



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CAUSE NO. 16 OF 2016

MARIBU AGRIBUSINESS COMPANY LTD.....PLAINTIFF

-VERSUS-

CONSOLIDATED BANK KENYA LTD.....1ST DEFENDANT

B. GATHIRU T/A REGENT AUCTIONEERS.....2ND DEFENDANT

ABONY DAIRIES LTD.....INTERESTED PARTY

RULING

Introduction

1. On 16th February, 2016 the plaintiff (“applicant”) herein instituted the current suit seeking a permanent injunction to restrain the defendants by themselves, their servants, agents, employees from advertising for sale, alienating, selling, entering into, occupying, taking possession, disposing off or otherwise howsoever interfering with all those properties known as Title Nos. Nyeri Mweiga/1694 and Nyeri Mweiga/1170 (“suit properties”); an order for independent valuation by competent and registered valuers to establish the true value of the suit property; General damages; such other consequential relief as the court may deem fit and just to grant; costs of the suit and interest.

2. Simultaneously with the plaint, the plaintiff brought the notice of motion dated **15th February, 2016** and filed in court on **16th February, 2016** which is the application before me for determination. The application is opposed by the respondents who filed a replying affidavit dated **17th March, 2016** together with grounds of opposition. In response to the replying affidavit, the applicant filed a short further affidavit on 23rd March, 2016. Subsequent to filing the application and responses as stated above, parties filed written submissions in support of their respective positions. I thereafter reserved the matter for ruling. The ruling has been adjourned a number of times due to pressure of work and the same is regretted.

3. The applicant is seeking the following orders;

1) Spent.

2) Spent.

3) That a temporary injunction be issued restraining the 1st and 2nd respondents either by

themselves, their agents, employees and or servants from selling, charging, mortgaging, leasing, entering, taking possession of or in anyway interfering with Title numbers Nyeri Mweiga/1694 and Nyeri Mweiga 1170 pending the hearing of and final determination of this suit;

4) costs;

5) An order for an independent valuation to be done to ascertain the value of the suit premises under Rule 10 of the Auctioneers Rules 1997.

4. I have taken time to carefully peruse all the pleadings and affidavits in respect of the application and the main issues that emerge for determination are as follows;

- a. Whether the applicant is entitled to the injunctive relief as prayed in its application.
- b. If the applicant is so entitled, whether it has met the necessary conditions for granting such orders.
- c. Whether the current proceedings are *res judicata* as submitted by the respondents.

5. The main facts in this matter are not hard to discern. The applicant is aggrieved by the respondents attempt to dispose of its parcels of land charged to the 1st respondent. The validity and existence of the charge over the suit properties is not in dispute. The applicant does not deny that the charge exists to secure credit facilities extended to it. Its chief grievance is that the manner of seeking to realise the securities is faulty. Primarily, it alleges *inter alia* that;

- a. The respondent did not follow the procedures laid down in Law for exercise of the statutory right of sale of charged property. In that regard it is alleged that the requisite notice or notification of sale was not properly issued or was defective.
- b. The respondent did not undertake a valuation of the properties to ascertain their market value as at the time of the purported sale.
- c. The respondent have not notified the applicant of the outstanding amount.

6. On its part, the respondent raises several objections. The respondent alleges *inter alia* that;

- a) The present suit is *res judicata* as there is in existence another suit filed in the High Court Commercial Division at Milimani Nairobi which is case No. HCCC No. 293 of 2014. The said suit is said to have dealt with the same matters as raised in the present application. The suit was said to have been determined by a ruling of the court rendered by **Ochieng J** on 26th May, 2015. The said ruling is annexed to the respondent's replying affidavit.
- b) The above notwithstanding, the respondent's view is that the current application does not in any event, meet the threshold set by Law for issuance of injunctive orders as sought by the applicant.

Analysis and Determination

7. At the outset, I must determine whether the current proceedings are indeed *res judicata*. If I find that they are, then the applicant will be guilty of abusing the court process and consequently, I must halt any further abuse and make appropriate orders to stop it. To enable me decide whether or not the issues here are *res judicata*, I must appraise myself of the issues in Milimani HCC No. 293 of 2014.

8. In that suit, there are two plaintiffs. The plaintiff in the present suit is listed as plaintiff number 2 in Milimani HCC No. 293 of 2014. In that suit, like the present one, the substratum is the charge over the suit properties. Like in this suit, the substance and validity of the charge is not an issue. What is in issue is

that, at the time of filing that suit, the plaintiffs were allegedly not in arrears. The right to exercise statutory power of sale had therefore not arisen. In addition, the defendant was accused of not following the laid down procedure in seeking to exercise its statutory power of sale.

9. **Ochieng J**, after hearing the application, granted injunctive orders. He did so after observing that the defendant was guilty of not adhering to the correct procedure in seeking to realise the charged properties. In his ruling however, he did not stop the provisions of the charge from continuing to run. Indeed he permitted the defendant to make a fresh attempt at realising the securities if conditions so warranted and in compliance with the laid down procedures.

10. So soon thereafter, the respondents herein kick-started another process to realise the securities. It is this second process that has informed this current application under consideration. In seeking to realise the securities this second time, again the respondents are said to have flouted rules of procedure. The question I then pose is whether; the applicant's complaint impugning the second attempt can be said to be *res judicata*. In my view it cannot be. I say so because factually, the events complained of here occurred long after the ruling by Ochieng J. They cannot therefore be a basis for impugning the present application on the ground of being *res judicata*.

11. Irrespective of the number of times a chargee seeks to exercise its right of sale, it is at all times enjoined by law to strictly adhere to laid down enforcement procedure every time it attempts to do so. I therefore find that the matters raised in this application strictly speaking are not *res judicata*. However in my view, given that the foundational basis of both suits is the charge over the suit properties any subsequent issue arising out of the enforcement and/or realisation of the charge should be ventilated in the same suit and not a fresh case.

12. To an extent therefore, in as much as the immediate grievances emanate from different set of facts, there is a significant correlation between the two suits. It is my considered view, that the second suit may be violating the *sub judice* rule, albeit in a collateral manner. It cannot be that every time a new matter arises from the charge document, it should form the basis of a new suit! Such a situation is a recipe for chaos if permitted. I therefore find that although they are not *res judicata*, the issues in this application could well have been resolved in the initial suit. I shall return to this matter later in this ruling.

13. In seeking to exercise its statutory power of sale, a second time, it is plain to see that the respondents fell into error. After issuing a statutory notice dated 11th June, 2015 the respondent thereafter proceeded to instruct the second respondent to sell the charged properties by public auction. In the notification of sale prepared and served by the Auctioneer dated 23rd November 2015, it is indicated that the;

a) Securities would be advertised in the Daily Nation of 19th January, 2015 (**Emphasis mine**);

b) The auction shall take place on 4th February, 2016.

14. Clearly the notification was defective. It purported to have the property advertised on a date that had already passed. That alone taints the Auctioneers Notification of sale. Ultimately the auctioneers advertised the securities on 2nd February, 2016 intending to sell on 18th February, 2016. This is against the originally intended date of sale which had been stated as 4th February, 2016. A court of law cannot help but wonder why the auctioneer chose to proceed this way. Was it deliberate, so as to mislead the applicant? Was it a typo? No one except the respondents can answer that question. However, no explanation was offered for that anomaly and this court cannot speculate an answer.

15. It is now well settled that the exercise of statutory power of sale by a chargee is an elaborate process guided by the strict provisions of Law under the Lands Act and Statute governing sale by Public Auction. From the day a statutory Notice is issued, strict adherence to dates and timelines is mandatory. To deviate even by a single act, contaminates the entire process and it must be repeated. I think I have said enough to demonstrate that the application must succeed. I had earlier on made observations pertaining to the *sub-judice* rule and its application to this suit. In **John Mwangi Wamai v Teresa Gathiri Mwema** [2015]

eKLR this court quoting the ruling of **Olao J** in **Thiba Min Hydro Co. Ltd vs. Joseph Karu Ndwigwa** (2013) eKLR) stated that;

“...the remedy to a plea of *sub judice* is not to strike out a suit but either to have it stayed or consolidated...”

16. Taking into account the overriding objective of the rules of procedure, I would hesitate to guillotine these proceedings but would instead recommend appropriate steps towards hastening the conclusion of the dispute herein. This will best be served by consolidation. However, since I do not have such an application before me, I cannot order consolidation. Still, I shall make appropriate orders in that regard to progress the matter further.

17. In view of the above, the orders that best commend themselves to me under the circumstances are as follows;

1) A temporary injunction do issue restraining the defendants'/respondents either by themselves or agents from realising the properties LR No. Nyeri Mweiga/1694 and Nyeri Mweiga/1170 pending the hearing and determination of this suit.

2) The plaintiff to file and serve all parties with an appropriate application to consolidate this suit and Milimani HCC No. 293 of 2014 for final determination within six (6) months from the date of this ruling.

3) In default of filing such application as per no. (ii) above, the orders granted under (i) above to lapse automatically without any other order of the Court.

4) Costs to be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 23rd day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Njuguna for the 1st defendant

N/A for the plaintiff

N/A for the 2nd defendant

N/A for the interested party