



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELC. CASE NO. 733 OF 2017

EDWIN KAGO KAGWI.....PLAINTIFF/APPLICANT

VERSUS

STANBIC BANK KENYA LTD.....1ST DEFENDANT/RESPONDENT

JOSEPH NGANGA KARIUKI t/a

JOSRICK MERCHANGTS.....2ND DEFENDANT/RESPONDENT

MICHAEL WAIGWA.....3RD DEFENDANT/RESPONDENT

CHIEF LANDS REGISTRAR.....4TH DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 27th November, 2017 in which he sought the following orders:-

1. This Application be certified as urgent and be heard ex-parte in the first instance.

2. Pending the interpartes hearing and determination of this application a temporary injunction do issue restraining the Defendants/Respondents, their agents, servants, employees, nominees and/or other parties claiming through or under them or howsoever acting under their instruction from disposing, alienating, transferring, advertising, entering, taking possession or in any other manner interfering with the Plaintiffs'/Applicants' occupation, possession and quiet enjoyment of Flat No. D6, BLOCK D located on L.R. No. 2/125 (Original No. 2/90/2) and/or dealing with the same in any other manner adverse to the Plaintiff/Applicant.

3. Pending the interpartes hearing and determination of this suit an injunction do issue restraining the Defendants/Respondents, their agents, servants, employees, nominees and/or other parties claiming through or under them or howsoever acting under their instruction from disposing, alienating, transferring, entering, advertising, taking possession or in any other manner interfering with the Plaintiff/Applicant's occupation, possession and quiet enjoyment of the parcel of land commonly known as Flat No. D6, BLOCK D located on L.R. No. 2/125 (Original No. 2/90/2) and/or dealing with the same in any other manner adverse to the Plaintiff/Applicant.

4. The 1st Defendant/Respondent be and is hereby required to avail comprehensive, concise and accurate certified statements of the Plaintiff/Applicant's Current Account No.0100000659918 and subject loan account from inception of the 1st loan facility secured by the Mortgage dated 4th December, 2003 to date.

5. Costs of this application be in the cause.

2. The Applicant had taken a facility from the 1st Respondent in 2003 and as security offered Flat No. D6 Block D on LR No. 2/125 (Original No. 2/90/2) (suit property).

The Applicant further took an additional facility from the 1st Respondent in 2008. The Applicant was unable to repay the facility as agreed. The 1st Respondent instructed its lawyers to issue the necessary statutory notices.

3. The statutory notices were issued as required. The suit property was advertised for sale through public auction on the 15th November, 2016 and on 19th January, 2019 but on each of those two occasions, the auction did not take place. In a bid to reduce the loan, the Applicant deposited Kshs.3000,000/= towards reduction of the amount owed to the 1st Respondent. The amount could not however clear the loan.

4. The suit property was again advertised for sale which sale was to take place on 24th May, 2017. The auction did not take place. The fourth and final advertisement of sale of the suit property was carried out in the Daily Nation of 3rd July, 2017 for an auction slated for 18th July, 2017. This time, the suit property was sold.

5. The Applicant filed this suit on 30th November, 2017. He contemporaneously filed the current application in which he sought the orders stated in paragraph 1 hereinabove.

The Applicant contends that the statutory notices were not issued in accordance with the relevant law; that the address through which the notices were sent does not belong to him; that he had actually cleared the loan due to the 1st Respondent; that the auctioneer did not act in accordance with the law and that the alleged service of documents upon him as alleged by a process server is not true.

6. The Applicant further contends that the 3rd Respondent who purchased the suit property did so through collusion and that the auction was not conducted in accordance with the conditions stipulated and therefore the same was illegal; that the transfer of the suit property was effected in favour of the 3rd Respondent while this suit was pending.

7. The Applicant's application was opposed by the 1st Respondent through a replying affidavit sworn on 2nd January, 2018. The 1st Respondent contends that it issued all statutory notices required before the suit property was sold on 18th July, 2017. The 1st Respondent argues that contrary to the Applicant's contention that he was not given statements of his account, the 1st Respondent states that the Applicant was given all statements which were upto date as per the annexed statements in its replying affidavit.

8. The 1st Respondent further argues that the Applicant knew of the loan status and that when statutory notices were given and the suit property advertised twice with no auction taking place, the Applicant made a deposit of Kshs.3000,000/= towards reduction of the principal amount. The Applicant made certain requests which he was advised to put in writing which actually he did. The 1st Respondent therefore argues that the Applicant's application has been overtaken by events in that the suit property has already been sold and is in possession of the 3rd Respondent.

9. The 3rd Respondent opposed the Applicant's application through a replying affidavit sworn on 27th February, 2018 and a further replying affidavit sworn on 21st June, 2018. The 3rd Respondent contends that he purchased the suit property after seeing a press advertisement which had scheduled its sale on 18th July, 2017. As the 3rd Respondent was based in Saudi Arabia, he asked his brothers to attend the auction and participate. His brothers participated in the auction where he turned out to be the highest bidder.

He wired the 25% required from his account to the account of the auctioneers. He thereafter came to Kenya where he made the balance.

10. The 3rd Respondent contends that he has since taken possession of the suit property which he renovated and has put in a tenant. He further contends that the suit property has now been registered in his name. He denies the Applicant's allegations of collusion in the auction as contained in the Applicant's further affidavit sworn on 10th April, 2018.

11. I have carefully considered the Applicant's application as well as the opposition to the same by the 1st and 3rd Respondents. I have also considered the submissions of the 1st and 3rd Respondents. The only issue for determination is whether an injunction should issue in the manner prayed for and whether an order should be issued directing the 1st Respondent to provide an account of the Applicant's loan account.

12. It is important to note that the Applicant moved to Court to file this application after the suit property had already been sold. The suit property was sold on 18th July, 2017 and the present application was filed on 30th November, 2017. The suit property has since been registered in the 3rd Respondent's name. All that the Applicant had wanted has been overtaken by events in that the 3rd Respondent has taken possession and the suit property is registered in his name.

13. An injunction can only be given to prevent that which has not happened. It cannot be given where that which is meant to preserve has already taken place. The law is clear that where a property is sold in a public auction and the property is transferred, the only remedy available to the Applicant is damages if at all he succeeds in showing that the auction was not conducted in accordance with the law. In the circumstances, it will be an academic exercise to try to consider whether the Applicant has made out a prime facie case and even if one were to consider that, the Applicant has not demonstrated that he has a prime facie case which would have warranted grant of an injunction. There were statutory notices issued. The Applicant was aware of the loan status but he chose to ignore to repay it. Even when he made a lumpsum amount towards clearance of the loan, he never followed up by clearing the arrears which had accumulated.

14. The Applicant at some stage was in touch with the 1st Respondent's officials but he seems to have lost touch perhaps due to his busy schedules out of the country.

The Applicant wants an order for the 1st Respondent to give a full statement of account. The 1st Respondent has demonstrated that they have an upto date statement of account in respect of the Applicant's account. After the auction, the Applicant was advised that the excess sum realised had been credited into his account. There is therefore no basis for granting an order for accounts as prayed in prayer 4 of the Notice of Motion dated 27th November, 2017. I therefore find no merit in this application which is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 13th day of June, 2019.

E.O.OBAGA

JUDGE

In the presence of M/s Nafula for Mr. Kinyanjui for 3rd Defendant and Mr. Atika for M/s Ooma for 3rd Defendant.

Court Assistant Hilda