



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 65B of 2003

REGINA MUNYIVA NTHENGE PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD DEFENDANT

R U L I N G

By the Chamber Summons dated 9/9/03 the plaintiff/applicant seeks to have the defendant/respondent restrained from selling or in any way interfering with property known as MUPUTI/KIIMA – KIMWE 2266 Machakos Municipality pending hearing and determination of this suit and seeks costs of the application. The application is expressed to be brought under Order 39 Rule 1 of Civil Procedure Rules and Section 3A of Civil Procedure Act.

The main grounds upon which the application is brought are that the applicant was not notified of the sale, that she has never been supplied with the accounts as to what the balance is despite requests and that she desires to exercise her right of redemption. The application is also supported by the affidavit of the applicant Regina Munyiva in which she adds that she received a loan of I million from the defendant in 1990 and she has been making repayment and has paid in excess of 3.1 million. She believed to have completed the same when on 9/9/03 she received a letter advertising the plot for sale. On seeing the same she went to the defendant bank and requested for the accounts but the defendant has declined to supply the loan account statements. Had she had adequate notice she would have exercised her right of redemption.

Benjamin Mwawuda filed a replying affidavit in opposition of the application. He is the advance officer of the defendant. He confirms that the applicant took a loan with their bank. The suit land was charged to the bank as security. That the applicant has defaulted in the repayment of the loan and the defendant exercised its statutory right of sale by moving to realise the security by public auction and it is not the first time it is up for sale as the defendant has severally indulged the plaintiff and she filed Nairobi High Court Case 2060/95 seeking to restrain the Respondent from selling the land and in Machakos HCC 258/96 and the Machakos HCC 291/96. The three were dismissed, stood over generally and abandoned respectively. That the present suit and application are an abuse of court process as they are bent on denying the defendants its right to realize the security and yet the applicant is not making any attempts to settle the loan. It is denied that the applicant has been making any payments or that she made any request for accounts and that she was properly served with notification of sale on 30/6/03 in accordance with Auctioneers Rules and acknowledged by an adult member of plaintiff's family.

I have considered the application, affidavits in support, annexures thereto and submissions by counsels. I wish to point out at this stage that the authorities filed by the respondents were disregarded by court as they had not been served on plaintiff's counsel at the time of the hearing.

Though in her affidavit, the plaintiff seemed to be denying knowledge that she owed any money to the defendant, it was admitted by her counsel that she admits her indebtedness. The suits she has filed before do attest to that fact.

The main bone of contention is whether the plaintiff was served with notification of sale. Section 74 (1) of the Registered Land Act provides that if default is made in payment of the principal sum or interest, the chargee may serve a notice on the charger in writing to pay the money and Section 74 (2) provides that if the charger does not comply within 3 months of the date of service, with the notice the chargee may sell the property. The Respondents claim to have served the plaintiff in accordance with the Auctioneers Rules. The certificate of service indicates that an adult member of the plaintiff by name Regina Munyiva Nthenge was served and that another hearing notice was served by post. However, this being a serious land issue, rules of service would require that an attempt be made to serve the plaintiff personally. Indeed the plaintiff claims to have received the notice only 3 weeks to the sale on 11/9/02 which is not proper. I do uphold the plaintiff's contention that she was not properly served, if at all.

The second issue raised by the applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the Oaths and Statutory Declarations Act provides that:

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made ...shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat.”

The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia Commissioner of Oaths on 13/10/03 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths.

It is likely that stamp was just affixed. This court would have no alternative but strike off the replying affidavit as it is not *properly commissioned and that means that the application would stand unopposed.*

The other point taken by the applicant is whether the affidavit in reply was filed in time and whether it was properly on record. Order 50 Rule 16 (1) provides as follows:

“Any Respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.”

I do not agree with Mr Mungata's contention that since the affidavit was filed on 30/10/03, 7 days after service that the Respondents needed to seek the court's leave to file. This application first came up for hearing on 11/11/04 and by then the Respondents had filed their papers well over 3 days earlier in 2003. That argument cannot be sustained.

The Respondent raised the issue of there being other suits filed by plaintiff in respect of the same property which were stopping the sale of the suit land. However, from the Respondent's own affidavit, the same have been dismissed or withdrawn. The cause of action in the present case arose about September 2003 when the Respondent allegedly failed to serve the plaintiff with notification of sale of her property. The other suits notwithstanding, the plaintiff had a right to file another suit if her rights were breached and an order of injunction was required to stop the infringement. In the present case if the land were sold without proper notice that would prejudice the applicant's right and she would have suffered irreparable loss if the land is sold and placed out of her reach. It is only proper that the Respondents comply with the law and issue a proper notice. The court would not have granted this order based on 2nd ground of failure to supply accounts to applicant as that is no basis for grant of such an order. For the above reasons and

having found the Respondent's affidavit defective and struck it off, I do find that the applicant has made out a prima facie case which has good chances of success and an order of injunction is granted restraining the Respondents from selling or disposing of the suit land pending the hearing and determination of this suit. Costs to be in the cause.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE