



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 89 OF 2013

JANE NYAMBURA NDUNGU.....PLAINTIFF

-VERSUS -

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. On 14th January 2013, the plaintiff commenced proceedings by filing a Plaint. The plaintiff's claim was that the Defendant had intended to auction the plaintiff's property which the plaintiff had charged in favour of the defendant, as a security for a loan that the defendant had advanced to **COWFORD GENERAL CONTRACTORS LIMITED**.
2. The plaintiff perceived the defendant's actions as unlawful, fraudulent, malicious and in bad faith.
3. In order to safeguard her rights, the plaintiff asked the court to issue an injunction to restrain the defendant from selling the suit property.
4. On 26th February 2013 the plaintiff filed an application seeking an interlocutory injunction to restrain the defendant from selling the suit property, which is **L.R. NO. RUIRU TOWNSHIP/149**.
5. At that time, the property had been advertised for sale on 13th March 2013. That sale did not take place, and it would appear that the relationship between the parties remained calm for a considerable period of time.
6. The reason for that calm period is that the parties had entered into an agreement through which the defendant appointed **ACUMEN VALUERS LIMITED** as Management Agents over the suit property. The said Agents were responsible for collecting rents from the suit property, and depositing the same into the loan account.
7. However, on 12th January 2015 Messrs **ANTIQUA AUCTIONS** advertised the suit property for sale by public auction. The advertisement was in the "*Daily Nation*", and it indicated that the property would be sold on 28th January 2015.
8. Having learnt about the intended sale, the plaintiff rushed back to court and filed the application dated 27th January 2015. That application sought an injunction to stop the intended auction.
9. The application dated 27th January 2015 was listed for hearing on 28th January 2015, as it had been

filed under a Certificate of Urgency. The initial hearing of the application was ex-parte.

10. Having heard the advocate for the plaintiff, the court found that, on a *prima facie* basis, the plaintiff had a basis for questioning the intention of the defendant, to auction the suit property. As the defendant was recovering monthly rentals from the suit property, which was to be applied towards the payment of the loan owed to the defendant, the court directed the defendant to stop the auction. The court further directed the defendant to provide the plaintiff and the court with an Account reflecting the rentals which the defendant's agent had been collecting, and also showing how the said rentals were utilized.

11. Whilst giving the orders on 28th January 2015, the court ordered that the application dated 27th January 2015 be argued inter-partes on 3rd February 2015.

12. When the application came up in court on 3rd February 2015, Miss Odera, the learned advocate for the defendant, informed the court that the suit property was sold on 28th January 2015.

In the light of that information, the plaintiff filed the application dated 28th January 2015. By that application the plaintiff asked for the following reliefs;

“1. That this application be certified as urgent and heard ex-parte in the first instance in respect to prayer number two in the application herein.

*2. That the sale which occurred on the 28th January 2015 of the property known as **RUIRU TOWNSHIP/149** by Antique Auctions, under instructions from their principal, Equity Bank Limited, be set aside, and that there be a stay of any further execution proceedings.*

3. That this Honourable Court be pleased to grant prayers 1 and 2 of the applicant's application dated 29th January 2015.

4. That costs of this application to be provided for by the defendant”.

13. In the first instance, the application dated 29th January 2015 came up for hearing on 3rd February 2015. On that date, the application, which was filed under a Certificate of Urgency, was heard *ex-parte*.

14. The court granted an order to stop any further steps which could thereafter lead to the transfer of the suit property. The court then ordered that the application dated 29th January 2015 be heard *inter-partes* on 11th February 2015.

15. When the case came up on 11th February 2015, the plaintiff had just changed her advocates, from the Law Firm of **WANDUGI & COMPANY ADVOCATES**, to the Law Firm of **S. MUSALIA MWENESI ADVOCATES**.

16. The new lawyers indicated that they required more time to enable them file a further affidavit.

17. When the defendant's advocate pointed out that the plaintiff had 2 applications which were still pending in court, the plaintiff withdrew the application dated 27th January 2015. Consequently, the only application that remained, and which is the subject matter of this Ruling, is the application dated 29th January 2015.

18. When canvassing the application, the plaintiff submitted that the sale of the suit property was irregular because it was done when the court had issued an order to stop it.

19. Secondly, the defendant had been collecting rent from the suit property, which it ought to have used to pay the instalments towards the payment of the loan.

20. As the defendant sold the property despite the court order, the plaintiff submitted that the court should penalize the defendant for being in contempt of the court.

21. According to the plaintiff, the failure by the defendant to comment on the plaintiff's contention, that the defendant and the auctioneer were informed about the injunction order immediately after it was issued by the court, gives rise to the principle of waiver and estoppel.

22. I understand that to mean that the defendant cannot now be allowed to challenge the accuracy of the factual statements which it had not responded to earlier.

23. The plaintiff quoted the following passage from **HALSBURY'S LAWS of ENGLAND, 4th Edition, Vol. 16**, at page 992;

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although unlike estoppel, waiver must always be an intentional act with knowledge”.

24. What right is the defendant said to have waived?

25. The plaintiff submitted that the defendant waived its right to auction the suit property when the defendant agreed to take over the management of the plaintiff's properties.

26. For as long as the defendant's agent continued collecting rents from the suit property, it could not have been expected that the defendant should have expected the plaintiff to remit monthly payments into the loan account: that is the plaintiff's submission.

27. In this case, the plaintiff reasoned that before the defendant could reclaim its right to exercise its statutory powers of sale, the defendant ought to have first given notice to the plaintiff that it was abandoning the arrangement through which the defendant collected rents from the suit property.

28. The plaintiff also advanced the submission that the principle of estoppel was applicable to this case. In that respect, she cited the following words, which Odunga J. quoted with approval from the decision in **CENTRAL LONDON PROPERTY TRUST LIMITED VS HIGH TREES HOUSE LTD [1947] KB 130**;

“In general, where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the party who gave the promise or the assurance cannot afterwards be allowed to revert to the provisions of legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration”

29. Although the plaintiff relied on the words above, from the case of **REPUBLIC VS KENYA RAILWAYS & THE HON ATTORNEY GENERAL Exparte, INVIOLETTE WACIKE SIBOE MISC APPLT. No. 10 of 2009**, she did not then pinpoint the promise or the assurance which the defendant had given to her.

30. I have also noted from that same authority, the following words which Odunga J. quoted from **MULJI JETHA LIMITED Vs COMMISSIONER OF INCOME TAX HCCC No. 594 of 1966 [1967] E. 50**;

“It is well settled that the principle of equitable estoppel cannot be used as a means of founding a cause of action. Admittedly, it would be an over-simplification to say that

equitable estoppel can be used only by a defendant and not a plaintiff...

....

It is therefore correct that the company was endeavouring to use the principle as a sword rather than as a shield and, for this reason, its claim must fail”.

31. The parties herein executed a Deed of Assignment for Rental Income dated 20th February 2012. By the said Deed the parties expressly made note of the following facts;

“WHEREAS

1. *By a letter of offer dated 4th May 2011, the Bank offered and the Assignor accepted a loan facility of an aggregate principal amount of Kenya shillings Sixteen Million (Kshs. 16,000,000/-) together with interest and other costs as set out therein, (hereinafter ‘the loan facility’).*
2. *It was a term of the said letter of offer that the loan facility would be secured by way of an existing charge over **Title No. RUIRU TOWNSHIP/149**, pursuant thereto, to be executed and registered in favour of the Bank.*
3. *The Assignor further agreed with the Bank to channel all his rental income through his current account with the Bank. In particular the entire rental income from Title No. **RUIRU/TOWNSHIP/149** (hereinafter ‘the premises”).*

32. The Deed made it abundantly clear that the Assignment was to be read and construed together with the letter of offer and the Legal Charge.

33. On the basis of the contents of the said Deed of Assignment for Rental Income, there does not appear, on a *prima facie* basis, to be any promise or assurance from the defendant concerning a waiver of the defendant’s rights under the charge instrument.

34. In the event that there might have been a promise or an assurance from the defendant to the plaintiff, (which the plaintiff has not, on a *prima facie* basis, demonstrated), the plaintiff submitted that the defendant should have given Notice to her.

35. The defendant has shown the Demand Notice as well as the Statutory Notice which the defendant served on both the borrower and the plaintiff.

36. By giving those notices of its intention to realize the security, the defendant could be deemed, on a *prima facie* basis, to have been making it clear that the plaintiff’s property would be auctioned unless the plaintiff or the borrower made good the defaults in the repayment of the loan.

37. The plaintiff acknowledges that the suit property was already sold. Of course, the plaintiff is challenging the legality of the said sale.

38. However, although that challenge to the sale has been mounted in the application, the Plaintiff does not reflect a similar challenge. The Plaintiff had not yet been amended to reflect the fact that the suit property had been sold, and that the plaintiff was now seeking to reverse the said sale.

39. When the relief sought in the Plaintiff is an injunction to stop the sale of the property yet the said suit property had already been sold, the court finds it difficult to comprehend how the plaintiff intended to demonstrate that she has a *prima facie* case with a probability of success.

40. Furthermore, when the plaintiff acknowledges that the suit property had already been sold, that implied that another person has come onto the scene. That person is the purchaser, **UNION TEA BROKERS LIMITED of P.o. Box 81120-80100, MOMBASA.**

41. If the sale was to be set aside, it would have a direct impact upon the purchaser. Therefore, before the court could grant orders which could be prejudicial to the purchaser, it would only be fair and just to accord the said purchaser, a hearing.

42. Currently, the purchaser has not been brought on board in this case. For that reason, if the plaintiff had otherwise demonstrated a *prima facie* case with a probability of success, the court would still have found it difficult to, possibly, condemn the purchaser un-heard.

43. As regards the alleged contempt of court, the plaintiff may need to take appropriate steps to try and have action taken against the defendant.

44. The penalty for contempt of court would not normally be the grant of an interlocutory injunction.

45. I find that the plaintiff has failed to prove a *prima facie* case with a probability of success. Therefore the application dated 29th January 2015 fails. It is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Onindo for for the Plaintiff

Miss Odera for the Defendant

Collins Odhiambo – Court clerk.