



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 605 of 2003**

**WINFRED WAMBUI KINGORI.....PLAINTIFF**

**- VERSUS**

**PARAMOUNT UNIVERSAL BANK LTD.....1ST DEFENDANT**

**JOHN IRUNGU WACHIRA.....2ND DEFENDANT**

**DAVID SWAO.....3RD DEFENDANT**

**RULING**

Before me is an amended chamber summons dated 27<sup>th</sup> November 2008. In the application, the plaintiffs seeks temporary injunction pursuant to the provisions of **Order XXXIX Rules 1& 2** of the **Civil Procedure Rules** to restrain the defendants, by themselves or through their agents or servants from selling, transferring, charging or in any manner whatsoever alienating the parcels of land known as LR. No. 13824 (IR 64445) and LR.No.14600 (IR 71664) both situate at Karen Nairobi (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Winfred Wambui Kingori. She swore a further affidavit in support of the application. The application is opposed. Michael Riitho and Timothy Kimani, employees of 1<sup>st</sup> defendant, swore replying affidavits in opposition to the application. John Wachira Irungu swore a replying affidavit on his own behalf and on behalf of the 3<sup>rd</sup> defendant in opposition to the application.

Prior to the hearing of the application, the parties to this application agreed to file written submissions prior to the date fixed for the oral hearing of the application. The plaintiff and the defendants filed their respective written submissions together with the authorities that they relied on in support of their respective cases. Having carefully considered the said submissions, it was evident that the plaintiff's application is seeking to challenge the exercise of statutory power of sale by mortgagee (1<sup>st</sup> defendant). It was the plaintiff's case that the defendant had purported to exercise the statutory power of sale before it had issued valid statutory notices. The plaintiff denied the allegation by the 1<sup>st</sup> defendant that she has been served with valid statutory notices. In her further affidavit, the plaintiff deponed that the statutory notice had been addressed to Wilfred Wambui Kingori instead of herself, Winfred Wambui Kingori. It was the plaintiff's case that the certificate of posting exhibited by the 1<sup>st</sup> defendant did not support the 1<sup>st</sup> defendant's argument that the said statutory notice had indeed been sent by registered post. In response to the plaintiff's claim, the 1<sup>st</sup> defendant submitted that it had indeed served the statutory notice upon the plaintiff and in response thereto the plaintiff had written to the 1<sup>st</sup> defendant requesting to be granted indulgence to pay the outstanding amount.

Having evaluated the evidence in regard to service, I am of the firm view that the 1<sup>st</sup> defendant indeed served the statutory notices upon the plaintiff. The typographical mistake in the first name of the plaintiff i.e. the plaintiff was referred to as Wilfred instead of Winfred did not render the said notices invalid. The notices were sent through the postal address that the plaintiff had notified the 1<sup>st</sup> defendant. I did not buy the plaintiff's argument that there was lack of sufficient proof that the statutory notices were sent by registered post on account of the fact that the registered letters did not contain certain particulars. I hold that the 1<sup>st</sup> defendant discharged the burden placed on it to establish that it had indeed issued the statutory notices in issue.

The second argument that the plaintiff presented in support of her application for injunction is that the attestation in the charge over the suit properties, being LR. No. 13824 and the further charge over LR. No.14600 was invalidated by the fact that the said documents did not state the firm of advocates who drew them. Presumably, the plaintiff was relying on the provisions of **Section 35(1)** of the **Advocates Act**. It was further submitted on behalf of the plaintiff that the signature of the plaintiff on the said instruments of charge were witnessed by an advocate who was at the material time an employee of the 1<sup>st</sup> defendant. It was the plaintiff's case that she was not present before the said advocate and therefore, presumably, the legal effect of her signature on the said instruments of charge was not explained to her. In response to this submission, the 1<sup>st</sup> defendant reiterated that the charge and further charge were properly attested by an advocate in the presence of the plaintiff. It was the 1<sup>st</sup> defendant's case that the plaintiff's contention that the charges were improperly attested was just but an attempt by the said plaintiff to improperly secure the invalidation of the said charges.

I have carefully perused the said instruments of charge. The charge and the further charge were prepared and drawn by the firm of Salim Danji & Co. Advocates. The copies of the charge and the further charge annexed to the affidavit of the plaintiff did not contain any indication of the firm of advocates that had prepared the said documents. However, in the replying affidavit sworn on behalf of the 1<sup>st</sup> defendant, copies of the same charge and further charge were annexed which showed that the said documents were drawn by the said firm of Salim Danji & Co. Advocates. I therefore hold that the plaintiff failed to establish that the said charge and further charge were invalidated by virtue of the fact that the advocate who drew them did not indicate his name in the said instruments.

Further, it was apparent from the attestation complained of by the plaintiff that it was indicated that the plaintiff acknowledged being made aware of the effect of the charge and the provisions of **Section 69 (1)** of the **Transfer of Property Act** that had been explained to her. The plaintiff cannot therefore purport to challenge *post facto* and deny that she was not in the presence of the advocate who attested her signature. If I understood the plaintiff's argument, she was not saying that she did not execute the said instrument of charge; rather she is saying that she did not appear before the advocate who attested her signature. The question that this court asks itself in the context of the facts of this case is whether there is credibility in the claim by the plaintiff that she had not appeared before the advocate who attested to her signature. I am not so persuaded. I think it is convenient for the plaintiff to allege that she had not appeared before the said advocate who attested to her signature.

For the plaintiff to succeed in her claim, she has to contend with provision of **Section 97 (1)** of the **Evidence Act** that specifically exclude oral evidence to explain what has been reduced to written form. This court is not required to form an opinion whether or not the plaintiff was present before the attesting advocate by calling any other evidence other than evaluating the document itself. My perusal of the charge and the further charge clearly establish that the plaintiff confirmed in writing that she was present before the said advocate and further that she had understood the effect of her signature on the charge and the further charge. It is therefore evident that the plaintiff's complaint to the effect that she was not present when the advocate attested to her signature is not supported by any cogent evidence.

The third complaint by the plaintiff is that the 1<sup>st</sup> defendant had exercised its statutory power of sale oppressively and capriciously. The plaintiff claimed that the 1<sup>st</sup> defendant had converted the sum of Kshs.2.9 million in her saving account and further sold her motor vehicle Reg. No. KAK 047R without rendering any account. The plaintiff further complained that the 1<sup>st</sup> defendant levied unlawful debits on

the said account which, in her view, amounted to the 1<sup>st</sup> defendant clogging her equity of redemption. In response to this allegation, it was the 1<sup>st</sup> defendant's argument that it had levied charges and interest that was provided for in the charge and further charge. My evaluation of the arguments made in this regard is that whereas the plaintiff may have a case that the 1<sup>st</sup> defendant may have levied unlawful charges on her loan account, it is trite that a dispute over accounts cannot constitute sufficient ground for the grant of an order of injunction (**See Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125**). Such complaint may constitute proper grounds for award of damages but cannot constitute a ground to prevent a chargee from exercising its statutory power of sale.

It was submitted on behalf of the plaintiff that the 1<sup>st</sup> defendant had acted contrary to **Section 52** of the **Transfer of Property Act** that prohibits the transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants during the pendency of this suit. The plaintiff was invoking the doctrine of *lis pendens* in support of her argument that the 1<sup>st</sup> defendant should not have transferred one of the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants during the pendency of this suit. The law in Kenya in regard to the application of the doctrine of *lis pendens*, I think, is now settled. The Court of Appeal in **CA Civil Application No. NAI 131 of 2005, Surinder Kumari Mediratta vs Kenya Commercial Bank & 2 others (unreported)** cited with approval the decision of Madan J (*as he was then*) in **Mawji vs United States International University & Anor [1976] KLR 185**. At page 201, the learned judge held as follows in regard to the application of **Section 52 of Transfer of Property Act**:

*“I think the situation in Kenya is, or it ought to be, this: the court has power to prevent a breach of the provisions of Section 52 in proceedings before it in which any right to immoveable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose.”*

Since then, the trends in decisions by the court is that for the doctrine of *lis pendens* to apply, the court must either have granted an order of injunction restraining any dealings in the suit property or alternatively issued a prohibitory order prohibiting any transaction in regard to the suit property.

The fact that the plaintiff has filed suit seeking certain orders in respect of the suit property is not sufficient for the doctrine of *lis pendens* to apply. If that were the case, many transactions relating to dealings of immovable property would be frustrated by the mere fact that one of the parties has filed a suit in court, irrespective of the merits of such a case. In the present application, it was evident that when on 2<sup>nd</sup> June 2006 Waweru J issued the order restraining the 1<sup>st</sup> defendant from selling the suit property, the suit property had already been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. According to the agreement annexed to the replying affidavit of the 2<sup>nd</sup> defendant, the suit property (i.e LR. No. 13824) was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 17<sup>th</sup> March 2005 and transferred to the said defendants on 4<sup>th</sup> July 2005. It is therefore evident that the doctrine of *lis pendens* cannot be applied in support of the plaintiff's present application.

In the present application, it is evident that the 1<sup>st</sup> defendant has already sold the suit property in exercise of its statutory power of sale. The plaintiff placed no evidence before this court that she had repaid in full the amount that was advanced to her by the 1<sup>st</sup> defendant together with the accrued interest and other charges. Although the plaintiff alleged that the right of the 1<sup>st</sup> defendant to exercise its statutory power of sale by chargee had not accrued, and although the plaintiff further alleged that the 1<sup>st</sup> defendant had irregularly exercised its statutory power of sale, I am unable to grant the application sought for injunction since the property in question has already been sold. The plaintiff's equity of redemption in respect of the said suit property was thus extinguished. Under **Section 69 B (2) of the Transfer of Property Act**, the title of a purchaser of a property sold by a chargee in exercise of its statutory power of sale cannot be impeached on the grounds that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised. The plaintiff cannot seek to impeach the exercise of the statutory power of sale by the 1<sup>st</sup> defendant for the purpose of reversing the sale and transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The only remedy available to the plaintiff if she was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regard whether the plaintiff's equity of redemption is still in existence, I need not look further than to cite with approval the decision of Nyamu J (*as he was then*) in **Nairobi HCCC No.9 of 2003 Ze Yu Yang vs Nova Industrial Products Ltd** (*unreported*) where at page 9 of his ruling he held as follows:

*“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with celebrated case of GEORGE MBUTHIA & JUMBA CREDIT CORPORATION CIVIL APPEAL 111 OF 1986. In that case the decision of Chief Justice Apaloo at pg. 5 clearly states that the equity of redemption is extinguished by a valid contract under S.60 of the Transfer of Property Act...If any doubt existed or persisted after the GEORGE MBUTHIA & JIMBA CREDIT CORPORATION concerning the extinguishment of the equity of redemption, the following two subsequent decisions of the Court of Appeal have crystallized the position in law. PRISCILLA KROBOUGHT GRANT V KENYA COMMERCIAL FINANCE CO. LTD. C.A 227 OF 1995. At page 4 in the unanimous decision of the judges of Appeal after citing in full S.69B of TPA:*

***“In the present case therefore, the only remedy of the applicant would be a claim for damages should she be able to prove that there was an improper or irregular exercise of the statutory power of sale. It would therefore, appear to us, at this stage, that the applicant does not have an arguable case.”***

*IN THE CENTRAL BANK KENYA LTD VS TRUST BANK & 4 OTHERS C.A NO.215/1996 at page 14 held that a purchaser pursuant to statutory power of sale, who has a title registered in his favour had an indefeasible title and a right to immediate possession. The title was registered under Registration of Titles Act in case in question.”*

I need not add more. In so far as the basis of the plaintiff's case is a claim for the recovery of the suit property that has already been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, it cannot be said that the plaintiff has a prima facie case. It is further evident that statutorily, the plaintiff's remedy lies in damages. Damages will therefore constitute adequate remedy in the circumstances. The balance of convenience tilts in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are already the registered proprietors of the suit property.

The upshot of the above reasons is that the plaintiff has failed to establish a suitable case for the grant of the interlocutory orders of injunction. The amended chamber summons filed in court on 27<sup>th</sup> November 2008 lacks merit and is hereby dismissed with costs.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY 2009**

**L. KIMARU**

**JUDGE**