



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA OF KISII

Civil Case 69 of 2006

GRACE WANGARI NGUGI PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA

AMWEL MAYIENGA OPENDA..... DEFENDANT

RULING

The Plaintiff/applicant GRACE WANGARI NGUGI sued the two defendants/Respondents – BARCLAYS BANK OF KENYA LTD and SAMUEL MAYIENGA OPENDA seeking court to declare that the exercise of Statutory Power of Sale by 1st Respondent to 2nd Respondent of Plot NO. KISII MUNICIPALITY/BLOCK III/40 was null and void and therefore the 2nd defendant/Respondent did not properly acquire that plot. She sought for an order to rectify the Register over that plot and that the 2nd defendant be evicted from the said plot and be enjoined from trespassing therein.

Simultaneously with the plaint the applicant filed the present application seeking for an order of temporary injunction restraining the 2nd defendant/Respondent, his servants or agents from wasting, damaging, constructing, disposing of or alienating the plot in dispute until the suit is heard and disposed off.

She also prays for an order inhibiting the lease title of the said plot.

Mr. Bosire prosecuted the application for the applicant while Mr. Namachage for 1st respondent and Mr. Onyancha for the second respondent vehemently opposed the same.

The background of the dispute as discerned from the pleadings, affidavits annexures and submissions of the counsels is as follows:

The plot in dispute belongs to and was registered in the name of the late JOHN NGUGI who passed away on 19th December 2005. Apparently he had two wives – Grace who is the plaintiff/applicant and JANE WANJIRU (now deceased) who was the mother of one DAVID MAINA NGUGI.

In 1986 Wanjiru and her son David Maina filed Nairobi High Court Succession Cause No.226 of 1996 petitioning for a grant of letters of Administration in respect of the Estate of the late Ngugi. The court issued a grant in their joint names in the same year. Thereafter the two caused the said plot to be transferred in their joint names. After that DAVID MAINA approached the 1st defendant/Respondent seeking for a loan. He obtained a power of Attorney from his mother over the said plot and thereafter he charged the plot as one of the securities to obtain the loan. After that David defaulted in repaying the

loan.

There were numerous correspondences between him and the bank. The bank informed him that it will exercise its Statutory Power and sell the plot to recover its money. Rather than have the plot sold by way of Public auction David approached the bank and requested that he be allowed to get a buyer of the plot. That way the plot would fetch much more. The buyer would then pay the bank what David owed it and the balance to be paid to David. The bank agreed to the arrangement. David approached the 2nd defendant/respondent and they agreed on the purchase price. 2nd defendant paid the bank what David owed it after which the bank released the title documents to David to effect transfer. Meanwhile a caution had been filed by the applicant. The 2nd respondent made an application before the Chief Magistrate Court which ordered the caution removed. The order was made ex parte. Thereafter the plot was transferred by David to the 2nd defendant/Respondent.

The 2nd defendant respondent started construction on the plot and hence this suit.

It was further submitted that in 1998 the applicant made an application to have the grant issued to Wanjiru and David revoked.

The court allowed the application and revoked the said grant. Thereafter it issued a fresh grant in the joint names of David Maina and the applicant.

Apparently by then David's mother Wanjiru was dead.

Mr. Bosire submitted at length that the transfer of the plot to the 2nd respondent was unlawful. The bank wrongly sold the property to the 2nd defendant as after they were paid their money they could not then sell the plot. The grant David and his mother had been granted had been revoked and as such David had no authority to sell the land. The sale and the building therein amounted to meddling with the deceased's Estate which is a Criminal offence.

Mr. Bosire also took issue with the way the caution was removed and said it was irregular. The subordinate court did not have jurisdiction to do so and the applicant was never heard. All in all he submitted that applicant has a prima facie case and if the order of injunction is not granted she will suffer loss. The property will be wasted and will lose its character.

Mr. Namachanga opposed the application. He narrated to court the history of the transaction. By the time David charged the property it was registered in his name and that of her mother. The mother gave him Power of Attorney to charge the property. The charge therefore was proper a fact even the applicant concedes to. Thereafter the said David failed to repay the loan and the bank had the right to exercise its Statutory Powers.

However the loanee requested that he look for a buyer which arrangement was agreed to by all the parties. He therefore submitted that there was nothing wrong with the transfer. The bank was paid its money and the balance given to the loanee.

Mr. Onyancha concurred with Mr. Namachanga and said his client bought the property after he was approached by David. He first checked with the bank who agreed to the arrangement.

I have considered the application, submissions, affidavits and annexures. The court too was referred to several authorities which I have considered carefully. There was the issue of the removal of caution lodged by the applicant. This, the court was told that was done by an order of the magistrates court which was irregular as the court had no jurisdiction.

This may be so but what is before me is not an appeal against that order.

In fact a part from annexing a copy of the application this court has scant details of what may have

happened. It seems no appeal or application for review were ever made by the applicant and it would therefore be difficult to ask this court at this juncture to deal with that order. There is no application before me to set it aside and therefore I will leave it at that.

There is no dispute that the plot in question is now registered in the name of the 2nd respondent.

This was done after the grant issued to David and Wanjiru had been cancelled and a new order issued. As Mr. Bosire submitted S.45 of The Law of Succession Act prohibits in meddling with deceased's Estate and S.82 prohibits the selling of immovable property. The applicant therefore submitted that the sale was unlawful and an injunction therefore should be granted. As I stated the counsels cited several authorities. The principles of granting or not granting orders of injunctions are well set in the case of GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358. The first issue is that of prima facie case. Her main issue is the sale of the property to the 2nd respondent which she states was illegal, granted that the initial grants was revoked. However the applicant does not deny that when David Maina charged the property to obtain a loan for the 1st respondent the property was registered in his name and that of his mother. He had a Power of Attorney from the mother. The mortgaging of the plot therefore was proper and lawful. That lawful transaction did not turn unlawful when the grant was revoked. The transaction done before the revocation was proper and lawful. The bank therefore was legally entitled to sell the property when DAVID defaulted in payment. This may have occurred after the revocation but there was nothing wrong with that.

David himself did not complain against the 1st defendants exercise of its Statutory Power. He has sworn an affidavit and admits failing to paying the loan. He is the one who requested he be allowed to have the property sold by way of private treaty so he could realize some money from the sale after the bank was paid. There is no evidence that the bank or even the 2nd respondent were aware of the revocation of the grant and in any case the plot was still registered in the names of David and his mother. In any case, as I have stated the banks Statutory power were never extinguished by the revocation. David the loanee was the one who suggested the mode of sale and he has not raised any complaints. The bank, once there was default was bound to sell the plot. Thus there is a real issue as to whether the sale was unlawful and the facts seems to point otherwise.

Applicant alleges she will suffer loss if injunction is not granted.

She is the administrator of the Estate of the deceased. David is her co-administrator and if there was any wrong doing it is David who would shoulder the blame. She is not in occupation of the plot and the 2nd respondent is building in it. As submitted the value of the plot is well known and as such it would not be difficult to compensate her by award of damages. In any case her co-administrator is the one who caused the property to be sold.

I believe the Estate of the deceased had other properties and when it will come to distribution of the whole Estate they can have a set off in the light of the involvement of the co-administrator. Her loss, if any can therefore be well compensated. On the other hand, holding back the 2nd respondent from developing the plot which is in his name would result to greater loss which may be difficult to compensate. The balance therefore tilts in favour of not granting the order of injunction sought.

In the circumstances the application is dismissed to the extent that no injunction will issue against the 2nd respondent stopping him from developing the plot. The court however allows the prayer for inhibition and order the respondents not to dispose off sell or alienate the plot until suit is heard and determined.

Costs in the suit.

Dated 17th October 2006.

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Onyancha for Respondent.

N/A for Applicant – Though given notice.