



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

Civil Case 310 of 2006

THUO MATHENGE.....PLAINTIFF

VERSUS

JANET MUTHONI WAHOME.....ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA.....^{2ND} DEFENDANT

R U L I N G

The plaintiff is seeking an injunction to restrain the defendants from selling, assigning, transferring, alienating or otherwise dealing with the property L.R. TIGONI/MABROUKE/BLOCK 1/954.

The plaintiff is also seeking a declaration that he is entitled to occupy the said property, together with the minor children, from his marriage to the 1st defendant. Another declaration that he seeks is that he has a legal and equitable interest in the property.

And in order to facilitate the redemption exercise, the plaintiff asks that the 2nd defendant be ordered to provide accounts of the 1st defendant's indebtedness.

It is the plaintiff's case that the suit property was purchased by him, in 1991. However, the property was registered in the name of the 1st defendant, who was the wife to the plaintiff.

In 1999 the 1st defendant is said to have obtained a loan of KShs. 1.0 million from the 2nd defendant. The said loan was secured by charge which was registered against the title to the suit property.

Although the plaintiff did initially help the 1st defendant to make some repayments towards the loan, the payments are said to have stopped after the 1st defendant deserted the plaintiff.

Mr. D.W. Mwangi, advocate for the plaintiff, readily conceded that the 1st defendant had ignored her obligations to repay the loan, and that the arrears then escalated to over KShs. 2.0 million.

At that point in time, the plaintiff says that he approached the 2nd defendant, with a view to rescuing the suit property from sale. The plaintiff's intention was to take over the obligation to repay the mortgage loan, but on the understanding that the title to the suit property would ultimately be transferred to him.

It is the plaintiff's case that by allowing him to make some repayments towards the repayment of the loan, the 2nd defendant must be deemed to have recognised that the plaintiff has acquired both a legal and beneficial interest in the suit property. It is for that reason that the plaintiff believes that he is entitled to a declaration to that effect.

As far as the plaintiff is concerned, the 1st defendant "**wasted her matrimonial home**", by failing to make the monthly loan repayments, due to the 2nd defendant.

For that reason, the plaintiff submits that the 2nd defendant's interest is to recover the money which it had lent to the 1st defendant. And the plaintiff says that he is ready to make the necessary payments to the 2nd defendant.

He therefore seeks an injunction to stop the 2nd defendant from selling off the suit property, so that he (the plaintiff) can be accorded an opportunity to rescue the suit property.

In the event that the injunction was granted, the plaintiff believes that it would not be prejudicial to the 2nd defendant, as the said defendant would ultimately be paid off by the plaintiff. On the other hand, if the injunction were denied, the plaintiff contends that he would suffer irreparable loss, which would be incapable of being compensated in damages.

The plaintiff has relied on the authority of **ANGELA MUENI KITALE V BENEDICT MAKOSA KITALE & ANOTHER, HCCC No. 1219 of 2000 (O.S)** as authority for the proposition that an injunction ought to issue to restrain a mortgagee from selling-off the security if the spouse of the mortgagor was seeking a chance to take over the responsibilities of the mortgagor.

In that case the learned judge noted that the mortgagee stood in the way of the mortgagor's spouse, and denied her the opportunity to redeem the mortgage, even though the said spouse was found to be capable of meeting the sums demanded. He said;

"In the instant case, the money is there. There is evidence that the plaintiff is willing and capable of paying the mortgage debt off. I do not see why the 2nd defendant has to insist on selling the suit property when it will not suffer much as compared to the plaintiff whose equity of redemption will be extinguished by the sale in exercise of Statutory Power of Sale."

In view of that finding, the plaintiff's redemption action was allowed, and she was allowed some six months to redeem the mortgage.

In this case, the plaintiff has provided the court with evidence to show that the 2nd defendant has never stood in his way. If anything, the 2nd defendant had shown a willingness to accept a lesser sum in settlement of the outstanding amounts. Therefore, the plaintiff cannot be right to try and equate the 2nd defendant herein to the mortgagee in the case of **ANGELA MUENI KITALE V BENEDICT MAKOSA KITALE & ANOTHER**.

In my considered view, as the 2nd defendant herein had already been more than willing to accommodate the plaintiff, through an agreement which would have enabled the debt to be paid off, there would be justification for giving orders to compel the 2nd defendant to do that which it was already doing willingly.

To my mind, the plaintiff has only himself to blame if the suit property is sold off.

The fact that the chargee may have permitted the plaintiff to make some payments towards the clearance of the outstanding loan could not, by itself, give to the plaintiff some special status vis-à-vis the suit property. It must be borne in mind that lenders would be only too happy to have their loans repaid by any person who might be ready and willing to assist the borrower to discharge his obligation. Such

persons could range from employers to spouses, or even children or parents and friends of the borrower. Simply because they made contributions towards the repayment of the loan should not give to any such persons a claim against the title.

In my view, the plaintiff is best advised to repay the outstanding loan, if he has a genuine interest in safeguarding the suit property. Meanwhile, as the 2nd defendant has not been shown to have acted either irregularly or unlawfully in trying to realise the security, I decline to issue the injunction.

And, in relation to the 1st defendant, the plaintiff has not demonstrated that she had any legal or other lawful authority to sell-off the suit property. Indeed, the plaintiff has not as much as suggested that the 1st defendant had tried to sell the suit property by public auction or otherwise howsoever. Therefore, I find no basis for issuing an injunction against the 1st defendant.

In conclusion, the application is found to be without merit. It is thus dismissed, with costs to the 2nd defendant.

Dated and Delivered at Nairobi, this 23rd day of October 2006.

FRED A. OCHIENG

JUDGE