



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 31 OF 2015

MICHAEL KINYUA NATHAN.....APPELLANT

VERSUS

KENYA INDUSTRIAL ESTATES LTD.....1ST RESPONDENT

VIEWLINE AUCTIONEERS2ND RESPONDENT

AND

EUNICE GICUKU KINYUA.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. This is a ruling on the undated Notice of Motion filed in court on 30/04/2018. The applicant prays for an order of stay against the 2nd respondent or any other auctioneer not to sell her land LR. GATURI/NEMBURE/7990 by public auction. She also seeks for an order to join her as a party in this appeal. The applicant seeks for a permanent injunction to restrain the 2nd respondent or his servants, agents from selling LR. GATURI/NEMBURE/7990. The final order sought is for review of the orders issued on 30/08/2016 and allow the applicant to settle the debt owed to the 1st respondent in monthly installments.
2. An order to declare LR. NO. GATURI/NEMBURE/7990 a matrimonial property and that the applicant is entitled to life interest in the land is included in this application which is supported by the affidavit of the applicant.
3. The grounds in support of the application are that the applicant was served with the redemption notice a week before she filed this application. The 2nd respondent indicated that he was to sell the applicant's land by public auction to recover a debt.
4. It is deposed that the matrimonial home of the applicant and her children sits on the property charged for the loan by her husband.
5. The applicant states that her consent was not sought by her husband when he gave the title to the bank as security. She states that the auctioneer has not furnished her with a valuation report prior to commencement of realization of the security as required by the Auctioneer Rules. The 2nd respondent has also not obtained a court decree authorizing him to sell the security.
6. The 1st respondent opposed the application on grounds that it was bad in law, frivolous, malafides, vexatious and otherwise an abuse of the court process. It is deposed that the applicant who is the chargor's wife has colluded with her husband to frustrate the 1st respondents from realizing the security in recovery of the debt.
7. The applicant purports to be protecting the interests of her children namely Kennedy Murithi and Denis Murage who have already registered a caution against the title although the applicant states one of the children is a minor.
8. The assertion that the applicant was not aware of any charge against the property is false since there has been protracted litigation between her husband and the 1st respondent. She also states that her (spousal) consent was not sought by the *Chargor*.
9. The appellant obtained injunctive orders against the respondent on 28/05/2015 on condition that he deposits Kshs.200,000/- within 45 days in court pending hearing of the Appeal. The order lapsed due to non-compliance on the deposit order by the applicant. The 1st respondent then proceeded to issue a redemption notice on 30/04/2018 which promoted the applicant herein to file this application.
10. The 1st respondent argued further that the applicant says she was not issued with a valuation report whereas the same was issued as required showing the forced sale value of the property as Kshs.725,000/-.

11. The applicant further stated that she is suing on behalf of a minor and a person of unsound mind without proof which statement was untrue.
12. The application was argued orally by the parties in court. The applicant was in person and briefly stated the grounds relied on in her affidavit. Mr. Marete for the 1st respondent made his oral submissions in opposition to the application.
13. From the representations of the parties in this case, I make a few observations. It is not in dispute that one Michael Kinyua the husband of the applicant was advanced Kshs.300,000/- by the 1st respondent on 26/02/2013. The loan has partly been paid but due to accruing interests and irregular repayments, the amount now owing to the 1st respondent as at 13th June, 2018 was Kshs.728,764.39.00.
14. It is also not in dispute that Michael Kinyua and the 1st respondent have been in court battles over the sale of the security LR. GATURI/NEMBURE/7990 for several years. The auctioneers have been joined in these legal battles.
15. The Chargor was denied a restraining order in Embu CMCC No. 276 of 2014. He appealed in this case and was granted orders to restrain the 1st respondent but defaulted in compliance of the conditions imposed. He was ordered to deposit Kshs.200,000/- in court within 45 days in default of which the orders were to be vacated.
16. The orders were vacated at the expiry of 45 days due to the default on part of Michael Kinyua. The 1st respondent issued a Statutory Notice of sale which was served on the *Chargor*.
17. The 1st respondent instructed the 2nd respondent to realize the security after complying with the law. This prompted the applicant to file this application.
18. The applicant has denied that she ever gave her spousal consent to the charge registered in favour of her husband. The 1st respondent has attached the consent executed by the applicant on 8/02/2013.
19. The applicant names her two children Kennedy Muriuki and Denis Murage as the affected persons. She seeks to protect their interest and that of herself who are likely to be rendered destitute in the event that the security is sold. She states that the matrimonial home in which she has life interest sits on LR. GATURI/NEMBURE/7990.
20. The 1st respondent has annexed a caution lodged against the title by the two children of the applicant. In lodging a caution, a copy of the person's identity card must accompany the said caution for proper identification. The children could not have lodged a caution if they were minors and if it happened, the applicant has not explained how the minor child identified himself.
21. This matter has a long history as shown by the correspondence annexed by the 1st respondent dating back to 2014 when the first statutory notice was served on the *Chargor* dated 15/05/2014. Several correspondences have been exchanged by the parties and the auctioneers have been instructed severally. The case before the Magistrate court which resulted in lodging the appeal was filed in 2014. The applicant has not told the court that she is separated from her husband and this confirms that the two have walked this journey together.
22. For this reason, she ought to have disputed or denied the spousal consent in 2014 when the case before the magistrate's court was filed. By her husband.
23. It was not necessary that the 2nd respondent obtain a court decree before the security is realized. The terms of the contract are very clear that in default of the loan repayments, the charge may exercise its statutory powers of sale.
24. The applicant said valuation of the land was not done before the 2nd respondent stepped in. The 1st respondent has annexed the report to its replying affidavit and has thus complied with the law.
25. The facts and history of this matter show that the applicant has come to court in an attempt to save the family land from the intended sale. She says she is ready to pay the loan in monthly installments. These are orders that this court will not grant since there is a binding contract between the 1st respondent and Michael Kinyua. The applicant is indeed a stranger to the contract and she of course consented to the security being charged.
26. The Chargee has a right to exercise his statutory powers of sale of the security provided the law has been complied with. The 1st respondent has annexed the statutory notice already served on the *Chargor*.
27. I find no merit in this application, and I dismiss it with costs.
28. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Applicant present in person