REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 968 OF 1999

GRACE WANJIKU……...……...PLAINTIFF/APPLICANT

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LTD. ……...…1ST DEFENDANT/RESPONDENT

TABERA CLEARING AGENCY LTD. ...2ND DEFENDANT/RESPONDENT

RULING

This was an application by Chamber Summons brought under Order XXXIX Rules 2, 3 and 7, Section 63(c) and (e), Section 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), and Section 77(i) of the Registered Land Act (Cap. 300, Laws of Kenya). The application is dated 12th November, 2003 and was filed on the same date.

The Applicant prays for Orders -

(i) that the Court do nullify the auction of property L.R. No. Kabete/Lower Kabete/70;

(ii) that the Court do issue Orders against the 1st Defendant restraining it, its employees, servants and/or agents from managing, disposing and/or alienating the property, L.R. No. Kabete/Lower Kabete/70 pending the hearing *inter partes* of the suit.

The grounds for the application are -

(i) that the auction was conducted under fraudulent circumstances;

(ii) that the interest charged on account was done fraudulently and that this issue is the subject of investigations at the moment;

(iii) that the notification of sale was not served on the Plaintiff as required by law;

(iv) that the property in question is the only home of the Plaintiff/Applicant, and she would be irreparably injured and prejudiced if the sale is not nullified;

(v) that the property was sold for Kshs.4,000,000/- less the market value.

The application is supported by the Affidavit of Grace Wanjiku, the Plaintiff/Applicant.

The deponent states that she had guaranteed a legal charge on the suit property, L.R. No. Kabete/Lower Kabete/70, on behalf of Tabera Agency Ltd. the second Defendant/Respondent. She says the initial charge was in respect of the sum of Kshs.2.6 million in 1997, but over the yeas, with interests and penalties, this figure has risen to Kshs.13,000,000/-. The first Defendant/Respondent exercised its statutory power of sale through auctioneers, and sold the suit property by public auction on 11th November, 2003. The Applicant states that she only learnt of sale on 10th November, 2003 when her son, a director of the second Defendant/Respondent (the firm of auctioneers), mentioned to her that the sale had been advertised in the Daily Nation dated 10th November, 2003. By that time, she asserts, it was too late for her to take legal action to stop the sale due to take place the following day. She says she is over 80 years of age, and the suit property is her only home. She says the first Defendant had frustrated her efforts to have the suit land sub-divided and sales undertaken for the purpose of redeeming the suit property. She says that interest rates on the charge loan had been escalated for the purpose of frustrating her; she states that she has taken up the question of fraud with the Ministry of Justice and Constitutional Affairs, and that there are investigations in progress. She says the suit property is worth more than Kshs.11 million, even though it was sold for only Kshs.4 million.

At the very beginning of the hearing on 3rd December, 2003, Mr. Mwangi for the Respondents raised a preliminary objection, based on a formal notice dated 17th November, 2003 and filed the same day.

The first objection was that this same application had been made before, and had in every case been dismissed; therefore the matter was *res judicata* and the Plaintiff/Applicant had no right to file this application. Secondly it was argued that the Plaintiff's application was an abuse of the Court process, as there were other applications pending before the court, seeking the same relief and these have yet to be determined. It was submitted too that the matters the subject of the application were not disclosed in the Amended Plaint; hence the application was not based on issues raised in the suit.

Counsel for the Respondents stated that the Plaintiff's Amended Plaint goes back to 31st August, 2000 when it was annexed to a Chamber Summons application filed on that date. Counsel remarked that the matters raised in the Amended Plaint were:

> *that* the auction of 5th July, 2000 had been conducted fraudulently;
>
> *that* the deal accepted had been much less than the market value, and so a permanent injunction was sought against the Defendants/Respondents.

On 11th June, 1999 an application for an injunction brought by the Plaintiff, had been heard. The Court had held that there was no prima-facie case to warrant an injunction. And in yet another application by the Plaintiff/Applicant the Court had said (5th July, 2000) that the points in respect of which the applications were being made were now *res judicata*. The Applicant had yet another application, which culminated in the Honourable Justice Rimita's verdict on 4th June, 2003, that the matter was *res judicata*.

Counsel produced case law to show that it is not only a suit that can be said to be *res judicata*. He cited UHURU HIGHWAY DEVELOPMENT LTD. v. CENTRAL BANK OF KENYA, Civil Appeal No. 36 of 1996.

In that case, the learned Judges of Appeal, Akiwumi, Tunoi and Shah, JJ.A. have stated (p.14):

> "There is no doubt at all that [the] provisions of Section 7 of our Civil Procedure Act relating to *res judicata* in regard to suits do apply to applications for [the] execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of *res judicata*."

On page 16 they further state:

> "…there must be an end to applications of [a] similar nature; that is to say further, wide principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of our Civil Procedure Act caters for."

Counsel for the Defendants/Respondents submitted that the Plaintiff/Applicant's Amended Plaint of 31st August 2000 rests on one claim: that the auction sale was fraudulent. There is nothing new in the applications that have been made more recently by the Plaintiff/Applicant. He wondered why the suit itself has not been argued on the merits, for so long.

Mr. Okwengu for the Plaintiff/Applicant doubted whether this was a genuine preliminary objection. He stated that, if the pending applications brought by the Applicant can block the present application, then they may be withdrawn. The concern of this application is the subsequent auction of 10th November, 2003. This became a contentious point, as counsel for the Defendants/Respondents maintained that the main suit bears no relation to an auction of 10th November, 2003, and that the effect of the Plaintiff's approach is that the Plaintiff is trying to litigate in instalments, rather than following the proper procedure of prosecuting the main suit to completion.

On 11th June, 1999, the Honourable Mr. Justice J.K. Mitey made a Ruling in this matter in the following terms:

> "The Plaintiff does not deny that she executed the charge document in favour of the first Defendant of her own free will. She understood the contents and the purpose of the document. She is bound by it……Her complaint should be directed at the third Defendant and not the first Defendant. I find that the Plaintiff has not established a prima facie case. The legality of the charge document is not being challenged by her. Furthermore it has not been established that damages would not be an adequate remedy if the order is not granted. The balance of convenience clearly tilts in favour of not granting the order of injunction. The application is dismissed with costs and the interim injunction is hereby discharged."

On 17th August, 1999 the Plaintiff filed an application by Chamber Summons, seeking an injunction to restrain the first Defendant from selling the charged property, L.R. No. Kabete/Lower Kabete/70 in exercise of the chargee's statutory right of sale. On 28th March 2000 the Applicant again filed a Chamber Summons application, praying that the first Defendant be restrained from selling the same suit land.

Mr. Justice Patel who heard the exparte application of 28th March, 2000 made Orders:

> (a) that an injunction do issue restraining 1st Defendant from selling, disposing of, alienating, dealing or tampering with the suit property;
>
> (b) that the first Defendant do furnish the Applicant with accounts to facilitate redemption of the suit property and the Applicant be allowed 90 days to subdivide and sell the property and the proceeds be used to offset the loan account.

On 31st August, 2000 the Plaintiff filed an application by Chamber Summons seeking orders that the first Defendant/Respondent be restrained by temporary injunction from transferring, alienating or dealing with the suit land. It was stated as a ground of application that the first Defendant/Respondent had already disposed of the suit property and was in the process of alienating it. Yet another application in those very terms was made and filed on 9th October, 2000.

When this matter came before this Court by *ex parte* application on 17th November, 2003 I fixed it for hearing on 25th November, 2003, and made the temporary order that the suit property be not transferred pending the hearing.

I have now heard the representations of counsel, as well as had an opportunity to look at the tortuous background of the matter. I have taken note of the many applications made over the years by the Plaintiff/Applicant, always over the same issues. I have noted that while temporary orders have sometimes been entered in favour of the Plaintiff/Applicant's prayers for Orders tending to defeat the first Defendant/Respondent's statutory power of sale, the more lasting position of the Court has been that this statutory power must be upheld. This was the clear decision which, with respect, was correct, of the Honourable Mr. Justice Mitey in his ruling of 11th June, 1999. The Honourable Mr. Justice Rimita heard this matter on 2nd April, 2002 and stated:

> "I note from the record that a similar application was filed by the Applicant and rejected by this Court on 11th June, 1999."

The learned Judge went on:

> "It would appear that no agreement was reached…on the matter of sub-division and sale. That being the case, this application is *res judicata."*

Having looked at all aspects of this case and having heard the detailed submissions of counsel, I find that the prosecution of the matter, from the very beginning in 1999, took a rather artificial turn when the cardinal principle of property law, that a chargee has a statutory right of sale over the property formally tendered as security for a loan, was overlooked by the Plaintiff/Applicant. Consequently there was a large number of applications replicating one another, and seeking remedies that could not be sustained without seriously compromising established procedures for the enforcement of agreements involving property rights. This led to the mischief of unnecessarily clogging the judicial process with a great number of applications which appeared now to have replaced the original purpose of prosecuting the main suit, and obtaining justice by seeking damages on the basis of the case set out in the Plaint.

In this Ruling, I dismiss the Plaintiff/Applicant's application dated 12th November, 2003. I set aside all the interim Orders in place. I reject the prayers in this application. I Order that the Plaintiff/Applicant shall pay the costs of the Defendants/Respondents.

DATED and DELIVERED at Nairobi this 19th day of December, 2003.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mutea

For Plaintiff/Applicant: Mr. Kiptoo, Instructed by Nyamori Wekesa & Co. Advocates

For the 1st Defendant/Respondent, Mr. Njeru, Instructed by Macharia Njeru & Co. Advocates.