



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1537 OF 2000

JOASH WA'MANGOLI PLAINTIFF

VERSUS

HOUSING FIANNCE OF KENYA LTD

ANOTHER DEFENDANT

R U L I N G

This is an application dated 31st August 2000. It is brought by way of chamber summons under Order 21 Rule 79, Order 39 Rules 1 and 2 of the Civil Procedure Rules and under Section 3A of the Civil Procedure Act. It is seeking mainly four orders which appear in the application as prayers 3, 4, 5 and 6. These orders sought are:

- “1. That the unlawful sale of the suit premises being L.R. No. 1/753, Kindaruma Road Kilimani be set aside pending the hearing and final determination of this suit.*
- 2. That an injunction do issue against the Defendants jointly and severally restraining them and/or their servants and/or agents from transferring and/or alienating in any way LR No. 1/753, Kindaruma Road Kilimani pending the hearing and final determination of this suit.*
- 3. That the suit premises being L/R No. 1/753 Kindaruma Road, Kilimani be preserved until the final determination of the suit or further order of this court. and*
- 4. That all dealings in and the making of entries in the register relating to the suit premises being L/R No. 1/753 Kindaruma Road, Kilimani be forbidden until the final determination of this suit or further order of this court.*

The grounds for the application are that the Respondents Demand Notice pursuant to which the 2nd Respondent sold the Applicants property was not valid as it was in contravention of Section 69(A) (1) of the Transfer of Property Act; that the auctioneers (2nd Respondent) failed to comply with the auctioneers rules as to the period between the date of advertisement and the date of sale of the property. That the amount of the debt is grossly inflated and/or exaggerated; that the Applicant was not advised on the 1st Respondents power of sale nor had he been updated as to the interest rate calculation and the sums due to the First Respondent and lastly that the Applicant stands to suffer irreparable loss.

The application was supported by an Affidavit of the Applicant sworn on 31st August 2000 which had the annexures to it namely Demand Notice J.W.M. 1 and copy of the advertisement J.W.M.2.

The Respondents opposed the application and filed one Affidavit sworn by Jacinta Mutio Wambua, the Deputy Manager Legal of the first Respondent. That Affidavit says in brief that statutory notice was served and demand Notice was issued subsequent to the same statutory Notice; that this matter has been the subject of another court order being HCCC No. 4952 of 1999; that the Applicant has been in arrears for a long time and previously auctioneers had been commissioned to sell the same property. That the Applicant has been in the know as far as interest and arrears are concerned; that the allegations as to advertisement are sham as even the date is blanked and handwritten; and that the sale had taken place for recovery of the debt. In my mind, although there are four prayers in this application for consideration as I have set them out hereinabove, the four can in fact be reduced into two applications, namely that injunction be granted restraining the Respondents from transferring, alienating or in any way dealing with the suit property till this suit is heard and determined and secondly that the unlawful sale of the suit property be set aside.

I cannot grant the prayer for setting aside the sale already carried out at this stage because it is in effect a prayer of mandatory injunction which I cannot grant when the Purchaser who would be adversely affected by such an order is not before me. The Plaintiff herein was filed on 28th August 2000 before the sale took place on 30th August 2000. However even after that the Plaintiff has not been amended to have the purchaser joined as a party. He may very well be an innocent purchaser without notice and to set aside the sale would be tantamount to condemning him unheard. This aspect of the case will affect the other prayers for injunction but I will consider them first.

The principles to be applied in cases such as this where the court is considering injunction application are now well settled. In the case of *GIELLA vs CASSMAN BROWN & CO. Ltd.*, the same principles were set out as follows:

(iv) an Applicant must show a prima facie case with a probability of success.

(v) An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury.

(vi) When the court is in doubt, it will decide the application on the balance of convenience”.

The fourth condition to be added to the above is that injunction remedy being an equitable remedy, the Applicant must demonstrate that he deserves it by coming to court with clean hands.

In this case the applicant filed the Plaintiff on 28th August 2000 and in the same Plaintiff he stated at paragraph 11 as follows:

“There is no other suit pending and there has been no previous proceedings in any other court between the Plaintiff and the Defendants over the same subject matter”.

Further in the Verifying Affidavit sworn by the Applicant himself he states as follows inter alia at paragraph 2.

“That I have read and understood the contents of the Plaintiff and aver all that is stated therein is correct”.

This confirms what is in the Plaintiff and takes away any blame over the same of the Plaintiff for the Applicant counsel. However, is it true or correct that there is no other suit pending between the parties and that there has been no proceedings between them on the same subject matter? This is not true. I have been referred to HCCC No. 4952 of 1992 filed in Nairobi High court registry. That suit is between Housing finance company of Kenya (present defendant) and Joash Wa Mang’oli (present Plaintiff/Applicant). The subject matter therein is L.R. No. 1/753 which was mortgaged to the present Respondent in respect of the same loan. Second Defendant/Respondent is an agent of the first Respondent and as such the parties effectively remains the same. This then means that the Plaintiff and Verifying Affidavit are not telling the truth as they are clearly concealing the truth which is that there is a suit between the same parties on the same subject matter. Thus the Applicant is not coming to court with clean

hands. He does not deserve any equitable remedy.

Further, I note that in HCCC 4952 of 1992 Hon. Justice Bosire (as he then was) had ordered possession of the charged property L.R. 1/753 situate at Nairobi to be..... and registered at Nairobi Lands registry to be given to the present First respondent. The order was made on 2nd July 1993. That same orders has not been vacated and is still effective though attempts were made to set it aside but according to records the same application seeking to set it aside has not been prosecuted.

Thus, apart from the Applicant not coming to court with clean hands and deliberately concealing facts, it is also clear to me that as the courts order in HCCC No. 4952 of 1992 which gave possession tot he First Defenant still stands, the Applicant before me cannot be said to have shown a prima facie case with a probability of success as their suit may very well be found to have offended the provisions of Section7 of the civil Procedure Act as the trial court may find it difficult to grant prayers in this suit because the proeprty is by the court order already in the possession of the First Respondent/Defenant.

Further, in the Plaint the main prayer that the Plaintiff/Applicant is seeking is an injunction pending the determination of the suit. That is an interlocutory order. That cannot be granted at the end of the suit. The second prayer is for a statement of the Plaintiffs Account with the 1st Defendant I do agree with Justice Mwera in his ruling in the case of Machakos District cooperative Union or co-oeprative Bank of Kenya Ltd. HCCC No. 41 of 1997. He says there as follows:

“If as it transpired, the dispute between these two is about rendering of a consent and accurate statement of loan account only. For that an injunction can never issue. That cannot stop a sale either’.

It can be repeated here that mere dispute as to accounts is never a ground to stop a mortgagee whose power of sale has arisen from exercising the same power of sale.

Lastly, as I have stated above, it would be futile in any event granting injunction here as the party mostly affected in the Purchase and as orders for injunction granted here must affect him and he will also be required to abide by the same orders. He is not a party in these proceedings. Even if First Defenant is stopped for transferring the To the purchaser, still it is the purchaser who will suffer injuries as his money will have been held up in a deal that later become non-starter. He should have been made a party. It will be clear from the above that this applicationdated31.8.2000 cannot succeed. It is dismissed with costs to the Respondents. Orders accordingly.

Dated at Nairobi this 6th day of June 2001.

ONYANGO OTIENO

JUDGE