



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E101 OF 2020

BETWEEN

SILAS MISOI YEGO T/A SIRO INVESTMENTS PLAINTIFF

AND

TRANSNATIONAL BANK LIMITED.....1ST DEFENDANT

LYDIAH N. WAWERU T/A PURPLE ROYAL AUCTIONEERS2ND DEFENDANT

RULING NO. 3

1. The Plaintiff has filed a Notice of Motion dated 11th January 2021 seeking an injunction restraining the Defendants from selling or otherwise disposing, through the exercise of the 1st Defendant's ("the Bank") statutory power of sale, of his parcel of land known as LR No. 209/6887 (I.R. 23309) situated in Kileleshwa within Nairobi County ("the suit property") for a period of four months to enable it liquidate the outstanding loan amount in order to redeem the suit property.

2. The application is supported by the Plaintiff's affidavit sworn on 11th January 2021. The thrust of his deposition is that after this Court and the Court of Appeal dismissed his application for injunction and stay pending appeal respectively, he engaged the Bank with a view to exploring various means of liquidating or restructuring the debt. He complains that the Bank has been unwilling to accommodate him. He states that he has found proposed purchasers for the suit property including **Fredrick Fyle (Kenya) Limited** but the Bank has rejected the proposals and proceeded to advertise the suit for sale by public auction.

3. The Plaintiff further states that he made several efforts to liquidate the debt by disposing of his other properties and making proposals. That the Bank has rejected them unfairly, unreasonably, maliciously and capriciously in a manner that is denying him the right to redeem the suit property. He accuses the Bank to clogging his equity of redemption contrary to the law and equity.

4. At the hearing of the application, Counsel for the Plaintiff requested the court to determine the matter on the basis of the material on record. In response, Counsel for Respondent submitted that there was no basis for granting the injunction and that the application was *res judicata* and should be dismissed.

5. It is not in dispute that the Plaintiff was at all material times was a customer of the Bank. In 2014, the Plaintiff requested and was granted a loan of KES 140,000,000.00 by the Bank to construct approximately 50 apartment units on the suit property. The loan was secured by a charge registered in favour of the Bank. When the Plaintiff defaulted in liquidating the loan, the Bank commenced the process of exercising its statutory power of sale.

6. The Plaintiff filed this suit and also moved the court by the Notice of Motion dated 16th April 2020 under **Order 40 rule 1, 2, 4 and 10** of the **Civil Procedure Rules** seeking an interlocutory injunction restraining the Defendants from selling the suit property by public auction. I heard the application and dismissed it by a ruling dated 30th June 2020. The Plaintiff filed a Notice of Appeal and moved the Court of Appeal in **Civil Application No. NAI 195 of 2020, Silas Misoi Yego t/a Siro Investment v Transnational Bank Limited & Lydia N. Waweru t/a Purple Royal Auctioneers** seeking an order of stay of the orders of the High Court pending the intended appeal from the ruling dated 30th April 2020. The Court of Appeal heard the application and dismissed it on 7th September 2020.

7. What the Plaintiff seeks is another injunction to enable him liquidate the debt by selling the suit property to a third party. The Plaintiff annexed to his affidavit a comprehensive offer in that regard by **Fredrick Fyle (Kenya) Limited**. The Bank considered the offer and rejected it as evidence by an email which has also been produced by the Plaintiff. It is therefore not clear what other offer is on the table for the Bank to consider. On the facts presented by the Plaintiff, I do not think there is any basis to grant an injunction.

8. At the time he filed the suit and application for injunction, the Plaintiff stated that he had entered into arrangements with a third party to sell the suit property in order to discharge the debt and it is for that reason, amongst others, he sought the injunction. In my ruling dated 30th June 2020, I found that the Plaintiff had not made out a prima facie case for the grant of an injunction restraining the Bank from exercising its statutory power of sale pending the hearing and determination of the suit. Additionally, the Court of Appeal, in its ruling dated 7th September 2020, held that, “we find that in the instant application, the 1st respondent demonstrated that the applicant was in arrears amounting to Kshs. 153,017,015.45 as at 10th July 2020. We therefore find that the appeal is not arguable.”

9. Since the Plaintiff has not amended the Plaint or presented any new facts to the court, there is nothing to enable this court adjudicate on the matter afresh. In other words, this application is *res judicata*. Further, like the Court of Appeal held, the Plaintiff is indebted to the Bank and nothing now stands in the way of the Bank exercising its statutory power of sale.

10. The Notice of Motion dated 11th January 2021 is dismissed with costs to the Defendants.

DATED and DELIVERED at NAIROBI this 1ST day of FEBRUARY 2021.

D. S. MAJANJA

JUDGE

Mr Mwangi instructed by Nyachoti and Company Advocates for the Plaintiff.

Mr Akello instructed by Robson Harris and Company Advocates for the defendants.