



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

ELC CASE NO. 178 OF 2016

JOYCE NANCY KABIRU.....PLAINTIFF/APPLICANT

VERSUS

FAULU MICRO-FINANCE BANK LIMITED.....1ST DEFENDANT/RESPONDENT

PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

CREATIVE LINKS ENTERPRISES LTD.....3RD DEFENDANT/RESPONDENT

RULING

This is in respect to the Plaintiff's Notice of Motion dated 2nd November 2016 in which she seeks the following orders:

1. Spent.

2. Spent.

3. *The Honourable Court be pleased to issue a temporary injunction against the defendants restraining them, their agents and/or servants from transferring, alienating and/or otherwise interfering with the plaintiff's right in any way on land parcel No. MWERUA/MUKURE/1673 or any part thereof until the hearing and determination of the main suit.*

The application is based on the grounds set out therein and supported by the plaintiff's affidavit. The gravamen of the application which is founded under **Order 40 Rules 1 and 2 of the Civil Procedure Rules** is that the plaintiff is the proprietor of land parcel No. MWERUA/MUKURE/1673 (the suit land) and by a charge instrument dated 13th February 2014, she secured a loan of Ksh. 1,000,000 from the 1st defendant. However, in December 2014, she received a notice that the suit land would be sold unless she paid Ksh. 1,624,553.48. being the outstanding loan. She was experiencing financial difficulties but nonetheless reduced the outstanding balance to Ksh. 1,005,091.70. On 1st August 2016, the 2nd defendant wrote to her advising that the suit land would be sold by public auction on 7th October 2016 and so she instructed her advocate to write to the 1st defendant requesting it to withdraw the notice of sale and also paid Ksh. 50,000 as a gesture of willingness to pay with a request to re-enter fresh negotiations on modalities of clearing the balance but on 7th October 2016, the 1st defendant in breach of its duty of care and in collusion with the 2nd and 3rd defendants unlawfully and fraudulently sold the suit land by public auction for Ksh. 3,000,000 to the 3rd defendant. That the suit land is within a tea growing area in Kirinyaga County and is valued at Ksh. 7,500,000. Further, that the suit land is relied on by her family

for their livelihood.

When the application came before me on 8th November 2016, only the plaintiff and 1st defendant were present and since the plaintiff was conceding that she owed the 1st defendant Ksh. 1,065,091, I directed that the said sum be deposited in Court which was duly done. That order was guided by the fact that both **MR. NGANGAH** advocate for the plaintiff and **MR. CHEGE** advocate for the 1st defendant intimated that a settlement was likely. Indeed that possibility of settling the matter was repeated on 22nd November 2016 soon after **MS KIRAGU** advocate came on record for the 3rd defendant.

The above notwithstanding, the 1st defendant through its head of legal services **PURITY RARIA** filed a replying affidavit to the said Notice of Motion on 7th November 2016 in which she deponed, inter alia, that the plaintiff had on 13th February 2014 executed a charge instrument over the suit land to secure the sum of Ksh. 1,100,000 together with interest at the rate of 12% per annum and an additional rate of 6% in the event of default. Following a default, the 1st respondent demanded the repayment of the loan which the plaintiff failed to repay and so the mandatory notice was served on her as provided by **Section 96 of the land Act**. That the 1st defendant has been very lenient with the plaintiff and subsequently instructed the 2nd respondent to sell the suit land which was sold to the 3rd defendant on 7th October 2016 for Ksh. 3,000,000 and so this application has been over-taken by events and the plaintiff's equity of redemption has been extinguished.

On its part, the 3rd defendant through an affidavit signed by **JOSEPH K. GACHOKI** and dated 22nd December 2016 stated that they were not party to the consent recorded on 8th November 2016 and that having seen the advertisement of the suit land in the Daily Nation of Monday 19th September 2016, the 3rd defendant resolved to purchase the same and borrowed Ksh. 3,000,000 from **SAGALA PHARMACY** who in turn borrowed it from its Financiers Fortune Sacco at a rate of 13.5%. That on 7th October 2016, the said **JOSEPH J. GACHOKI** attended a public auction on behalf of the 3rd defendant and was the highest bidder and deposited Ksh. 750,000 and later cleared the balance of Ksh. 2,250,000 and the 1st defendant released all the relevant documents to enable the transfer of the suit land to the 3rd defendant. An application for the Land Control Board's consent was duly executed in favour of the 3rd defendant which did not participate in any acts of fraud.

The application was canvassed by way of written submissions which have been filed both by the firm of **IKAHU NGANGAH & COMPANY ADVOCATES** for the plaintiff and **MAGEE WA MAGEE & COMPANY ADVOCATES** for the 3rd defendant.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

On 8th November 2016 when this Court directed that the outstanding loan sum of Ksh. 1,065,091.70 be deposited in Court, it was guided by the decision of the Court of Appeal in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 K.L.R 125** where it was held as follows:

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury’s Laws of England Vol. 32 (4th Edition) paragraph 725 as follows.....The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagee has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagee claims to be due to him unless on the terms of the mortgage, the claim is excessive”.

The plaintiff's default is not in dispute and neither is the sum being claimed by the 1st defendant as outstanding balance. However, as it has now turned out after perusing the replying affidavits of the 1st and 3rd defendants, the suit land was sold through public auction to the 3rd defendant on 7th October 2016. In paragraphs 11, 12 and 13 of the replying affidavit of **PURITY RARIA** dated 4th November 2016, it is deponed as follows:

11: “That on the 7th October 2016, the 2nd Respondent lawfully proceeded with the sale by public auction of the charged property, received three bids and subsequently sold it to the 3rd Respondent for Ksh. 3,000,000 (annexed and marked PRO 4 is a copy of a letter from the Auctioneer confirming the sale, certificate of sale and memorandum and cheques)”.

12: “That this application has already been over-taken by events as the charged property has already been sold to the 3rd respondent herein who has paid the full purchase value and parties have already executed the instrument of transfer by charge and released the title to the 3rd Respondent to proceed with registration”.

13: “That by virtue of the sale, the Applicant’s equity of redemption has been extinguished and her only claim can be in damages. The sale herein was lawful in all respects and the present application has no basis at all”.

On its part, the 3rd defendant via the replying affidavit of **JOSEPH K. GACHOKI** dated 20th December 2016 has deponed in paragraph 11 and 12 as follows:

11: “That on 7th October 2016 I attended the public auction outside Kerugoya Main Post Office on behalf of the 3rd defendant/respondent. That I made a bid of Ksh. 3,000,000 on behalf of the 3rd defendant/respondent and the same was the highest bid. That I paid Ksh. 750,000 as the requisite deposit and agreed to clear the balance within 90 days (annexed hereto are copies of the certificate of sale and memorandum of sale dated 11th October 2016 collectively marked JKG 5)”.

12: “That the 3rd defendant/respondent duly cleared the balance and was issued with a clearance by the 1st defendant/respondent (annexed hereto is a clearance dated 5th November 2016 marked JKG 6)”.

The above information only became available to this Court at the time when the application was canvassed inter-parte. In her plaint, the plaintiff alleges breach of duty on the part of the 1st defendant and also fraud on the part of all the defendants including selling the suit land below the market value which she states should be Ksh. 7,500,000 as per the valuation report annexed to her supporting affidavit (annexture JNK 8). In **JACOB OCHIENG MUGANDA VS HOUSING FINANCE COMPANY OF KENYA C.A CIVIL APPEAL No. 453 of 2001**, the Court of Appeal held that:

“If there was any irregularity in the conduct of the auction, the Applicant would be entitled to damages against the auctioneer pursuant to Section 26 of the Auctioneers Act which provides that subject to the provision of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licenced auctioneer shall be entitled to recover damages directly suffered by him from the auctioneer by auction”.

That decision has been followed in many cases including the case of **BOMET BEER DISTRIBUTORS & ANOTHER VS KENYA COMMERCIAL BANK LTD & OTHERS 2005 e K.L.R** which has been cited by counsel for the 3rd defendant. **Section 99 (1) of the Land Act** protects a purchaser of charged property even in cases of an improper or irregular sale except in cases of fraud, misrepresentation or other dishonest conduct of which he has actual or constructive notice. Of course issues of fraud, misrepresentation or other dishonest conduct on the part of the chargee cannot be determined at this stage but will have to await a final determination through evidence at the trial. However, **Section 99 (4) of the Land Act** is instructive and it states:

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

It is clear therefore that by the time this Court was directing the plaintiff to deposit the outstanding sum of Ksh. 1,065,091.70 in Court on 8th November 2016, the suit land had already been sold to the 3rd defendant a month earlier on 7th October 2016 and the plaintiffs equity of redemption had long been

extinguished and her only remedy is in general and special damages. This Court can now only order that the said sum be refunded to the plaintiff.

An application such as this one must of course be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

- 1. An applicant must show a prima facie case with a probability of success.***
- 2. Secondly, and interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot otherwise be adequately compensated by an award of damages; and***
- 3. If in doubt, the Court will determine such an application on the balance of convenience.***

A prima facie case on the other hand was defined in the case of **MRAO** (supra) as follows:

“It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

In the circumstances of this case, I am not persuaded that the plaintiff has established a prima facie case. The default in meeting her obligations to the 1st defendant in terms of repayment of the loan sum is not in doubt and neither is the sum due from her. Indeed among the prayers sought in her plaint is to be allowed to sell the suit land privately in order to pay the loan balance together with interest. That now appears to be water under the bridge. It is also clear to this Court that damages would be adequate compensation to the plaintiff who has given the value of the suit land as Ksh. 7,500,000 by her on valuation report.

Ultimately therefore and upon considering all the matters herein, this Court makes the following orders:

- 1. The plaintiff's Notice of Motion dated 2nd November 2016 is dismissed with costs to the 1st and 3rd defendants.***
- 2. The sum of Ksh. 1,065.092.00 deposited by the plaintiff on 17th November 2016 vide receipt No. B 450404 be released to her forthwith.***

B. N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Kiragu for 3rd Defendant present

Mr. Nganga for Plaintiff absent

Mr. Muchoki for 1st Defendant absent

No appearance for 2nd Defendant.

B. N. OLAO

JUDGE

16TH JUNE, 2017