



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 160 OF 2013

CAROLINE WAIRIMU WANJIHIA.....1ST PLAINTIFF

WGK INVESTMENTS LTD.....2ND PLAINTIFF

Versus

I & M BANK LIMITED.....DEFENDANT

HACIENDA LTD.....NECESSARY PARTY

RULING

1. The answer to the three Applications before Court turn on whether the sale by Public Auction of Apartment A8 Block A, Tamarid Court situated on LR.No.330/593 (**the suit property**) which took place on 3rd February 2015 and its subsequent transfer to the Necessary Party can be annulled and/or recalled.

2. The 1st Application dated 3rd February 2015 seeks the following orders:-

2. THAT the Defendant/Respondent by itself its agents and/or Servants be restrained by an order of Injunction from proceeding with the sale advertised for 11.00am on 3.2.2015 the sale by Public Auction scheduled for 11.00am in the forenoon at the Auctioneers ment of the suit premises and subject matter herein known as L.R 330/593 Nairobi; known as Apartment No.A8 block a Tamarind Court situated at Thomson's Estate Lavington Nairobi be stopped cancelled and /or declared null and void for seeing high-handed unconscionable unreasonable and/or illegal in that the amount being claimed is contrary to the provisions of the Banking Act Cap 488 of the Laws of Kenya.

3. THAT the Plaintiffs be allowed to pay the Loan amount due by a down-payment of Khs.10,000,000/- on or before 20.2.2015 as per the professional undertaking given to the Defendant's Advocates on Record by the Plaintiff's Advocates dated 30.1.2015 and the balance after Reconciliation of the Interest charged against the main Account No.0030024508121 from 2011 to date secured by the Suit premises.

4. THAT the Defendant be ordered to realize the security for the Loan Account No.0030023072401200 being Motor Vehicle No.KBK 386J the Log Book whereof is in its' possession and thereafter, claim the Balance if any from the 1st Plaintiff and/or refund the excess to the 1st Plaintiff.

5. THAT the 1st Plaintiff's two (2) Fixed Deposit of FDR No.003002307255015410 for Kshs.10,231,828/77 and FDR No.002307255011554542 for Kshs.4,542,171/10 both totaling Kshs.14,773,999/90 together with all the accrued and/or Accruing Interest held by the Defendant be accounted to the 1st Plaintiff.

6. THAT the Defendant do give a full statement of the Savings Account no. 00300230722410 together with all the Accrued Interest to date and give refund of the amounts therein to the 1st Plaintiff.

7. THAT the Defendant be and demand to pay the costs of this Application and all the Auctioneers charges.

3. While the 2nd Application dated 11th February, 2015 requests intervention as follows:-

2. THAT HACIENDA LIMITED the Purchaser of the Suit Premises by Public Auction on 3.2.2015 be enjoined as a NECESSARY PARTY in these proceedings.

3. THAT the said "HACIENDA LIMITED" by itself, its agents and/or Servants be restrained by an Order of Injunction from proceeding with the Registration of a Transfer and/or effecting Registration of Land Parcel No. LR 330/593 known as Apartment No.A8 block A Tamarind Court Situated at Thomson's Estate Lavington Nairobi from the current Registered owner "WGK INVESTMENTS LTD" purportedly sold to it by Public Auction on 3.2.2015 until the final determination of this Application and/or further Orders of this Honourable Court.

4. THAT if the said HACIENDA LTD have already registered a Transfer of the said Suit premises comprising of Land Parcel No.LR 330/593 known as Apartment No. A8 Block a Tarmarind Court situated at Thomson's Estate Lavington in pursuance of the said purported sale of the Plot by Public Auction on 3.2.2015 be cancelled, and/or declared null and void because the said sale was in breach of the provisions of Sections 96 and 97 of the Land Act, 2012 of the Laws of Kenya.

5. THAT the sale of the said Land Parcel No.LR 330/593 on 3.2.2015 to 'HACIENDA LTD' having been illegal, unlawful and in breach of the Law be declared null and void.

6. THAT the said HACIENDA LTD be ordered to pay costs of this application in any event.

4. The 3rd Application dated 26th February 2015 seeks the following Orders:-

2.THAT this Hon. Court do make an order for maintaining the 'status quo' on the suit premises as was pertaining on 19.2.2015 and ordering that the Transfer of the suit premises be put on hold until the final determination of both applications dated 3.2.2015 and 11.2.2015 and the current tenant on the suit premises do remain in the suit premises under the same rent until the final determination of both applications.

3. THAT during the period that the current tenant shall remain on the suit premises pending the final determination of both Applications the current tenant do Deposit the monthly rent from 3.2.2015 until further orders of this Hon. Court into interest-earning Account in the joint Names of EVANA THIGA GATURU, ADVOCATE & SAENDE & OCHOLA, ADVOCATES, to be opened in a Commercial Bank to be agreed upon by both Firms of Advocates.

4. THAT the Plaintiffs/applicants be granted Leave to file a further Affidavit within seven (7) days from today to the Defendant's Replying Affidavit filed and served on 10.2.2015.

5. From the rival Affidavits sworn herein, some facts are not in dispute.

6. By a letter of offer dated 4th February 2011, the Defendant advanced to the 1st Plaintiff an overdraft

facility in the sum of Kshs.29,500,000/= for purposes of working capital. The Guarantor to the facility was Joseph GithuKimemia and the 2nd Plaintiff. By a mortgage instrument dated 8th March 2011, the 2nd Plaintiff charged the suit property in favour of the Bank.

7. There was default in the payment of Debt and the Bank commenced realization of the security.

8. Shown to Court is a Statutory Notice dated 4th September 2012 which was obviously defective as it purported to give a two (2)Months Notice instead of three (3) months as is required by Section 90 (2) of The Land Act 2012. A second Notice of 7th September 2012 was served upon the 2nd Plaintiff this time being a 3 month Notice.

9. It is stated by the Bank that the Plaintiff failed to respond to the Notice and on expiry thereof, their Auctioneers issued a 45 days Notification of sale fixing the intended date of sale for 12th March 2013.

10. It would seem that there were discussions between the parties which averted the auction. The discussions included the possibility of the Plaintiffs selling the suit property by way of Private Treaty. But these efforts to have this matter settled amicably came to nought.

11. In the meantime the Plaintiffs had filed the present suit and obtained an Order of Temporary Injunction on 24th April 2013. Those Orders were discharged through a Court Ruling of 12th November 2014 and this paved the way for the Bank to proceed with realization.

12. By way of newspaper advertisement carried in the Daily Nation Newspapers of 19th January 2015 and 2ndFebruary 2015,Garam Investments, a firm of Auctioneers acting on behalf of the Bank, published information of an intended sale of the suit property which was slated for 3rd February 2015 at 11.00am.

13. It was the 1st Plaintiff's case that upon publication of this advertisement, she attempted to negotiate a settlement but this was frustrated by lack of cooperation on the part of the Bank.

14. On the same day when the auction was due to take place, the Plaintiffs filed a Notice of Motion dated 3rd February 2015 which was placed before Gikonyo J. The Court record shows that Gikonyo J. remarked,

“I read from the Application that sale of suit property was scheduled for 11.00am today order sought may, therefore, not be available at the moment. This is 2.30pm. I will not for those reasons certify the Application dated 3.2.2015 to be urgent. Let it be served for hearing, however, on 10.2.2015”.

15. It is now common ground that the sale by Public Auction proceeded on 3rd February 2015 and the suit property was bought by Hacienda Ltd (the Necessary Party). The Bank states that the property was sold at Kshs. 13.1 million which has been fully paid by the Necessary Party. By a Deed of Assignment of Lease by Mortgagee dated 12th March 2015 and registered on 22nd May 2015, the Bank assigned and transferred the Suit property to the Necessary Party.

16. The matters raised in the three Applications invite the Court to consider the following two issues:-

a) Was the Auction of 3rd February 2015 premised on an irregular and unlawful process?

b) And if so, what is the Applicant's remedy?

17. It has been alleged by the Applicants that the sale of the suit property proceeded before the charge carried out a forced sale valuation of the property. If that allegation was true then the sale would have breached the provision of Section 97(2) of The Land Act which places the following duty on a chargee exercising a power of sale;

“A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer”.

18. Although the statute is silent as to what the age of the valuation should be at the time of Public Auction, this Court would hold that just like in a sale by a Private Contract (section 98(4) of The Land Act), the valuation report should at the time of sale not be more than six months old. Although there is opinion that a valuation that would not be more than one year is good enough (see David Gitome Kuhiguka Vs. Equity Bank Ltd [2013] eKLR).

19. It turns out, however, that the Defendant engaged the services of Knight Frank (a firm of Valuers) who assessed the Market Value of the suit property at Ksh.16,000,000/=. Annexed to the Affidavit of Mr. Srinivasan Parthasarathy sworn on 9th February 2015 on behalf of the Bank, is a copy of the Valuation said to have been undertaken on 6th January 2015. This would be about one month before the date of the Auction. The Defendants are therefore emphatic that it has complied with the requirements of statute.

20. There is nevertheless an interesting argument by the Applicant that in addition to ensuring that a forced sale valuation is undertaken, a charge is under a duty to furnish a copy of it to the charger. The argument being pressed that had the Applicants been aware of the forced sale valuation then they would have made arrangements to give a professional undertaking to pay off the amount stated as the forced sale value.

21. On the plain reading of the statute, there is no obligation placed on the charge to furnish a copy of forced Sale Valuation Report to the chargor. Yet I take a view that a chargor who has learnt of an intended sale (whether by Public Auction or Private Treaty) is entitled to inquire from the chargee whether it has caused a forced sale valuation to be undertaken and there would then arise an obligation on the chargee to, without delay, answer to the inquiry and if a valuation has been undertaken to, again without delay, furnish a copy thereof to the chargor. But as it is here, no such inquiry was made by the charger and **I am not** inclined to find that the charge has breached the provisions of Section 97 of The Land Act.

22. An allegation by the Plaintiffs is that the sale of the suit property was illegal because the Bank did not serve a 40 day Notice upon the Charger as required by Section 96(2) of The Land Act 2012.

23. I have studied the answer of the Bank to the three Applications before Court and I am unable to find that the Bank has satisfactorily confronted the allegation of non-service of the Notice under Section 96(2). The Law therein provides:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.

24. In paragraph 22 of the Affidavit of Mr. Parthasarathy, he depones,

“Contrary to the allegation in paragraph 2 of the 1st Applicant’s Supporting Affidavit dated 3rd February, 2015 (the Supporting Affidavit) that the said sale of the Suit Property was in breach of sections 96 and 97 of the Land , 2012 for want of notice and valuation, the same is not true for the reason that:

i. The Respondent served upon the Applicants the requisite three (3) month notice to the Applicants through its letter dated 7th September, 2012 informing them of the nature of the default, the amount required to rectify the default and their rights under section 90 of the Land Act.

ii. The Respondent, through its auctioneers served upon the Applicants a 45 day Notification

of sale dated 9th January, 2013 in the form prescribed by the Land Act, 2012 and the Auctioneers Act as well as Rules promulgated thereunder.

iii. The Respondent, in an effort to obtain a competitive price of the Suit Property engaged the services of a reputable valuation company (Knight Frank) who, via the valuation report dated 6th January, 2015 set the current market value of the Suit at 16,000,000/- and the forced sale at 12,000,000/-.

iv. By a newspaper advertisement carried out in the Daily Nation Newspapers dated 19th January, 2015 and on 2nd February, 2015 the auctioneers informed the entire world of an intended sale which was slated for, and conducted on 3rd February, 2015, at a designated time and place. Annexed and marked SP10 are copies of the Newspaper advertisements dated 19th January, 2015, and 2nd February, 2015”.

25. What the Bank does not say is when and how it served the Notice required by Section 96(2) of the Land Act. As it has been said before, this Notice cannot be fused with the 45 day Notification of sale issued under the provisions of The Auctioneers Act. For example, in **DESIRES DERIVE LTD VS. BRITAM LIFE ASSURANCE CO.(K) LTD**eKLR [2016] this Court held;-

“The law seems clear enough that after issuance of the 3 months Notice under Section 90, a Chargee cannot exercise its Power of Sale before serving a further Notice of 40 days as required by Section 96(2). Whether this further Statutory requirement is unreasonable or absurd it must be given its full effect not only because it is an express and unequivocal Statutory requirement but also because it is now an important component of the Chargor’s equity of redemption. The Bank cannot shrink on that right by fusing it with another notice. It is because of this breach that this Court put off the intended sale of 25th June, 2016”.

26. If the Notice was not issued then the realization process may well be tainted and the Public Auction of 3rd February 2015 would be founded on an irregular process. Yet what would be the remedy to the Plaintiffs?

27. This Court does not hear the Plaintiffs saying that the Necessary Party had actual or Constructive knowledge or Notice of the said irregularity. Quite to the contrary the Applicants have in their submissions of 4th June 2015 stated that the Necessary Party was misled to bid without it being disclosed to her that the sale was being conducted illegally. Because of the innocence of the Purchaser it would be protected by the Provisions of Section 99 of the Land Act which reads:-

(1) 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 persons o 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”.

28. And as one quickly notices, under the provisions of Section 99(3), the purchaser enjoys this protection even if the sale has not completed.

29. Even if it is accepted that the process leading to the Auction was irregular, the Plaintiffs cannot reverse the process; their remedy is in damages.

30. For the reasons stated all the three Applications of 3.2.2015, 11.2.2015 and 26.2.2015 are without merit and hereby dismissed with costs to the Respondent.

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

F. TUIYOTT

JUDGE

PRESENT;

Nyambati for Gaturu for 1st Plaintiff

Ngonde for Defendants

N/a for Necessary Party

Alex - Court Clerk