



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO. 176 OF 2012

MUTUA KIHU.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD....1ST DEFENDANT

KENNEDY ONGUNY.....2ND DEFENDANT

RULING

Introduction

1. This is a ruling in respect of two applications. The first application is dated 4th February, 2013. It is brought by the Plaintiff and it seeks the following orders:-

1. Spent

2. Spent

3. That the 1st Defendant does give an account of the proceeds of sale of the suit property, NAIROBI/BLCOK 82/273, complete with taxed auctioneers' and advocates' costs.

4. That the letter dated 21st January, 2013 by the 1st Defendant be deemed as an unequivocal admission to maintain the status quo pending the hearing and determination of the suit herein filed.

5. That the auction and sale of the 27th March, 2012 be and is declared as null and void as the 2nd Defendant failed to comply with the advertised conditions of sale.

6. That costs be provided for.

2. The second application is dated 12th February, 2015. It is brought by the 2nd Defendant and it seeks the following orders:-

1. Spent

2. That the interim orders issued on 5th February, 2014 and various extended the last being 13th November, 2013 be discharged.

3. Spent

4. That all the rental income accruing from Nairobi/Block 82/273 Donholm be deposited in a joint interest bearing account in the names of the advocates for the 1st Defendant and the Plaintiff pending the hearing and determination of this application pending the hearing and determination of this suit.

5. That in the alternative to prayer (3) above, this Honourable Court be pleased to appoint a receiver manager to collect the rental income until further orders of the Court.

6. That this Honourable Court be pleased to issue directions as to the expeditious hearing of the main suit.

7. That costs of this application be provided for.

3. The Plaintiff had taken a loan of Kshs.690,000/= in May, 1980 from the 1st Defendant. In May, 1989 he took a further loan of Kshs.247,000/=. The Plaintiff offered LR No Nairobi Block 82/273 as security (suit property). The Plaintiff was unable to repay the loan. The suit property was sold in a public auction conducted on 27th March, 2012. The suit property was sold to the 2nd Defendant who has since obtained title to the same.

4. The Plaintiff moved to Court on 4th April, 2012 and filed this suit. He contemporaneously filed an application seeking injunctive orders. The application for injunction was heard and subsequently dismissed. An application to review the ruling dismissing the application for injunction was also dismissed. It is after the dismissal that the Plaintiff filed the application dated 4th February, 2013. The Court granted the Plaintiff orders of maintenance of status quo which he has enjoyed since then.

Application dated 4th February, 2013

5. In this application, the Plaintiff contends that after the suit property was auctioned, the Defendants have been threatening him with eviction yet they have not given an account of the proceeds of the auction to him. The Plaintiff argues that he has been in the suit property for over 30 years and that if he was evicted without the accounts being given it will amount to inequity.

6. The Plaintiff further contends that the auction was not conducted in accordance with the conditions of sale; that the 2nd Defendant was expected to pay at least 25% of the bid price at the fall of the hammer which was Kshs.2,500,000/= and that instead of the balance of the purchase price being cleared within 30 days from the date of auction, the 1st Defendant extended the period to 90 days.

7. The Plaintiff further argues that the 1st Defendant wrote a letter dated 21st January, 2013 which implies that he was allowed to stay in the suit property until this suit is heard and determined. The Plaintiff further argues that the auctioneers costs were inflated and all in all the auction as conducted was illegal.

8. The Plaintiff's application was opposed by the 1st Defendant based on a replying affidavit sworn on 27th February, 2013. The 1st Defendant argues that what the Plaintiff is seeking is an injunction disguised as order for maintenance of status quo; that the Plaintiff has filed to previous applications which have been dismissed and the current application is *res judicate* in that it raises issues which have been dealt with before.

9. The 1st Defendant contends that the Plaintiff is abusing the process of the Court by filing applications after previous ones have been dismissed and that what the Plaintiff should do is to fix the suit for hearing instead of filing unnecessary applications. On the issue of a letter dated 21st January 2013, the 1st Defendant argues that the letter was not meant to allow the Plaintiff to stay in the suit premises until conclusion of this case. The letter simply advised the Plaintiff that any refunds of what was realized from the auction that was over what he owed was to be refunded after he vacated the suit property.

10. As regards the prayer for accounts, the 1st Defendant contends that this prayer is premature and should be raised at the full hearing. The 1st Defendant therefore contends that the Plaintiff's application is for dismissal.

11. The Plaintiff's application was opposed by the 2nd Defendant based on a replying affidavit sworn on 26th April, 2013. The 2nd Defendant contends that the application by the Plaintiff is an abuse of the process of the Court in that it is essentially an application for injunction; that the Plaintiff had applied for injunction which application was dismissed and when the Plaintiff sought a review of the ruling dismissing the application a Preliminary Objection was raised by 2nd Defendant which led to the dismissal of the review application.

12. In a supplementary affidavit sworn on 22nd April 2013, the Plaintiff responded to the issues raised by the 1st Defendant. The Plaintiff contended that his application dated 21st September, 2012 was struck out before he applied for review. He contends that what was struck out was his application for stay of execution pending review. The Plaintiff further argues that the issue of Advocate's costs can only arise after taxation of costs and that the 1st Defendant has no lien over his money.

Analysis

13. I have considered the Plaintiff's application as well as the opposition to the same by the 1st and 2nd Defendants. I have also considered the submissions by the Plaintiff and the 2nd Defendant. There are three issues which emerge for determination. First is whether an order should be granted that the status quo be maintained. Second is whether an order for accounts should be granted and third is whether the auction which was conducted on 27th March, 2012 should be declared null and void.

14. On the first issue, there is no contention that the suit property was sold in a public auction conducted on 27th March, 2012. At the said auction, the 2nd Defendant is the one who purchased the suit property. The suit property has since been registered in the name of the 2nd Defendant and his wife. This suit was filed after the suit property had already been sold. The Plaintiff sought an injunction seeking to restraining the Defendants from interfering with his possession of the suit property. This application was dismissed by Justice Ougo in a ruling delivered on 29th August, 2012.

15. The Plaintiff thereafter sought to have Justice Ougo's ruling reviewed. The application for review was dismissed by Justice Havelock on

21st September, 2012. It is after the dismissal of the application for review that the Plaintiff brought the present application. The status which the Plaintiff is seeking to maintain is that he should continue remaining in the suit property until this suit is heard and determined. In his quest to have the status quo maintained, the Plaintiff refers to a letter dated 21st January, 2013 from the 1st Defendant to him in which the 1st Defendant informed him that there was a credit balance arising out of the proceeds of the auction which monies was to be released to him upon conclusion of this case after auctioneer's charges and legal fees are taken into account.

16. The Plaintiff therefore argues that as the 1st Defendant is holding his money, he is entitled to remain in the suit property until this suit is determined. The Plaintiff in his submissions relies on the Court of Appeal decision in **Nairobi Civil Appeal No. 163 of 1996 between Eustace Kangwere and Wiyathi Embu Service Station & Another**. The Plaintiff argues that this decision held that an order of status quo is different from an injunction or stay. On the contrary, the 2nd Defendant argued that this decision is inapplicable in the instant case.

17. The orders which the Plaintiff seeks are orders restraining the Defendants from interfering with his possession of the suit property. These orders whether couched as orders of status quo are in their very nature injunctive orders. The Plaintiff had been denied the injunctive orders which could not even be allowed on review. The Plaintiff cannot therefore again come to Court seeking similar orders which he chooses for convenience to call status quo orders. What the Plaintiff is seeking has already been heard and determined and is therefore res judicata. In the decision cited by the Plaintiff, the Justice Owuor (as she then was) had ordered maintenance of status quo when an application came ex-parte. During inter-partes hearing, the Judge went on to grant an injunction when she had no jurisdiction to grant the same in her appellate jurisdiction. The injunction which had been given was set aside on appeal. This decision does not therefore help the Plaintiff's case.

18. I will deal with the second and third issues together. In the second issue, the Plaintiff is seeking an order for accounts. In the third issue, the Plaintiff is seeking a declaration that the auction was null and void. The prayer for accounts and nullification of the auction cannot be dealt with at interlocutory stage. These two prayers form the basis of the Plaintiff's claim in the further amended plaint. The two cannot therefore be addressed at this interlocutory stage.

Conclusion

19. Having reached a finding that no prayer can be granted in the Plaintiff's application dated 4th February 2013, I proceed to dismiss the same with costs to the Defendants.

It is so ordered.

Application dated 12th February, 2015

20. In this application the 2nd Defendant contends that the Plaintiff is enjoying interim orders which were granted in his favour in 2013 yet he is not keen on prosecuting the pending applications. The 2nd Defendant states that despite the fact that he spent Kshs.10,000,000/= to purchase the suit property, he is not enjoying any benefit because it is the Plaintiff who is enjoying the benefit of rental income from the suit property. The 2nd Defendant therefore argues that the Court should order that rental income from the suit property be deposited in a joint interest earning account in the names of the Advocate for the Plaintiff and 2nd Defendant pending the determination of this suit.

21. The 2nd Defendant argues that the Court should discharge the orders which the Plaintiff has been enjoying and give directions as to the expeditious disposal of the main suit.

22. The Plaintiff who was duly served with the application by the 2nd Defendant did not file any grounds of opposition or replying affidavit to the same. The application therefore remains unopposed. Despite the Plaintiff being given time to file a response and submissions within 14 days from 19th February 2019, he neither filed a response nor submissions in respect of application dated 12th February, 2015.

23. I have considered the application by the 2nd Defendant and the submissions filed in support of the same. Prayer 2 of this application has already been rendered moot by virtue of dismissal of the Plaintiff's application dated 4th February, 2013. The prayers which are to be considered are prayers 4, 6 and 7 of the Notice of Motion dated 12th February, 2015.

24. As regards deposit of rental income in a joint interest earning account, a look at the file shows that the 2nd Defendant has not filed a defence to the Plaintiff's claim. There is no counterclaim filed herein. There is therefore no basis upon which an order can be made for deposit of the rental income in a joint interest earning account. The upshot of this is that the application fails and is dismissed with no order as to costs.

25. This suit has been pending since 2012. Applications which were filed in 2013 and 2015 respectively remained unprosecuted for long. The delay to prosecute the two applications has been unreasonable and now that they have been finally determined, there is need for the Court to give directions as to the quick disposal of this case. In this regard, parties are directed to comply with order 11 of the Civil Procedure Rules within 30 days from today. This matter shall be mentioned before the Deputy Registrar after the 30 days lapse for purposes of compliance. Should the parties fail to comply with the directions of the Court, this suit will stand dismissed for failure to comply with the directions of the Court. The costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 28th day of August, 2019.

E.O.OBAGA

JUDGE

In the presen of Mr Ombwayo for Plaintiff

M/s Hawa for Mr Karungo for 1st defendant

Mr Kopere for 2nd defendant

Court Clerk : Phyllis

E.O.OBAGA

JUDGE