



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO.65 OF 2018

SUNRISE SECURITY SERVICES LIMITED & 2 OTHERS.....PLAINTIFFS

=VERSUS=

NATIONAL BANK OF KENYA LIMITED

PURPPLE ROYAL AUCTIONEERS.....DEFENDANTS

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated 14th March 2018 in which they sought the following orders:-

1. Spent

2. The plaintiffs/applicants' application by way of Notice of Motion dated and filed on 14th February 2018 be marked as withdrawn with no order as to costs.

3. The defendants/Respondents whether by itself, its employees, servants, agents or auctioneers be temporarily restrained ex debito justitiae from completing any sale, disposing off or otherwise howsoever interfering with the plaintiff's possession, ownership or title to the parcel of land comprised in title number Dagoretti/Riruta/S.956,pending the hearing and determination of this application inter partes.

4. The first defendant/respondent delivers forthwith true and legible copies of all the documents relating to the facilities maintained with them by the plaintiffs.

5. The defendants/respondents whether by itself, its employees, servants, agents or auctioneers be restrained ex debito justitiae from completing any sale, disposing off, or otherwise howsoever interfering with the plaintiff's possession, ownership or title to parcel of land comprised in title number Dagoretti/Riruta/S.956,Nairobi pending the hearing and determination of the suit herein.

6. The costs of this application be in favour of the Plaintiffs/ Applicants.

2. Prayer 2 of the motion was granted on 21st March 2018. Prayer 3 of the same motion has been spent as there was no temporary injunction granted pending inter-partes hearing of the application. Prayer 4 was granted by consent on 28th March 2018. What therefore remains to be determined is Prayer 5 and 6 of the motion. The Advocates for the parties herein had agreed to put in written submissions. When the Advocates for the parties appeared before me on 30th May 2018, they indicated that their submissions were ready and that they were to file the same on that day. I directed that they file the submissions in the course of that day. Proceeded to give a date for ruling in the hope that all parties would comply. As at the time of writing this ruling, it was only the defendants' submissions which were in the file.

3. The applicants had filed an application for injunction in which they sought to stop a sale which was scheduled to take place on 15th February 2018. The application was placed before me on 14th February 2018 but I could not certify it urgent as the applicants had annexed an advertisement which showed that the suit property had been scheduled for sale on 11th January 2018. It turned out that it is the applicants Advocate who had annexed a wrong advertisement which was for a previous auction which had been scheduled for 11th January 2011 but did not take place. The suit property was therefore sold in a public auction held on 15th February 2018.

4. The applicants contend that the public auction which was conducted on 15th February 2018 was fraudulent in that the valuation of the suit

property was not properly carried out as the law requires. They state that the valuer who was given the task of valuing the suit property carried out a desktop valuation and put the forced sale value of the property at a much lower value than its actual value. The applicants contend that they commissioned an independent valuer who valued the same property and found that its forced sale price was close to one hundred million and its market value was over one hundred million.

5. The applicants also contend that the outstanding loan balance as disclosed to them was not the true balance and that the first respondent had withheld records in respect of the loan account and that therefore they did not know the true loan balance. They further state that the first respondent did not keep proper records of the loan account. It is on this basis that they want the completion of the sale process stopped until this suit is heard and determined.

6. The first respondent has opposed the applicants' application based on a replying affidavit sworn on 13th April 2018. The first applicant contends that the application as drawn offends the provisions of order 1 Rule 13 of the Civil Procedure Rules and is therefore incompetent; that the application is defective as the purchasers of the auctioned property have not been made parties to the suit and that there is no specific complaint or relief sought in the plaint regarding the auction conducted on 15th February, 2018.

7. The first respondent has gone to a great extent detailing the history of the loan account and the indulgence given to the applicants before the property was sold in a public auction. In short the first respondent has denied the allegations of the applicants and maintains that the auction was conducted properly and that there is no basis upon which the applicants will be granted an injunction.

8. I have carefully considered the applicants' application as well as the opposition to the same by the first respondent. I have also considered the submissions by the defendants. I will first address the issue of competency of the application. The respondents contend that the application offends **Order 1 Rule 13 of the Civil Procedure Rules**. The said Order 1 Rule 13 provides as follows;-

13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

9. As regards the provisions of Order 1 Rule 13 of the Civil Procedure Rules 2010 the respondents relied on decisions of the High Court in **Ndungu Mugoya & 3 others –Vs- Stephen Wangombe & 9 others [2005] eKLR** which dealt with Order 1 rule 12 of the previous rules which were exactly the same as in the present Order 1 Rule 13. In that case, the Judge found that the provision was couched in mandatory terms and proceeded to find that failure to give authority to plead in writing rendered the suit incompetent. The judge went ahead to strike out both the application and the entire suit.

10. It is important to note that the Ndungu Mugoya decision (supra) was decided in 2005 when the issue of raising objections based on technicalities particularly of procedure were prevalent. That has however been largely taken away by **Article 159 (2), (d), of the Constitution** which discourages undue regard to procedural technicalities. It is indeed true that no authority to plea was initially filed but it has since been filed. I will therefore not bother to dwell on that issue which in any case i would not have upheld.

11. Another issue raised by the respondents is that the application offends the provisions of Order 40 Rule 2 of the Civil Procedures Rules which requires that a temporary order of injunction can only be sought in the circumstances where a similar order is sought in the suit. The respondents contend that the injunction sought in the plaint is materially different from the injunction sought in the application. The respondents argue that this offends the provisions of Order 2 Rule 6(1) of the Civil procedure Rules and therefore renders the application incompetent. Order 2 Rule 6(1) provides as follows:

“No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit”.

12. As regards the provisions of Order 2 Rule 6(1), the respondents relied on the decision in **Mary Ngaru – Vs- Family Bank Ltd. & 2 others [2014] eKLR** where the court addressed the issue of relief sought in the application which was not prayed for in the plaint. The court found that the application which sought a relief of injunction which had not been sought in the plaint and no amendment had been made to the plaint to incorporate the relief was incompetent. However in the instant case, I notice that there is an amended plaint which has incorporated a relief which is being sought by the applicants. The amendment was made before pleadings closed and as such no leave of court was required. The amendment was in compliance with the provisions of **Order 2 Rule 6(2) of the Civil Procedure Rules**. I therefore find that the application does not offend the provisions of **Order 2 Rule 6 of the Civil Procedure Rules**.

13. I now turn to consider whether an injunction should be granted. It is clear that the suit property has already been auctioned. The applicants have amended their plaint to include the purchasers of the property. Now the issue for determination is whether an injunction can be issued to restrain a chargee from proceeding to complete a sale which has already taken place. There are a number of decisions from courts to the effect that a chargor loses his or her right of redemption at the fall of the hammer. In **Samuel Njoroge Mburu –Vs- Consolidated Bank of Kenya Limited [2014] eKLR** the Judge held as follows:

“I have detailed above, the plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction held on 6th November 2012. Section 99 of the Land Act 2012 details the protection to which the purchaser of the suit property at auction is entitled.”

14. The suit property has already been auctioned. The applicants right to redemption was extinguished at the fall of the hammer on 15th February 2018. The applicants remedy now lies in damages if they will prove that the auction was not carried out in accordance with the law.

15. The applicants have dwelt at length on the issue of the loan balance and interest. There are a number of decided cases which have held that a dispute as to the amount owed or interest charged cannot be a ground for grant of injunction. See **Palms Company Limited – Vs- Consolidated Bank of Kenya Limited [2014] eKLR** which quoted a Court of Appeal decision in **Fina Bank Ltd. – Vs- Ronak Ltd [2001] 1 EA 54** where it was said as follows:-

“.... As the charge documents which were in evidence before the High Court expressly reserved in favour of the appellant, the right to charge interest at variable rates at its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis”

16. It is therefore clear from the analysis hereinabove as well as the decisions on the subject that no injunction can be given in the circumstances. I therefore find no merit in the applicant’s application which is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 4th day of October, 2018

E.O.OBAGA

JUDGE

In the presence of;-

M/s Chepkurui for Mr Mutua for Defendant

M/s Wanjiku for Mr Ngarua for Plaintiff

Court Clerk : Hilda

E.O.OBAGA

JUDGE