



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1839 OF 2000

JAMES KAGWI MUGO.....PLAINTIFF

VERSUS

MBUGUA MUGO & OTHERS.....DEFENDANT

RULING

The Housing Finance Company of Kenya Ltd (HFCK) has been joined in the suit as interested party. It now applies for the following orders viz:

1.
2.
3.
4. That the orders given on 27.3.2001 be vacated set aside or discharged
5. That in the alternative pending the hearing and final determination of this suit there be a stay of execution of the orders dated 27.3.2002
6. That the costs of this application be provided for

The plaintiff filed this suit against his three brothers on 8.11.2000. In general plaintiff seeks a declaration that he is a co-owner of LR No. 209/4586 and is saying that LR No 209/4586 is a partnership property owned by the four brothers.

Plaintiff filed an interlocutory application dated 6.11.2000. He wanted the defendants to be restrained from managing the suit property and an order appointing Muigai Commercial Agencies ltd as manager of the property.

Mbogua Mugo and Stephen Mugo, first and second defendants respectively, filed respective affidavits supporting the plaintiffs assertion that he is a co-owner of the suit property. They supported the orders sought by plaintiff. They stated that unless the orders are granted the property would be sold to recover a loan of shs 8,109,908/52 as shown in the letter dated 8.11.2000.

Domnic Kinuthia Mugo – the third defendants filed an affidavit disputing plaintiffs claim and opposing the orders sought in the application. It is clear from the plaintiffs affidavit to support the application of 6.11.2000 that plaintiff first defendant and second defendant were in agreement on how the suit property should be managed but the third defendant was interfering with the arrangement.

Plaintiff filed a certificate of urgency praying that the application of 6.11.2000 be heard urgent because 3rd defendant was collecting rent and HFCK was about to sell the property. He annexed a letter dated 6.11.2000 from HFCK indicating that there were arrears of the loan to the extent of Kshs 2,198,750/50 against a loan balance of Kshs 8,169,908/52 and that the administration of the mortgage account has been transferred to the Risk management and Recoveries Department HFCK threatened legal action unless acceptable arrangements of regularizing the account were made within 21 days.

The application dated 6.11.2000 was heard by Gacheche Commissioner of Assize (now Judge) and allowed on 7.3.2001. It was supported by 1st and 2nd defendants but opposed by the third defendant. On 27.3.2002, the further orders now sought to be set aside were recorded by consent. The consent orders inter alia, appointed Mr. H.K. Njuguna of Metroeosmo Valuers Ltd as Manager of the suit property. He was authorized to collect the rents and pay the rental income less outgoings to account no 109332 with HFCK in the name of J. Mbugua Mugo and Brothers Ltd.

Applicant, HFCK, say that the suit property is charged to them to secure a loan of shs 6 million which as at 28.2.2002 stood at shs 9520,189.33 and that the charge ranks in priority over all other interest including those claimed by plaintiff.

The supporting affidavit of Jacinta Mutio Wambua show that defendants were served with a statutory Notice of sale dated 28.2.2002 and that the order directly affects the rights of the HFCK as chargee Jacinta Mutio Wambua deposes that HFCK was not aware of the order until October 2001 when it appointed its own receiver.

There is no dispute that the suit property was by a charge dated 15.9.98 charged to HFCK to secure a loan of shs 6 million. There is also no dispute that by the time Mr. H.K. Njuguna was appointed a manager the accounts was in arrears. Indeed by a letter dated 6.11.2000 HFCK had threatened legal action to recover the money. The affidavit of Jacinta Mutio Wambua shows that HFCK served the statutory notice dated 28.2.2001 giving the chargor 3 months to redeem the charged property. So when Gacheche, Commissioner of Assize, granted the orders on 7.3.2001 and recorded consent orders on 27.3.2001 HFCK had already given the statutory notice which had not yet matured.

It is argued that the orders were made in the interest of HFCK as the Manager pays some money from rent to HFCK. Documents filed shows that an average of about shs 230,000 is collected monthly as rent and that an average of shs 150,000 is paid to HFCK. But the issue here is whether the orders affecting the rights of HFCK under the charge could have been made without notice to HFCK and without its consent.

The timing of the suit and the application is telling. The suit and application were filed two days after HFCK wrote the letter dated 6.11.2000 threatening legal action to recover the money owed under the charge. Documents filed by 3rd defendants show that there are other previous proceedings between the same parties to wit, HCC NO. 2/12/99. The orders sought by plaintiff in the application would have been sought in that other suit. Gacheche, Commissioner of Assize, was surprised that the 1st and 2nd defendants were supporting the plaintiffs application.

It seems to me that the purpose of the application was intentionally to defeat the exercise of powers by HFCK contained in the charge and that plaintiff and first and second defendant colluded to bring the application. The real intention of the plaintiff and 1st and 2nd defendant was to pre-empt the intended action by HFCK. The orders prejudiced the rights of HFCK under the charge.

The orders are in reality an indirect injunction against HFCK. The rights of HFCK under the charge are protected by the charge and by the law. They cannot be taken away in a suit in which HFCK was not a party and before giving HFCK an opportunity to be heard.

The application is brought under the inherent jurisdiction of the court. The court has jurisdiction ex debito Justitiae to set aside orders which are contrary to law.

For the above reasons, it is for the ends of justice that the orders affecting the rights of HFCK under the

charge and which was made without giving HFCK a chance to be heard should be vacated.

The four brothers are quarrelling over the management of the property. Although Mr. Njuguna the Manager has been remitting some monies to the loan account with HFCK, it is probable that HFCK will be able through its receiver to recover more. Fortunately HFCK does not intend to sell the property. It intends to appoint a receiver to recover the more than shs 9 million still owed. It is in the best interest of the parties that a receiver appointed by HFCK do manage the property. The receiver appointed by HFCK will ensure that every coin recovered as rent goes towards the reduction of the loan.

Consequently, I allow the application with costs to be paid by plaintiff, 1st and 2nd defendants. I set aside the orders given on 7.3.2001 and on 27.3.2001 as prayed.

I order Mr. H.K. Njuguna of Metrocosmo Valuers ltd to file his final accounts relating to the dealing with the suit property todate in court within 21 days of the service of this order.

E. M. Githinji

Judge

20.9.2002

Mr. Ngala holding brief for Masika present

Mr. Mogire holding brief for Mr. Kenani present

Mr Njiha present

Mr. Muriithi holding brief for Mr. Kibuchi present

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