



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 3187 OF 1997

JOSHUA NGENY BIWOTT.....PLAINTIFF

VERSUS

KENYA NATIONAL ASSURANCE CO. LTD...DEFENDANT

RULING

This is the plaintiffs application dated 23.8.2001. Plaintiff seeks two main orders namely:

1.
2. The 2nd defendant do deliver up to plaintiff the little documents pertaining to the suit premises L.R No. 209/5275/90 Park View Estate
3. The 2nd defendant be restrained from charging interest on the outstanding mortgage arrears from 2.7.2000.

The suit was instituted through an originating summons. By the originating summons plaintiff sought orders inter alia that he be authorized to sell L.R No. 209/527/90 at market price and repay the outstanding mortgage loan to First defendant. That application was opposed by Zannah Carol Biwott – the plaintiffs wife. The present application is similarly opposed by Zannah Carol Biwott The position of Zannah Carol Biwott is that she has applied for a loan from her employer and is ready to redeem the mortgage. If only plaintiff were to sign necessary documents. The present application is also opposed by the official receiver – 2nd defendant but 2nd defendant states in para 11 of the replying affidavit of Silvanus Maundu Ndisya sworn on 17.9.2001 that the official receiver has no objection to release the original title documents upon suitable professional undertaking by advocates for buyer or upon payment of outstanding loan by plaintiff or by his wife. According to the official receiver the balance of mortgage loan was shs 894,933/10 as of 31.8.2001.

The originating summons was heard by Rawal J. who on 2.3.2000 allowed plaintiff to sell the suit property after a lapse of four months on terms proposed by plaintiff. The learned Judge clarified that she gave the 4 months time limit to enable interested party Zannah Carol Biwott to make good her intention to redeem the loan due.

The suit property is registered in the name of plaintiff and his wife Zannah Carol Biwott. The property was bought through a loan given by Kenya National Assurance Company (1st defendants now in liquidation. The property was charged to first defendant to secure the loan. Plaintiff and Zannah Carol are estranged and the loan has not been paid since 1996.

Plaintiff claims that he owns half share of the property. Zenah Carol Biwott seems to say that she

wholly owns the property. The property is registered in the joint names of plaintiff and his wife Zannah Carol Biwott. There is no decree of the court giving the entire property to Zannah Carol Biwott. Indeed the judgment of Rawal J defeats the claim by her that the property wholly belongs to her.

It is true that Zannah Carol Biwott has applied for a loan from her employer to redeem the property. The loan approved is shs 840,000. There are conditions attached to the loan offer that:

1. Zannah Carol Biwott must reside in the house
2. The property must be registered in her name only

Those conditions defeat the plaintiffs interest in the property are not capable of being complied with because the property is already registered in the joint names of the party. The loan offered is just about enough to discharge the mortgage leaving nothing to compensate plaintiff for his share. Plaintiff is not ready to forfeit his rights to the property. This is why it has been difficult for plaintiff and his wife to reach a mutual agreement to redeem the property. Zannah Carol Biwott has informed court that she has no money of her own to redeem the property. As conditions for the loan to Zannah Biwot cannot legally be enforced (as plaintiff share cannot be taken away from him. It is clear that Zannah Carol Biwott is not able to redeem the suit property.

There is already a decree in favour of the plaintiff. That decree has not been varied. However if the prayers sought in the application are granted the charge contract will have been varied and the security to which the 2nd defendant is entitled to in law will have been taken away. Court cannot vary the contract between parties by stopping the 2nd defendant from charging interest on the outstanding loan. Similarly court cannot take away the security from the 2nd defendant without 2nd defendants consent. Rawal J has already found that the order in winding up cause no. 18 of 1996 does not bar the 2nd defendant from selling the suit property to recover the outstanding loan.

To execute the decree of Rawal J, plaintiff should look for a buyer of the suit property and ask the lawyers for the prospective buyer or his own lawyers to offer acceptable undertaking to the second defendant. Releasing the title documents with discharge the charge will not facilitate the sale of the property. It is the 2nd defendant who can execute the discharge of the charge.

The 2nd defendant cannot be forced by court to execute the charge unless the outstanding loan is fully paid up.

It is for the above reasons that I dismiss the application with costs.

E. M. Githinji

Judge

24.4.2002

Mr. Kanyeki present

Miss Mugo present

Zannah Carol Biwott present

Mr. Oyiembo absent

Order: Ruling to be typed and copies supplied as prayed

E. M. Githinji

Judge