



REPUBLIC OF KENYA
IN THE HIGH COURT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 405 OF 2004

ANDREW PETER NGIRICHI ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

COOPERATIVE BANK OF KENYA LIMITED ::::::::::::::: 1ST DEFENDANT

DR. STEPHEN TENNYSON NJERU KAMUTI ::::::::::::::: 2ND DEFENDANT

RULING

The Plaintiff by way of Plaint filed this suit on 24th June 2004.

He claims a mandatory injunction to restrain the 1st Defendant from evicting him from or in any way interfering with his tenancy or occupation of premises known as L.R. No. KERUGOYA/1325 and 1326. He also seeks general damages for the development on the said property.

The basis his claim is that by a verbal agreement made in or about November 2003 he leased a residential house on the said premises from the 2nd Defendant with an option of buying the said house. In or about January 2004 he spoke to the 2nd Defendant who offered to sell the said house to him at the sum of Kshs 3 million.

Acting on this offer he carried out renovations on the said premises at a cost of Kshs 1.2 million. He then paid to the 2nd Defendant Kshs 150,000/= on 19th May 2004 “being a commitment on the previous negotiation to purchase the premises.”

The Plaintiff further avers that the Defendants later in the month of May 2004 notified him that the said property was charged to the 1st Defendant for Kshs 4.6 million who on 21st May 2004 informed him of its intention to sell the property by way of public auction despite the development he had carried out on the property.

In a panic the Plaintiff offered to buy the property Kshs 4.6 million even though the same was worth only shs 3 million less.

The Plaintiff further avers that the 1st Defendant through its Credit Manager has threatened to evict him yet he is ready to buy the property at Kshs 3 million or by public auction taking into account the development valued at Kshs 1.2 million.

Simultaneously with the filing of the Plaint, the Plaintiff has taken out a Chamber Summons wherein he prays for interlocutory injunctive relief against the 1st Defendant. He further prays that the 1st Defendant be ordered to give him priority and offer the property for sale to him at the market value “or through public auction less the improvements and developments carried out by the Plaintiffs. The application is

supported by the Plaintiff's affidavit sworn on 24th June 2004. He basically swears to the facts averred in the Plaintiff but adds interesting options that he should alternatively be allowed to complete his tenancy or thereafter remove his fittings and demolish the developments he had carried out on the premises if he cannot be given an opportunity to purchase the property or he should be refunded the amount invested in the renovation and development of the property.

The first Defendant has filed a Replying Affidavit sworn by one LUCAS MESO its Senior Manager, Credit Risk Department. The chargee's rights have priority over the arrangements made between the Plaintiff and the 2nd Defendant. Indeed in exercise of its statutory power of sale the property had been offered for sale at a public auction held on 26th May 2004 in which the Plaintiff participated and his bid of Kshs 4.6 million was accepted. The Plaintiff pursuant to his bid issued a cheque for Kshs 700,000 in part payment of the 25% deposit demanded by the auctioneer and undertook to pay the balance of Kshs 450,000/= before the close of the day. The cheque for Kshs 700,000/= was dishonoured and the sum of Kshs 450,000/= was never paid. In the 1st Defendant's view the Plaintiff has therefore not come to Court with clean hands, as he had not mentioned that he had participated at the said public auction and issued a cheque that had bounced. It is the 1st Defendant's contention that the Plaintiff should blame himself as he knew or ought to have known that the 2nd Defendant had no capacity to sell the said property without the authority, consent and approval of the 1st Defendant as chargee. The first Defendant further deposes that the debt by the 2nd Defendant is still outstanding and the Plaintiff has no authority or basis to determine what is payable for the said property. In sum the 1st Defendant deposes that the Plaintiff has not shown that he has a prima facie case with a probability of success.

The application was canvassed before me on 21st September, 2004. Counsel for the Plaintiff recited the facts deposed in the Plaintiff's affidavit in support of this case. He submitted that no public auction had taken place but the 1st Defendant had agreed to sell the charged property to the Plaintiff at Kshs 4.6 million which the Plaintiff initially accepted. However, the Plaintiff realized that the value of the property was less than shs 3 million and withdrew his original offer. He however, later sought to have the property at market value but the 1st Defendant instead threatened to advertise the said property for sale. This threat provoked the present application. Counsel further submitted that the sale is being done behind the 2nd Defendant's back and the notice purportedly relied upon by the 1st Defendant is inadequate. In Counsel's view the Plaintiff had shown a prima facie case with a probability of success.

Counsel for the 1st Defendant on the other hand argued that the Plaintiff had no locus standi to institute these proceedings. He was indeed non-suited as against the 1st Defendant because there was no contract between them. Counsel argued that the 1st Defendant's rights as chargee take priority over those of the Plaintiff or any other person. Indeed according to Counsel the alleged contract between the Plaintiff and the 2nd Defendant was not enforceable as it was not in writing; Counsel further challenged the bona fides of the Plaintiffs and accused him of not respecting the truth. He too recited the facts deposed in the affidavit of Lucas Meso in opposition to the Plaintiff's application. He argued that the Plaintiff's application is an abuse of the process of the Court and no attempt had been made to meet any of the prerequisites set out in the precedent setting case of *Giella -v- Cassman Brown & Co. Ltd (1973) E.A. 358*. He prayed for dismissal of the application.

I have carefully considered the application in the light of the affidavits on record and the arguments by the advocates for the Plaintiff and the 1st Defendant. I am fully aware that an injunction is an equitable remedy for the protection of the legal rights of parties to litigation which rights have been threatened with violation. The conditions for the grant of an interlocutory injunction were laid down by the Court of Appeal in the case of *Giella -v- Cassman Brown & Co. Ltd (supra) 358*. First the Applicant must make out a prima facie case with a probability of success at the trial; secondly, an injunction will not normally issue unless damages will not adequately compensate the Applicant for the injury feared and thirdly if the Court is in doubt it should decide the application on a balance of convenience. At this stage I cannot decide the merits of the case with any finality. The Applicant's conduct will not escape the scrutiny of the Court and an injunction will be refused if the same does meet the approval of the Court.

Bearing in mind the above principles I have to decide whether or not the Applicant has shown a prima facie case with a probability of success at the trial. The 1st Defendant is threatening to exercise its

statutory power of sale of the said property as the 2nd Defendant has defaulted in his obligations under the charge. The Plaintiff is not a party to the contract of charge. He fears that if the statutory power of sale is exercised, he will lose a bargain. The 2nd Defendant, the chargor has not been served with any papers in this suit to date.

He has not challenged the 1st Defendant's exercise of the statutory power of sale under the charge. I have therefore no doubt in my mind that the Plaintiff has not shown a prima facie case with a probability of success at the trial. I am also not persuaded that the Plaintiff has legal rights in respect of the said property, which may be protected by the injunction sought against the 1st Defendant. Indeed I venture to add that on a prima facie basis the prayers sought against the 1st Defendant are not available to the Plaintiff. The Plaintiff is not seeking to enforce a known right. He is in my view asking the Court to contract for him with the 1st Defendant. To this extent he may not even have an arguable case.

Having found as above, it is not necessary to consider the second condition for the grant of an interlocutory injunction. This application is accordingly dismissed with costs to the 1st Defendant.

It is so ordered.

DATED AND DELIVERED AT NARIOBI THIS 18th DAY OF OCTOBER 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of :