



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 703 OF 2011

TEJPRAKASH SEHMI.....PLAINTIFF

VERSUS

PETROAFRIC COMPANY LIMITED.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

LAND REGISTRAR NAIROBI.....3RD DEFENDANT

GULF AFRICAN BANK LIMITED.....INTENDED 4TH DEFENDANT

RULING

Gulf African Bank Limited (“the Bank”) filed the application dated 24/9/2019 seeking stay of execution of the judgement delivered by this court on 8/8/2019. It also sought to restrain the Chief Land Registrar from interfering with its legal charges registered against the land known as Nairobi Block 55/78 (“the Suit property”). The Bank sought to be joined as the fourth Defendant to the suit and to have the judgment set aside unconditionally and for the hearing of the suit to start *de novo*.

The application was made on the grounds that the Bank was condemned unheard and its security was in jeopardy which will cause it irreparable loss exceeding Kshs. 74,658,879.36. The Bank contended that a court of law cannot issue orders affecting the interests of a party in his absence or without giving him a hearing. The Bank also contended that a certified copy of the title was not tendered in evidence before the court delivered its judgement The Bank added that the Plaintiff had no *locus standi* to bring the suit in the first place and that the court had no jurisdiction to issue orders that may lead to the setting aside of its lawfully registered legal charges over the Suit Property.

The application was supported by the affidavit of Mr. Lawi Sato who deponed that the court entered judgement on 8/8/2019 and directed the Bank’s customer, the 1st Defendant to arrange to furnish alternative security to the Bank within 90 days of the judgement after finding that the Plaintiff had a superior claim to the Suit Property. He deponed that prior to charging Nairobi/Block 55/78, the Bank carried out due diligence and confirmed that the land was registered in the 1st Defendant’s name. He produced copies of the certificate of lease dated 5/2/2010, charge dated 15/7/2010 and the further charge dated 24/2/2015.

He averred that following the 1st Defendant’s default in repaying the loan, a statutory notice was issued to the 1st Defendant on 25/5/2017 giving him notice that the Bank had commenced the process of realization of its security by instructing an auctioneer. He averred that the debt owed to the Bank stood at Kshs. 74,658,879.36 and continued to accrue interest. He attached a copy of the valuation report giving the forced sale value of the Suit Property as Kshs. 72,000,000/= in July 2018. He averred that the Bank would suffer irreparable loss on account of the delay in disposing of its security due to the judgement which did not take into account the Bank’s interest as charge of the suit land.

Mr. Sato deponed that by a letter dated 4/6/2019, the Plaintiff’s advocates informed the Bank about an injunction application relating to its security over the suit land. He attached a copy of the letter dated 4/6/2019 addressed to the Bank’s Branch Manager bringing to their attention the existence of this suit while mentioning that the court had directed that the Bank be served with the application for injunction so that it could attend court and advise the court on the status of the Suit Property and the Bank’s involvement in the matter. A mention notice for 22/7/2019 was attached to the letter together with the application for injunction dated 28/5/2019. He stated that the Bank sought copies of the complete pleadings from the Plaintiff’s advocate on 24/6/2019. He deponed that on perusal of the pleadings sent on 19/7/2019, the Bank’s advocates informed the Plaintiff’s advocates vide a letter dated 15/7/2019 that the plaint sent was incomplete while pointing out that no order joining the Bank as a party to the suit had been produced and that the Bank only appeared as an interested party in the mention notice.

He further deponed that Mr. Allen Waiyaki Gichuhi, a partner in the firm of Wamae and Allen Advocates informed him that he obtained a copy of the pleadings after judgement was rendered on 8/8/2019 and established that the plaint dated 9/12/2011 was a four page pleading.

Mr. Sato deponed that the National Land Commission informed the 1st Defendant's advocates vide the letter dated 11/10/2017 that the 1st Defendant was the legitimate owner of L.R. No. 209/4844/1 and made reference to the ruling of Lady Justice Nyamweya of 4/12/2012 vide which the court dismissed the Plaintiff's application for injunction and found that the Plaintiff had not established any interest over the Suit Property. He attached a draft defence which he contended raised serious triable issues on jurisdiction and *locus standi*.

The Plaintiff opposed the application through the replying affidavit filed on 21/1/2020. He averred that the court had decreed that he had a superior claim to the Suit Property and directed the 1st Defendant to provide alternative security to the Bank. He averred that the Bank had failed to establish any basis for the review of the judgement under Order 45 of the Civil Procedure Rules since the court issued a remedy to the Bank and added that under the charge and further charge there were other remedies available to the Bank against the 1st Defendant from whom it acquired an interest in the suit land.

The Plaintiff faulted the 1st Defendant for not seeking to join the Bank in the suit and averred that the Bank did not conduct due diligence on the fraudulent title the 1st Defendant held over the Suit Property. He contended that the Bank had been defrauded by the 1st Defendant and there were other means through which the Bank could recover the monies owed to it by the 1st Defendant.

Mr. Shemi contended that the Bank had furnished documents to court showing that it knew of this suit and went ahead to give a further charge to the 1st Defendant using the Suit Property as security. The further charge and deed for variation were created in February 2015. He argued that had the Bank conducted due diligence and done a valuation of the Suit Property, the tenants residing on the suit land would have informed the valuer that the Suit Property belonged to the Plaintiff's family who had erected houses on the land. The Plaintiff believed that the Bank's remedy against the 1st Defendant lay in suing the 1st Defendant for fraud and non-disclosure of material information. He urged that this application was an afterthought intended to delay execution of the court's decree and added that he would suffer injustice and prejudice if the court allowed the application.

The Bank filed written submissions on 17/1/2020 which the court has considered. It submitted that the judgement was unlawful and unfair and that there was no basis for the Bank to be denied its security when it did not participate in the hearing of the suit. It submitted that the Plaintiff lacked standing to institute this suit being neither the registered proprietor of Nairobi/Block 55/78 nor executor of the Estate of the late Joginder Kaur. It added that the Plaintiff did not satisfy the requirement to produce a certified copy of the title pursuant to Order 21 Rule 6 of the Civil Procedure Rules which it urged was intended to avoid absurdities by showing the entries registered against a title over land.

Miss Marienga made oral submissions and contended that the court was *functus officio* after it delivered judgment. She added that the Bank's interest was covered by the 1st Defendant. She submitted that two titles were produced at the hearing; that the Plaintiff produced a lease and the 1st Defendant produced a certified copy of its title together with a copy of the lease which in her view essentially satisfied the requirement under Order 21 Rule 6 of the Civil Procedure Rules. She contended that the Bank had failed to establish the grounds for review under Order 45 Civil Procedure Rules. She was emphatic that the Bank was aware of this dispute over the land it held as security based on the documents the Bank produced in support of its application.

Mr. Waigwa conceded that the Bank only filed a Notice of Appointment of Advocates as an interested party but did not participate at the trial. He urged that the determination on the Bank's interest should have been arrived at after hearing the Bank, and added that the Bank should have been joined as a party to the proceedings.

The issue for determination is whether the Bank has made out a case for the court to review its judgement and grant the orders sought. In other words, was the Bank denied an opportunity to be heard?

The judgement delivered on 8/8/2019 mentioned at paragraph 15 that the Bank appointed advocates who filed a notice to represent it as an interested party in the suit. The notice of appointment of advocates was filed on 2/7/2019 after the hearing had been concluded but before judgement was delivered. The court noted in the judgement that no application was made for Gulf African Bank Limited to participate in the proceedings despite being aware of this suit challenging its security.

The court notes from the letter dated 4/6/2019 from Lumumba and Lumumba Advocates addressed to the Bank that the Bank was made aware of these proceedings which prompted it to instruct an advocate to file a notice of appointment in this case on 2/7/2019. Mr. Sato explained in his supporting affidavit that the Plaintiff sent an incomplete copy of the plaint to the Bank pursuant to which the Bank wrote to the Plaintiff's advocates requesting them to send a complete plaint. No explanation was given as to why the advocates whom the Bank had appointed did not peruse the court file to lift copies of the plaint so that the Bank could apply to participate in these proceedings before the court delivered its judgement. There is also no explanation as to why it took the Bank about a month and half to file the instant application after judgement had been delivered. In the court's view the Bank was well aware of these proceedings and could have applied to join the suit and present its case before the court rendered its judgement. The Bank was not denied an opportunity to be heard as it contended. The issue of the Plaintiff's legal standing to bring this suit was addressed by the court in the judgement.

If the root of a title that a bank holds as security is successfully challenged, the financial institution ought to pursue other legal remedies available to recover the monies owed to it by the chargor whose title has been invalidated by the court.

The court finds no merit in the application dated 24/9/2019 and declines to grant the orders sought in the application.

Dated and delivered at Nairobi this 3rd day of February 2020

K.BOR

JUDGE

In the presence of:-

Mr. K. Wachira holding brief for Ms. Marienga for the Plaintiff

Mr. A. Waigwa holding brief for A. Gichuhi for the Intended 4th Defendant

Mr. A. Waigwa holding brief for M. Dayib for the 1st Defendant

Mr. V. Owuor- Court Assistant