



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL TAX AND ADMIRALTY DIVISION
CIVIL CASE NO 211 OF 2014
ANTHONY MUTHUMBI WACHIRA.....1ST APPLICANTS
DR. BERNADINE NANJALA MUTHUMBI....2ND APPLICANTS
VERSUS
HOUSING FINANCE COMPANY OF KENYA.....RESPONDENT

RULING

1. The Parties herein should not be surprised that the Ruling this Court shall render is short as almost all the Prayers sought in the Application of 22nd June 2016 and 3rd August 2016 have been overtaken by events.

2. In the Application of 22nd June 2016 the Plaintiffs seek the following Prayers:-

2. THAT pending interpartes hearing and determination of this application, this honourable court be pleased to grant temporary order of injunction restraining the Defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership or title to all that parcel of land known as Maisonette unit 2 erected on L.R No.5/153 located in Lavington Nairobi and otherwise identified as UNIT 2 JIPE VILLAS.

3. THAT to the extent that it is necessary, this Honourable Court do review its decision of 16th December 2014 and in lieu thereof do issue an injunction restraining the sale by the Defendants whereby themselves, employees, servants and/or agents or Auctioneers and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, appointing a receiver, evicting, transferring, or concluding any transfer whether by Auction or private treaty or otherwise in any manner whatsoever interfering with Maisonette unit 2 erected on L.R. No.5/153 located in Lavington Nairobi and otherwise identified as UNIT 2 JIPE VILLAS until the final determination of this suit.

4. This Honorable Court be pleased exercise powers given to it by section 103, 104 (2) and (3) and 105 of the Lands Act, 2012 to grant order of re-opening and revising the terms of the charge by:

I. Revising the payments terms and effecting an amortization schedule that takes cognizance of the school fees collection and balance the interests of the chargro with those of the chargee.

II. Appointing an independent Valuer to re-value the suit premises and nullifying the valuation done by the Defendant's Valuer.

III. Deducting usurious interests rates and charges and in lieu thereof reschedule the loan over the remaining 5 years period.

5. THAT the Plaintiff be granted leave to further Amend its Amended Plaintiff herein in terms of the annexed draft further Amended Plaintiff and the same be deemed filed upon payment of the necessary fees.

6. THAT costs of and occasioned by this application be provided for.

While the Application of 3rd August 2016 is for the following Prayers:-

2. THAT a mandatory injunction to issue against the 2nd Defendant by her, her servants or agents or any one authorized by her or claiming under her directing the Defendant to forthwith and unconditionally reinstate the Plaintiffs in the possession of the suit premises being Maisonette Unit 2 erected on L.R No.5/53 located in Lavington Nairobi pending the interpartes hearing and determination of this application.

3. THAT the proceedings in PMCC 4599 of 2016 and all subsequent orders arising out of the said proceedings be and are hereby stayed pending hearing and determination of this suit.

4. THAT the proceedings in PMCC CMCC 4599 of 2016 and all subsequent exparte orders and/or decree arising out of the said proceedings be and are hereby stayed pending hearing and determination of this suit.

3. The change of circumstance is that three days after the presentation of first Application, ownership of Maisonette Unite 2 on LR NO.5/153 (the suit property) was transferred to Antonina Mayoka Sangura who is sought to be enjoined as the 2nd Defendant.

4. This change of ownership was as a result of sale of the suit property by the 1st Defendant on exercise of its Statutory Power of Sale. There is no agreement between the Plaintiff and the 1st Defendant as to whether the property was sold by way of Private Treaty or Public Auction. The Bank stating that it was sold by Public Auction and the Plaintiffs the other.

5. Prior to the Sale, the Parties had been to Court in respect to an Application for Injunction by the Plaintiffs. A Ruling of 9th March 2015 determined that Application of 22nd May 2014. The ultimate Orders of Justice Gikonyo are of some significance to the Directions and Orders this Court shall be making. The Good Judge in paragraph 47 of the Ruling ordered:-

“However, I am inclined to take a path which is fair and appears to the court to carry the lower risk of injustice. I will order sale of the suit property, but only after satisfaction of the following:

a) The Respondent shall, within 30 days of today provide the Applicants with statements of account on the debt, and for purposes of this ruling, the amount owing as at the date of last payments and as of today.

b) The Respondent shall within 30 days of today cause a current forced valuation on the property to be undertaken as required under section 97 of the Land Act.

c) On satisfaction of condition (a) and above, the auctioneer shall accordingly advertise the suit property for sale as per the Auctioneers Act and rules made thereunder.

d) A temporary injunction is, therefore, issued for 30 days or for as long as the Respondent has not fulfilled conditions (a) and (b) above”.

6. In the Reply to the Application of 22nd June 2016 the Bank maintains that it fulfilled the conditions set out in the Ruling. What seems uncertain to this Court is whether condition (b) in respect to the taking of a current forced valuation was met. The uncertainty stems from the fact that the Valuation which was annexed to the Affidavit of Martin Machira sworn on 18th July 2016 which is said to have been relied on was made on 26th May 2014 which would be about 10 months prior to Ruling.

7. One of the issues taken up by the Plaintiffs is that the Sale of the property proceeded without the Defendant taking a current forced Sale Valuation of the property (see for example ground (f) of the Application of 22nd June 2016). From what this Court has stated in the preceding paragraph this assertion by the Plaintiffs has not been displaced and if that were the case then the sale proceeded not only in contravention to Section 97 of The Land Act but also in express disregard of a Court Order. Section 97 provides:-

“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a *lien* to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.

(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.

(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.

8. Of course the purchaser takes the position that he is an innocent purchaser at a Public Auction for value

without notice and would therefore seek solace in the protection afforded by Section 99 of the Land Act to Purchaser. Section 99 provides:-

“This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

While the Plaintiffs have in the Amended Plaint averred that the Purchaser is not an innocent Purchaser for value without Notice, I have keenly looked at the Affidavit of the 1st Plaintiff in Support of the Application and there is no iota of evidence of any alleged misfeasance on the part of the Purchaser. And if that was all to the matter this Court would have dismissed the entire Application.

9. However, since the sale appears to have also proceeded in breach of the terms of a Court Order an argument could arise as to whether the sale is a nullity and whether in those circumstances the Purchaser can still enjoy the Protection of Section 99 of The Land Act. This now is the new real controversy and the Court will be making Orders that allows all parties herein to make their arguments on the matter.

10. As to the request that this Honourable Court exercises its Powers under Section 103, 104 and 105 of The Land Act, 2012, those are not grantable as the Bank has exercised its Power of Sale and that Sale is yet to be set aside.

11. Let me turn to the second Motion. On 30th June, 2016 this Court granted Status quo Orders in the presence of Counsel for the Plaintiffs and the 1st Defendant. Those Orders were extended on 19th July, 2016, again, in the presence of Counsel for those two parties. This Court is now told that on the strength of a Court Order in **CMCC No.4599 of 2016 ANTONINA MUYOTA SANGURA VS. ANTHONY MUTHUMBI WACHIRA**, the 2nd Defendant evicted the Plaintiffs from the house on 29th July 2016.

12. What this Court is not told by the Plaintiffs is that the 2nd Defendant was served or was otherwise aware of the Orders issued on 30th June, 2016 noting that neither her nor his Advocates were present when the Order was made and extended on 19th July, 2016. For that reason alone, this Court is unable to

find that the Orders made by the Lower Court were made in contravention of the Orders issued herein, or otherwise fault the issuance of that Order. In addition this Court is not persuaded that it should reverse the current status by a mandatory order of Injunction.

13. These now are my Orders:-

1. The Application of 3rd August 2016 is hereby dismissed with costs.
2. Prayers 2,3,and 4 of the Application of 22nd June 2016 are hereby dismissed.
3. Prayer 5 of the Application of 22nd June, 2016 is hereby allowed.
4. As the Application of 22nd June 2016 has partly failed and partly succeeded, there shall be no order on costs.
5. Parties shall address Court as to whether or not a status quo Order should issue pending the hearing and determination of the matter.

Dated, Signed and Delivered in Court at Nairobi this 17th day of February, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Mirei for Plaintiff

Omino h/b for Karungo for 1st Defendant

Alex - Court Clerk