amended plaint the plaintiffs make several complaints including the following:-

- (a) That the principal debtor paid the loan in full and the property should have been discharged.
- (b) That the Charge was not executed in accordance with the Law.
- (c) That the 2nd defendant did not execute the Charge at all and that the signature on the charge is a forgery.
- (d) That the Chargors (**the plaintiffs**) did not appear before one Alice J. Gulenywa Advocates to execute the Charge nor was the purport and implication of the charge explained to them.
- (e) That no Statutory Notice of Sale was served upon the plaintiffs prior to the intended sale of the suit property.
- (f) That the requisite Auctioneer's 45 days Notice was not served.
- (g) That the plaintiffs did not execute any personal guarantees.
- (h) That any guarantees are not enforceable against the plaintiffs on grounds that the terms thereof were varied by the 1st defendant.

Simultaneously with the filing of the amended plaint the plaintiffs filed an amended Chamber Summons seeking injunctive reliefs restraining the defendants from advertising for sale disposing of, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or leasing, letting otherwise howsoever interfering with the ownership of title to and/or interest in the suit property.

The grounds for the application are the same grounds that form the basis of the plaintiffs' claim in the plaint. The application is supported by an affidavit of the 1st plaintiff sworn on 31.8.2006.

The applicants appeared before me ex-parte on 31.8.2006 and on being satisfied with the prima facie merits of the application, I granted an interim order of injunction restraining the defendants by themselves their servants, Auctioneers or agents or any one of them from evicting the plaintiff's from the suit property pending the hearing of the application inter parties on 5/9/2006. On 5.9.2006 the application was by consent fixed for hearing on 29.9.2006 and the interim orders in force were extended to that date.

In the meantime, the 3rd defendant entered appearance and delivered his defence on 28.9.2006. The 3rd defendant has further raised a counterclaim seeking two primary orders that the plaintiffs do vacate the suit property and for an eviction order against them. The 1st defendant has filed a replying affidavit and Grounds of Opposition have been filed on behalf of all the defendants. On 21.9.2006, the 1st plaintiff filed a further affidavit in response to the replying affidavit filed by the 1st defendant.

Before the hearing could proceed, the defendants raised preliminary objections in terms of notices thereof dated 4.9.2006 and 12.9.2006. The 1st notice which was filed by the 3rd defendant has three grounds as follows:-

- 1) That it is an undisputed fact that the 3rd defendant is now the registered proprietor of the suit premises.
- 2) That by virtue of the provisions of Section 69(B) (2) of the Transfer of Property Act 1882, the title of the 3rd defendant to the suit premises is not impeachable and the remedy available to the plaintiffs, if any, is an action for damages against the 1st defendant.
- 3) That in view of the foregoing the plaintiffs' application and the suit as against the 3rd defendant is frivolous, lacks merit and should be dismissed with costs to the 3rd defendant.

The 2nd notice was filed by the 1st and 2nd defendants and has two primary grounds as follows:

1. That the plaintiffs have filed the following suits.
 - (i) HCCC No.1035 of 1997, Nairobi
 - (ii) Kakamega CMCC No.205 of 2002
 - (iii) Bungoma HCCC No.124 of 2000
 - (iv) Nairobi HCCC No.1056 of 2002.

The plaintiff's actions amount to abuse of the process of the court.

2. The reliefs sought against the 1st defendant in the present application are ***res judicata*** the same having been raised in Nairobi HCCC No.1056 of 2002 and a ruling thereon delivered on 24.2.2004.

I will first deal with the objection raised by the 1st and the 2nd defendant which is upon the ground that the matter is ***res judicata*** as against the 1st defendant. The principle of *res judicata* is set out in Section 7 of the Civil Procedure Act which reads as follows:-

“7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

There are several explanations given under this section including explanation 4 which is relevant. The explanation is as follows:-

“Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

Section 7 and the explanations thereunder should be read together with the provisions of Order II Rule 1(1) of the Civil Procedure Rules which is as follows:-

“1.(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim.”

Now applying the above principle to the matter at hand, I note that in HCCC No.1056 of 2002 which was formerly Bungoma HCCC No.124 of 2000, the plaintiffs together with an entity called Bangam Investments Limited, sought one primary prayer against the 1st defendant and its agent M/s Trailways Enterprises (**Auctioneers**). The prayer was as follows:-

“That the defendant and its Agent M/s Trailways Enterprises (Auctioneers) be restrained by injunction against selling the property of the plaintiffs namely LR No.209/8275/50 Nairobi by public Auction or otherwise on 29.8.2000 or any other day pending the hearing and final determination of the suit.”

The grounds for the application were that no Statutory Notice had been served, that amount claimed was denied and that the interest charged was illegal and baseless. The Court found that the primary ground for seeking relief was that as guarantors the 1st defendant had varied the terms of the guarantee without the plaintiffs consent. Mutungi J did not agree with the plaintiffs and infact held that the plaintiffs had consented to the variations in advance and dismissed the application for injunction which must have given way to the subsequent sale.

In the present application several reliefs are sought and include an order to restrain the defendants from inter alia leasing, letting otherwise howsoever interfering with the ownership of title to and/or interest in the suit property. The foundation of the reliefs sought is inter alia secret and fraudulent transfer of the suit property by the 1st defendant to the 3rd defendant, intended eviction of the plaintiffs from the suit property and alleged defective charge documents. Secret and fraudulent transfer of the suit property, eviction of the plaintiffs and the interest of the 3rd defendant were not matters that were directly and substantially in issue in the application that was determined by Mutungi J. The 3rd defendant’s interest had not in any event come into being. It cannot be said therefore that the reliefs sought against the 1st defendant in the present application are *res judicata*. I find and hold that the doctrine of res judicata does not preclude the application now before the court.

Having found that the reliefs sought against the 1st defendant in this application are not *res judicata*, I cannot say that the application is an abuse of the process of the court. If the 1st and 2nd defendants strongly believe that the plaintiffs’ actions in filing various suits in different courts is a gross abuse of the process of the court, they are at liberty to move the court under Order VI Rule 13 of the Civil Procedure Rules. The Preliminary Objection raised in the circumstances of this case is unsuitable for the relief sought by the 1st and 2nd defendants.

With respect to the 3rd defendant’s Preliminary Objection, I have found as follows: There is no dispute that the 3rd defendant is now the registered proprietor of the suit property and that he was so registered subsequent to a sale of the suit property by the 1st defendant in exercise of its Statutory Power of Sale. The plaintiffs however have challenged the said sale and transfer in the amended plaint. They have alleged fraud and further that the mortgage instrument was null and void and could not give rise to the said sale and transfer. At this stage, I am not hearing the case, so I cannot delve into the sufficiency or insufficiency of the particulars of fraud. A conclusive finding on the fraud allegation or illegality of the mortgage instrument cannot be made in this preliminary objection.

The 3rd defendant thinks that even if fraud is established his title to the suit property is not impeachable and the only remedy available to the plaintiffs if any is an action for damages against the 1st defendant by dint of the provisions of Section 69 (B) 2 of the Transfer of Property Act which is in the following terms:-

“69B (2) Where a transfer is made in the exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground:-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

In my view it is plain that that section does not protect a purchaser against whom fraud is alleged. It protects an innocent purchaser. The 3rd defendant may not be guilty of fraud or any irregularity. But a determination of that aspect of the plaintiffs’ application cannot be made in this preliminary objection. I do not think that the decision of Nyamu J in **Ze Yu Yang – vs – Nova Industrial Products Limited [2003] 1 E.A 362** which the 3rd defendant relied upon to support his objection advances the 3rd defendant’s case. In that case at page 366, the Learned Judge doubted that practically a situation can arise where a purchaser, can be involved in fraud which in my view suggests that if fraud can be proved against a purchaser Section 69 B (2) of the Transfer of Property Act may not protect such a purchaser. On my part however, I am in no doubt that such a purchaser cannot seek protection under that section. Being of that mind I find that the objection raised by the 3rd defendant cannot be conclusively determined at this stage.

In the end, the two Preliminary Objections raised by the defendants are overruled with costs to the plaintiffs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2006.

F. AZANGALALA

JUDGE

31.10.2006

Read in the presence of:-