



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1661 of 2002

JOSEPH NJOGU NJUGUNA & ANOTHER.....PLAINTIFF

VERSUS

PAULINA RAGUZ AND ANOTHER.....DEFENDANT

RULING

In this application filed on 15th November, 2002 Mr and Mrs Njogu Njuguna, hereafter called “the applicants” seeks orders against Pauline Raquz Tetra Park Limited for :-

1. An injunction against the Defendant or their servants and /or agents restraining them from evicting or transferring the property known as LR No. 1/149 (original No. 1/93/1) until the matter is heard and determined
2. An order restraining the defendants from causing eviction of the plaintiffs from the suit property until the matter is heard and determined.
3. Costs of this application be provided for.

The grounds on which the application is based are said to be that the property had merely been used to guarantee a loan to a third party and the charge was not redeemed in time as the applicants were negotiating a private sale of the property at shs 23,000,000/= and it would suffer irreparable loss as the property had been sold at shs 14,500,000/= only.

The application is however strongly opposed on the grounds inter alia that a similar suit had been finalized through consent order; that the stranger to a third party for valuable consideration had taken place and that the applicants would not suffer any loss which would not be adequately compensated by an award of damages.

Briefly, it is not in dispute that the applicants were the registered owners of the suit property and had charged it to the 2nd respondent. Due to the applicants failure to pay back the loan advanced to them, the 2nd respondent in exercise of its mortgage’s powers strictly transferred the suit property to the 1st respondent at a cost of shs 14.5 million on 18th October, 2002.

On its part the applicant in an effort to raise funds had found a buyer for shs 23,000,000/= who had deposited shs 3,000,000/= on 20th June, 2002 but the buyer had failed to pay the balance on due date. Hence the sale herein by the mortgagees in exercise of its powers under S. 69 of the Indian Transfer of property Act as the property is registered under the Government Lands Acts.

To succeed in its current application. It was incumbent upon the applicants to show a prima facie case

against the 1st respondent which has a likelihood of success. Secondly it is not the practice of the Court's to grant orders of stay where the applicant can be adequately compensated by an award of damages or where the feared act would be in contravention of the law. In case the court is in doubt it can act on balance of convenience.

In the instant case, there is no dispute that the applicants were breached the terms of the mortgage and the mortgages right of sale whether by public auction or private treaty had arisen and the applicants had been duly notified and were practically trying to raise funds by sale of the suit property.

It is also not in doubt that the property had since been sold by the 2nd defendant to the 1st defendant who was the registered owner for value. As the 1st defendant title was obtained for value, it is unlikely that the applicants can succeed against him.

I am therefore not satisfied that the prima facie case with a likelihood of success has been made out by the applicants.

On the nature of the loss which the applicants are likely to suffer, it is observed that the applicants had already resigned to their fate and were only looking for a buyer who had agreed to pay the sum of shs 23,000,000/= and yet the property was sold for shs 14.5 million. The loss they would therefore ..... is the difference between the prices of shs 8.5 million.

As this is a monetary loss and the 2nd respondent is a respectable company, I am satisfied that the applicants losses could be adequately compensated by an award of damages which the 2nd respondent could pay.

On balance of convenience, it is observed that the 2nd respondent is now the legal owner of the suit property and it would be unconstitutional to deny them the possession and use of their property after such a hefty investment. On the other hand the applicants had already given up hope of redeeming or retaining the suit property. They would not therefore be unduly concerned if they were to leave the same. The respondents would however be greatly inconvenienced if they were to be kept out of their property. In view of the above and for the above reasons I am not satisfied that the applicants have made out a case with likelihood of success. I therefore dismiss the application with costs. Orders accordingly.

Delivered and signed this 9th day of December 2002

G.P. MBITO  
JUDGE