



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 879 OF 98

SAMSON NYUTU MWATHI..... PLAINTIFF

VERSUS

STANDARD CHARTERED BANK LTD & 2 OTHERS..... DEFENDANT

RULING

This is the plaintiffs application dated 17.4.98 for the main orders that: 1. ...

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3.

4. An injunction do issue restraining first and third defendants from alienating transferring or disposing plaintiffs land parcel No. Githunguri/Kiairia/1239 and Githunguri/Kiairia/1240 and from completing the intended transfer until the final determination of the suit.

5. The purported sale by Public Auction of the two parcels of land be nullified set aside and cancelled. The grounds of the application are summarised on the body of the application.

They are that:

(i) Plaintiff was not served with 3 months statutory Notice as per provisions of Section 74 of the Registered Act.

(ii) No auction actually took place on 9.1.98 as advertised.

(iii) Second defendant did not have an Auctioneers Licence as on 9.1.98 his licence having been terminated on 31.12.98.

(iv) Statutory Power of sale had not arisen as the first defendant Instigated the sale due to failure of a third party MAPAPLAST K PALMER E. A. Ltd to pay.

(v) Purported sale was conducted at a gross under value and sale was doctored to suit an intended purchase.

(vi) Purported statutory power of sale was unlawful and fraudulent The application is based on the plaint filed on 17.4.88 Plaintiff avers in paragraph 12 of the plaint that the sale was unlawful, irregular and fraudulent and he gives eight grounds for that averment. Reliefs sought in the plaint are:

(a) Permanent injunction to restrain defendant from alienating selling, transferring or otherwise dealing or interfering with the two suits properties.

(b) Declaration that the charge document does not cover accounts allegedly lent out to MAPAPLAST K LTD and the exorbitant interest charged and order compelling the first defendant to discharge the charge.

(c) A declaration that the purported sale by Public Auction of the suit parcels of land was null and void and an order setting aside the sale and cancelling any subsequent registration and rectifying the land register If the same has been altered.

The first defendant has filed two affidavits sworn by Jane Chege - the replying affidavit sworn on 4.5.98 and the supplementary affidavit filed on 12.2.99. The second defendant is the auctioneer and has filed a replying affidavit sworn on 4.5.98. The third defendant is the purchaser of the two suit properties. He filed an affidavit sworn on 6.5.98. Plaintiff has filed three affidavits - the supporting affidavit sworn on 17.4.98; the further affidavit sworn on 14.5.98 and the second further affidavit filed on 12.5.98 Plaintiff pleads in para 5 of the plaint that by a charge dated 25.5.92 he charged the suit properties to the first defendant to secure an overdraft of shs 350,000. He pleads in para 6 of the plaint that he thereafter repaid shs 565, 740 as part of the loan. He has annexed his letter dated 24.7.96 to his supporting affidavit. In that letter he indicates that he has already paid shs 520,740 and requests the first defendant to give him three months to prepare the payments and that in that period of three months he would be paying shs 100,000 per month. The two affidavits filed by Jane Chege show the transactions and the events prior to the sale of the two suits properties. The two affidavits show inter alia that:

(i) Plaintiff was given overdraft facility of shs 350,000 secured by the two suit properties

(ii) Plaintiff also applied for additional facilities to be granted to Mapa Plast Kenya M. Palmar (E.A) ltd and plaintiff executed a personal guarantee of shs 400,000. One ceristian Mwathi also executed a personal guarantee. Jane Chege has annexed statement of accounts in respect of both transactions showing the outstanding balances.

(iii) Plaintiff wrote to first defendant on 6.3.96 instructing first defendant to consolidate his personal account with the Maraplast (K) ltd account and the first defendant duly consolidated the accounts. Plaintiff letter dated 6.3.96 is annexed. Plaintiff admits in para 6 of his further affidavit that he wrote the letter.

(iv) Plaintiff started falling in arrears in his personal account from 1993 and the bank started demanding payment exhibits "5C5" to Jane chege replying affidavit.

(v) There has been two previous Public Auctions of the suit properties in July 1996 and in November 1997 but the auctions were not successful as no bids were received (para 7 of Jane Cheges replying affidavit and exhibits 3 to the affidavit.

(vi) Plaintiff has previously made proposals to first defendant personally and through Llyod Masika ltd to the first defendant. Plaintiff has also on three occasions asked the District Commissioner Kiambu to intercede to stop the sale of the suit properties. Three copies of the D.C.'s letters dated 31.7.96, 13.11.98 interceding on behalf of plaintiff are annexed as part of 5.7 to Jane Chege's supplementary affidavit.

Jane Chege has annexed a statutory Notice dated 1.1.95 issued by first defendants advocates. It shows the ammount owed by plaintiff personally and the amount owed by Mapaplast seperately and then indicates the total sum owed by both plaintiff and Mapa Plast. Plaintiff has also annexed to his supporting affidavit the Notice of Public Auction dated 24.11.97 given to him by the Auctioneer and also a notification of sale. The notification of sale shows separately the sum owed by plaintiff and Maraplast

Plaintiffs complaints include the failure to serve a three months statutory Notice and that Power of sale had not arisen. He also complains of exorbitant interest charges. It is clear from the affidavits of Jane Chege that the suit lands had been advertised for sale twice before and that the District Commissioner has on three occasions interceded for him. It is also clear that plaintiff was aware of the date of the Public Auction. He has annexed a notification of sale served on him by the auctioneer. He deposes in paragraph 2 of the supporting affidavit that on the day of the purported auction he called the offices of the auctioneer thereby indicating that he was aware of the date of the public auction. Jane Chege deposes that plaintiff was served with the exhibited statutory notice. In the above circumstances it is not prima facie credible that plaintiff was not served with statutory notice.

As to the complaint that the statutory power of sale had not arisen and that the interest charges are exorbitant, I refer to paragraph 6 of the plaint where plaintiff states that he paid shs 565,740 as part of the loan. He does not plead that he has paid in full either the sum he personally owes or the sum owed by Mapa plast. His letter dated 24.7.96 annexed to his supporting affidavit show that he appreciated that even after paying shs 520,740 there was still a large outstanding balance. He made proposals to pay that outstanding balance. As the three letters from the D.C. show, plaintiff was promising to pay the balances. There is no correspondence before the filing of the suit in which he disputed indebtedness. Plaintiff has not attempted to show that the interest rate charged is not the contractual rate in the charge documents. He has not even specified the interest rate applied by the first defendant. Plaintiff gave written instructions to first defendant to consolidate the two accounts. He wanted the outstanding loan balance in Mapaplast to be transferred to his personal account to reduce the overdrafts. This is what he says in his letter dated 6.3.96. He now complains of the lumping up of the two accounts in para 12(g) of the plaint that the lumping up of the two accounts clogged the equity of redemption.

But the affidavit of Jane Chege shows that separate accounts were still maintained but the sums outstanding in each account were demanded at the same time in the same letter. The statutory notice shows the sum outstanding in each account. The notification of sale also shows the sums separately. Had plaintiff paid the arrears in his personal account he would have a good case for the sum owed by Mapa Plast is not secured by the charge. But there was a large outstanding balance in his personal loan account which was secured by the charge. The correspondence in Jane Chege's supplementary affidavit show that plaintiff was not financially capable of repaying the amount secured by the charge. If there is a dispute on the amount outstanding on his personal account, that is a dispute on the sum due which cannot be a basis for an order for injunction. I am not satisfied that applicant has shown a prima facie case with probability of success on this aspect of his case. The affidavit of first and third defendants show prima facie that auction sale did take place on 9.1.98 at second defendants action mart at Mugoya Shopping Centre Nairobi South C.

The public notice in the newspapers annexed to 2nd defendants replying affidavit show the advertised venue as stated in 2nd defendants affidavit. The notification for sale annexed to plaintiffs supporting affidavit show the same venue. Plaintiff did not attend the auction and his averment that auction did not take place on the venue advertised is prima facie without any foundation. The Auctioneer Act 1996 came in effect on 15.8.97. The copy of the version of the Act exhibited by applicant in section 32 prohibits any person from carrying on the business of an auctioneer after 31st December next following commencement of the Act unless he holds a valid licence under the Act. But the version of the Act exhibited by 2nd defendant contains a proviso to s. 32 that an auctioneer:

(a) who had a licence valid until the 31st December of the previous year and

(b) being illegible has applied for renewal for ensuing year but had not been notified of the Boards decision may carry on the business within the terms of his previous licence until the application for renewal is determined.

The second defendant has exhibited his Auctioneers licence which was expiring on 31.12.97. He has annexed his application for a licence on the prescribed form dated 19.12.97. He has also annexed a copy of the official receipt dated 19.12.97 showing that he paid renewal fees. That shows that he paid renewal fees. That shows that he was authorised to carry on the business of an auctioneer within the proviso to

section 32 of the Act pending renewal of his 1997 licence. The copy of the Act relied on by the 2nd defendant is the official copy in the High court Library. The proviso to S. 32 of the Act in the official copy is consonant with S. 23(3)(a) and S. 23(3)(c) of the Interpretation and General provisions Act - Cap 2. The repeal of a written law does not, unless the contrary appears, affect the previous operation of a written law so prepared or affect a right privilege acquired under the repealed law. The Proviso to S. 32 ensures that licences issued under the repealed laws would be valid until new ones are granted or rejected.

The third defendant deposes that he bid for the two parcels of land and was declared the highest bidder after which he paid the 25% deposit and signed memorandum of sale. He deposes further that he paid the balance of the purchase price thereafter and that first defendant has executed the transfer though transfer has not been registered due to plaintiffs objection to the Githunguri Land Control Board for grant of requisite consent. The copies of the memorandum of sale executed on 9.1.98 are exhibited The two executed transfers are also exhibited. The first defendant by a letter dated 6.2.98 has confirmed receipt of the full purchase price in respect of each parcel of land. Jane Chege has annexed to her replying affidavit the statement in respect of Mara Plast and plaintiffs personal account. The statement of plaintiffs personal account shows that the proceeds of sale were credited to the plaintiffs personal account on 23.1.98 and 29.1.98 respectively leaving a debit balance of over shs 900,000. Plaintiff avers in paragraph 12(f) that third defendant (purchaser) is plaintiffs neighbour who works in a Bank. Plaintiff specifies in para 2 of his further affidavit that third defendant works as a driver with Kenya Commercial Bank. The third defendant is not therefore employed by the first defendant. The fact that third defendant is employed by a different bank and is plaintiff neighbour is not prima facie evidence of fraud or irregularity. Plaintiff has exhibited two valuation reports commissioned by the first defendant The first is dated 6.12.95 by APEX Valuers.

They valued parcel number Githunguri/Kiairia/1239 which measures 1.46 HA at shs 1.5 million and forced sale value at shs 1,150,000. Land parcel No. Githunguri/Kairia 1240 which measures 0.80 HA was valued at shs 800,000 and forced sale value at shs 680,000. The second valuation report is dated 23.9.97. The current open market values of the two properties is given as shs 500,000 and 300,000 respectively and the forced sale at shs 325,000 and 200,000 respectively. Land parcel No. Githunguri /Kiaria/1239 was sold at shs 550,000 and land parcel No. Githunguri/Kiariria/1240 at shs 350,000 It is apparent that the two properties were sold at about half the forced sales values of 1995 valuation but more than the market values in 1997 valuation. Plaintiff does not specifically plead in the plaint that the sale was at a gross under value. However, he deposes in para 7 of the supporting affidavits that to justify a sale at an under value, first defendant sent another valuer 2 years later who under valued the properties. Plaintiff does not allege that the M/S Gathumbi & Associates who did the 1997 valuation were in the employment of the first defendant. They appear to be private independent valuers. They would be liable personally to the plaintiff in damages if plaintiff were to prove fraudulent under valuation of his properties by them. plaintiff does not allege that the bank or the 3rd defendant personally played any role in the valuation. It has been explained that first defendant caused the property to be valued before the public auction in accordance with the law. The mere fact that property is sold at the public auction for less than its open market value is not itself evidence of fraud.

The first defendant has entered into a contract of sale with the third defendant. The third defendant has complied with the conditions of sale and a transfer has been executed in his favour . AS the case of George Gikubu Mbutia versus Jimba Credit Finance Corp & Another - C.A No 111/86 shows the equity of redemption is extinguished when property is sold at a public auction but this auction is subject to the completion of the contract. The case of Lord Waring versus London & Manchester Assurance Co. - (1936) Ch 310 cited with approval in that George Gikubu Mbutia case shows that court will not grant to a mortgagor tendering the money due under the mortgage Mortgage an injunction restraining the mortgagor from completing by conveyance a contract to sell mortgaged property in exercise of its statutory power of sale unless it is proved that the mortgage entered into contract in bad faith. In the present case, the applicant is not even saying that he is able and willing to redeem the charged properties. Even if he was able and willing to redeem the charged he would not be entitled to an injunction to restrain registration unless the bank entered into a contract of sale with third defendant in bad faith.

There is no prima facie evidence of bad faith in the present case. The transfer has been executed and by S. 74 (3) of the registered land Act, the Land Registrar has discretion to accept it as sufficient evidence that

the power of sale was duly exercised by the first defendant. By the same sub section, any person suffering damages by an irregular exercise of power has his remedy in damages only against the person exercising the power. From the circumstances of this case as stated above, I am not satisfied that applicant has established a prima facie with probability of success for all reliefs sought in the plaint. Consequently, I dismiss the application with costs to the respondents.

E. M. Githinji

Judge

31.5.2000

Mr. Kingara present

Mr. Igeria present

Mr. Kingara

I apply for certified copy of proceedings and ruling. Also give me leave to take Photostat copy of proceedings and ?Ruling.

E. M. Githinji

Judge

Order: Ruling to be typed and copies to be supplied as requested leave to applicants counsel to take photostat copy of the handwritten proceedings and ruling

E. M. Githinji

Judge