



REPUBLIC OF KENYA

High Court at Kitale

Environmental & Land Case 2 of 2012

MATHIAS WABWOBA..... PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION..... 1ST DEFENDANT

SAMMY MUIRURI MBURU 2ND DEFENDANT

R U L I N G

By Notice of Motion dated 18/04/2013, the 2nd Defendant/Applicant seeks to have the suit against him struck out with costs. The application is brought under the provisions of Order 2 Rule 15(b) (c) and (d) of the Civil Procedure Rules. The Applicant depones that the Plaintiff/Respondent secured a loan from the 1st Defendant Agricultural Finance Corporation hereinafter referred to as "AFC" and offered his land LR No. Saboti/Sikhendu/Block 1 (Mucharage)/215 as security. The Plaintiff/Respondent defaulted in repayment of the loan. The property offered as security was advertised for auction where the Applicant participated and became the highest bidder. The Applicant paid the requisite deposit and thereafter cleared the balance. The property was transferred and registered in his name and title issued accordingly. The Applicant contends that the suit against him is frivolous and unmaintainable and should be struck out.

The Plaintiff/Respondent who was duly served did not file any grounds of opposition or Replying Affidavit. His Advocate M/S Arunga who was present during the hearing urged the court not to strike out the suit against the 2nd Defendant/Applicant arguing that his presence in the suit was necessary and that the case should be heard at a full trial.

I have given due consideration to the 2nd Defendant's application. The court is being asked to exercise its powers to summarily dismiss the case without hearing. I am alive to the fact that this is a power which should be exercised with greatest care and circumspection and only in the clearest case. In the present case, the Plaintiff is praying for an order that the sale of the land to the 2nd Defendant/Applicant is null and void and that the register should be rectified and the Plaintiff's name restored as proprietor of the land. In the body of the Plaint, the Plaintiff contends that the sale of the land by the AFC was fraudulent and the particulars of fraud against the AFC are that there was no notification of sale issued as required; no statutory notice issued and that the property was undervalued.

It is clear from the Plaint that there is no impropriety attributed to the 2nd Defendant/Applicant yet the Plaintiff wants to have his Title Deed cancelled. A pleading or an action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. In the present case, the Applicant bought the property during a public auction. All the processes were followed and the

Plaintiff has not implicated him in any improper act as regards the process leading to his registration as proprietor. To make him undergo a trial where he has no reason to be in the same is to put him under unnecessary expense and anxiety. Section 69 B of the Transfer of Property Act (now repealed) read as follows:-

“ (1). A mortgagee exercising the mortgage's Statutory Power of Sale shall have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights and encumbrances to which the mortgage has priority, but subject to all estates, interests, rights and encumbrances which have priority to the mortgage.

(2). Where a transfer is made in exercise of the mortgagees Statutory Power of Sale, the title of the purchaser shall not be impeached on the ground -

- (a) that no case had arisen to authorize the sale; or**
- (b) that due notice was not given;**
- (c) that the power was otherwise improperly or irregularly exercised,**

and a Purchaser is not either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper or irregular exercise of the Power shall have his remedy in damages against the person exercising the power”.

The above section is clear that title which has been conferred upon an innocent purchaser for value cannot be impeached on the grounds that the sale was without due notice as the Plaintiff in this case argues in his Plaint. The Plaintiff's remedy is in damages against AFC if he will finally succeed to show that the sale of the property was irregular. This has been the position in the Transfer of Property Act and the courts have routinely applied the same in a number of decisions including the case of **Priscillah K. Robought Grant Vs Kenya Commercial Bank & 2 Others Nairobi Court of Appeal Civil Application No. 227 of 1995**. In the above case, the High Court had refused to grant the appellant an injunction in which she sought to restrain Kenya Commercial Bank from transferring a property to two purchasers at a public auction. The appellant moved to the Court of Appeal seeking inter-alia an injunction restraining the Respondent Kenya Commercial Bank from transferring the sold property to two purchasers. While holding that they could not give an injunction as the property had already been transferred to the purchasers, the judges observed in the ruling that since the property had been transferred to the 2nd and 3rd Respondents and that there was no evidence that there was conspiracy between the 1st Respondent on the one hand and the 2nd and 3rd Respondents on the the other hand, the appellant's remedy only lay in damages if she ever succeeded in her claim that the sale was irregular. The judges quoted section 69 B of The Transfer of Property Act in their ruling.

I find that since there are no allegations of conspiracy between the AFC in this case and the 2nd Defendant regarding the sale, the Plaintiff/Respondent has no sustainable claim against him. The remedy of the Plaintiff lies in damages against the AFC should he prove that the sale was irregular. The 2nd Defendant should not be put to anxiety and expense. I find that the suit against him cannot be maintainable in light of the clear provisions of Section 69 B of The Transfer of Property Act (now repealed) which was the statute under which the sale herein was conducted before the repeal. I proceed to strike out the suit against the 2nd Defendant with costs.

It is so ordered.

Dated, signed and delivered in Open Court on this 4th day of June, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Katili for Mr. Njuguna for 2nd Defendant/Applicant and M/S Arunga for the Plaintiff/Respondent.

Court Clerk: Joan.

E. OBAGA
JUDGE
04/06/2013