



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 189 OF 2014

MUNIDI OKEMBA LORE.....PLAINTIFF/APPLICANT

=VERSUS=

LUCY WANGUI GACHARA.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Plaintiff's Application dated 13th October 2014. In the Application, the Plaintiff is seeking for the following orders:

(a) **That a temporary order of injunction be issued restraining the Defendant/Respondent by herself, servants, agents, and/or employees from trespassing, occupying, living, continuing to live, staying and/or interfering in any way with the Plaintiff's quiet possession, use, occupation, development and proprietorship of the suit property being all that piece of land known as plot no. 825 (original no. 814/12) Watamu CR. NO. 27990 pending the hearing and determination of the suit.**

(b) **THAT costs of this suit be paid by the Defendant/Respondent.**

The Plaintiff's/Applicant's case:

2. In his Supporting Affidavit, the Plaintiff has deponed that on 4th April, 2014, he came across an advertisement in the Daily Nation newspaper by Keysian Auctioneers in which plot no. 825 (original number 814/12) was to be sold by way of public auction on 26th April 2014.

3. The Plaintiff has deponed that after conducting some investigations, he realised that the suit property was registered in the name of Susan Nyambura Wangai who had charged it to Equity Bank on 7th September 2011.

4. The Plaintiff deponed that he attended the public auction on 26th April 2013 and he emerged the highest bidder at the fall of the hammer after offering a purchase price of Kshs.10,220,000; that the suit property was transferred to him by Equity bank on 18th July, 2013 after paying the full purchase price and that he was utterly shocked when he found the Defendant in the suit property.

5. Despite being served with a demand notice to vacate the suit property, the Defendant has refused to vacate.

The Respondent's case:

6. According to the affidavit of the Defendant, she got married to one Joseph Strobel under Kikuyu customary law in 1996 and started living with him as wife and husband whereafter they purchased the suit property.

7. The Respondent has deponed that sometimes in the year 2012, she found out that while living in the house, this suit property had been transferred to one Firdaus Mohamed Ali out of love and affection on 5th February 2010. The said Firdaus Mohamed Ali then transferred the suit property to Susan Nyambura Wangui who subsequently charged the property to Equity bank.

8. It is the Defendant's case that she came to learn that the said Firdaus was a girlfriend to her husband, Joseph Strobel; that she filed a matrimonial cause number 8 of 2012 (OS) and that she has been unable to trace Firdaus and Susan for the purpose of service.

9. According to the Defendant, her husband, who is a fugitive in Germany, has denied ever transferring the suit property to Firdaus; that she has been living in the house and that she never saw a valuer going to the property for purposes of valuing it.

10. The Defendant finally deponed that the property that was valued by Equity bank is Gede/Kirepwe "B" 168 and not the suit property and that the charge document was defective in that respect.

Supplementary Affidavit:

11. Both the Plaintiff and the Defendant filed their respective supplementary affidavits.

12. According to the Plaintiff's Supplementary affidavit, the only known wife of Mr. Joachim Joseph Strobel is Firdaus Mohamed Ali; that the said Joseph Strobel transferred the suit property to his wife and that he conducted due diligence before purchasing the suit property from Equity bank.

13. On the other hand, the Respondent deponed that the marriage certificate annexed on the Plaintiff's affidavit is not authentic and that her marriage to Mr. Joseph Strobel subsists to date.

The Plaintiff's submissions:

14. The Plaintiff's advocate submitted that his client has been the registered proprietor of the suit property since 29th October 2013 having purchased the land by way of public auction from Equity Bank.

15. According to the Plaintiff's advocate, the Defendant has never been the wife of the initial registered proprietor of the suit and that in any event, the matrimonial house that the Defendant can only claim is Gede/Kirepwe B 168 and not the suit property.

16. Counsel submitted that the Defendant cannot question the manner in which the Plaintiff purchased the suit property and that a charge always runs in priority over all other interest in land.

17. The Plaintiff's counsel submitted that the Defendant has not questioned the manner in which the suit property was sold to him and consequently she is a trespasser.

18. The Plaintiff's counsel finally submitted that even if misfeasance is shown in the manner in which the sale was conducted, the Defendant can only claim for damages and not the suit property and that the Defendant's purported equitable rights cannot override the Plaintiff's legal rights over

the property.

19. Counsel relied on several authorities which I have considered.

The Defendant's submissions:

20. The Defendant's counsel submitted that the issues raised by the Plaintiff can only be raised at full trial and that the Defendant has been living in the suit property for more than 10 years.

21. According to the Defendant's advocate, the prayers being sought by the Plaintiff are mandatory in nature and the same cannot be granted pursuant to the provisions of order 40 of the Civil Procedure Rules.

22. The Defendant's counsel submitted that the Defendant has challenged the manner in which the suit property was transferred from Mr. Strobel in HCCC NO. 8 of 2012 (OS) and that the whole transaction is illegal and fraudulent.

23. The Defendant's counsel finally submitted that a mandatory injunction is only granted in straight forward and clear cases and that the eviction of the Defendant is not a simple and summary act. Counsel relied on several authorities which I have considered.

Analysis and finding:

24. It is not in dispute that on 4th April 2013, Keysian Auctioneers acting on the instructions given to them by the chargee, Equity Bank, advertised to sale the suit property by way of public auction in the Nation Newspaper.

25. The Plaintiff has exhibited on the Supporting Affidavit the newspaper cutting showing the advertisement and a copy of the charge document dated 7th September 2011.

26. The Certificate of Title annexed on the Supporting Affidavit shows that the suit property was transferred to the alleged husband of the Defendant, Mr. Joseph Joachim Strobel on 4th May 2005.

27. The forth entry in the Certificate of Title shows that the Defendant registered a caveat over the suit property claiming "licensee interest" on 12th January 2007. The Defendant withdrew the said caveat on 9th April 2008.

28. On 5th February 2010, Mr. Joseph Joachim Strobel transferred the suit property to Firdaus Mohamed Ali in consideration of love and affection. The said Firdaus Mohamed Ali then transferred the suit property to Susan Nyambura Wangui again for love and affection on 26th October 2010.

29. The chargor, Susan Nyambura Wangui, charged the suit property to Equity Bank Limited on 9th September 2011. Before the sale of the suit property by way of public auction to the Plaintiff for Kshs.10,220,000, a valuation report was done.

30. Despite the property having been registered in favour of the Plaintiff, the Defendant has refused to vacate the suit property on the ground that she is entitled to it by virtue of her marriage to Mr. Strobel.

31. According to the Defendant's Replying Affidavit and Defence, she is the legal wife of Mr. Strobel and therefore she has a bona fide interest in the suit property.

32. It is the Defendant's case that the transfer of the suit property from Mr. Strobel to a Ms Firdaus and then to Susan, the chargee, is fraudulent, null and void.

33. The Defendant has further claimed that the suit property is her matrimonial property and that indeed Mr. Strobel never transferred the suit property to Ms Firdaus.
34. The Defendant has accused the chargee for failing to conduct due diligence while charging the suit property. The Defendant referred this court to Malindi HCCC No. 8 of 2012 (OS) in which she is seeking for a declaration that the suit property was fraudulently transferred to Susan Nyambura and Firdaus Mohamed Ali. In the same suit, the Defendant is seeking that the suit property should be shared equally between herself and Mr. Strobel.
35. I have looked at the Defendant's Replying Affidavit in this matter and her Supporting Affidavit in Malindi HCCC No. 8 of 2012 (OS).
36. Other than showing that she was married to Mr. Strobel traditionally, the Defendant has not adduced any evidence to show that Mr. Strobel did not transfer the suit property to Ms Firdaus Mohamed Ali.
37. Indeed, the Defendant has annexed the transfer document in respect to the suit property in favour of Ms Firdaus and Susan on her Supporting Affidavit in HCCC No. 8 of 2012. The said transfers were registered as against the title on 5th February 2010 and 20th October 2010 respectively.
38. There is no evidence, either from Mr. Strobel or the document examiner, to show that Mr. Strobel did not sign the transfer document of 5th February 2010.
39. Although the Defendant claims that the suit property is her matrimonial home, paragraph 14 of her supporting affidavit in support of the Originating Summons in HCCC No. 8 of 2012 shows the contrary.
40. According to the paragraph, the only property she acquired with the respondent during the subsistence of the marriage is Gede/Kirepwe "B" 1/168 and Nissan Patrol KAL 742 q.
41. Even if it is true that Mr. Strobel acquired the suit property during the subsistence of the marriage with the Defendant, Mr. Strobel did not require the Defendant's consent to transfer the suit property to Ms Firdaus Mohamed Ali on 5th February 2010. I say so because by that time, the law requiring spousal consent before any transfer in land could be effected had not been legislated.
42. The copy of the Certificate of Title in respect to the suit property shows that on 12th January, 2007, the Defendant registered a caveat on the suit property as a licensee and not wife. She lifted the caveat on 9th April, 2008 paving way for Mr. Strobel to transfer the property to Firdaus. The Defendant has not explained why she registered a caveat on the suit property as a licensee and not wife, if she was indeed Mr. Strobel's wife and why she subsequently lifted the caveat.
43. The Defendant was aware way back in the year 2012 that Mr. Strobel had transferred the suit property to Ms Firdaus who subsequently transferred it to Susan. The Defendant was also aware of the fact that the suit property had been charged to Equity Bank when she filed HCCC No. 8 of 2012 (OS).
44. However, the Defendant did not bother to seek for an injunctive order pending the hearing of that suit.
45. Indeed, the bank went ahead to advertise the suit property for sale in the Daily Nation and again the Defendant never moved the court to stop the sale. The Defendant has waited until when the Plaintiff has procedurally and lawfully bought the suit property by way of public auction to claim that the said sale was fraudulent.

46. Although the Defendant claims that the charge document is defective, she is not the chargee and cannot therefore lawfully challenge the said document. There is no privity of contract between the bank and the Defendant to give the Defendant the *locus standi* to challenge the contract that was entered into between the bank
47. According to the provisions of section 103 of the Land Act, it is only the chargor, the spouse of the chargor, a lessee of the chargor or the trustee in bankruptcy of the chargor who can seek relief against the exercise by the chargee of any of the remedies provided for under section 85 of the Act. The Defendant is not one of the parties who can exercise that power and she is a stranger in so far as the contract between the chargor and the chargee is concerned.
48. In any event, a charge document cannot be said to be defective just because a valuation was not done before the property was charged. A valuation report is only mandatory when the chargee intends to exercise its statutory power of sale and not at the point of charging the property. The evidence before this court shows that a valuation in respect to the suit property was done before the same was advertised for sale by way of public auction as required by the law.
49. In view of the fact that the suit property has already been transferred to the Plaintiff by the chargor, and considering that there is no privity of contract between the bank and the Defendant, and having regard to the fact that prima facie, the bank complied with the law while selling the suit property to the Plaintiff, the only remedy for the Defendant is to seek for damages and not for the suit property and Susan.
50. According to the provisions of Section 98 (4) of the Land Act, upon registration of the land or lease or other interest in land sold and transferred by the chargee, the interests of the chargor passes to and vests in the purchaser free of any other charge or encumbrance to which the charge has priority, including the Defendant's equitable interests, if any.
51. Section 99(2) of the Land Act further protects a person who purchases the charged property in a public auction by stating that such a person is not obliged to inquire whether the sale is otherwise necessary, proper or regular.
52. Any person, according to section 99(4) of the Land Act, prejudiced by an authorized, improper and irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power, in this case, the bank.
53. However, I have already shown that the evidence before me shows that the suit property was lawfully sold by the chargee. If it is shown at trial that the said sale was not lawfully conducted, then the Defendant's remedy will only be for damages.
54. In the case of **Krobought Grant Vs Kenya Commercial Finances Co. Ltd & 2 others - Civil Appeal No. 227 of 1995**, it was held that a purchase at a public auction was protected by Section 69 B of the ITPA (in this case section 99(4) of the Land Act) and could only lose the protection if it was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice of.
55. In this case, the chargor, or even the Defendant, has not complained that the statutory power of sale was improper, of which the Plaintiff had notice.
56. In the circumstances of this case, the Plaintiff having purchased the suit property and the title having passed to him is entitled to the suit property.
57. This, in my view, is a proper, simple and summary case in which a mandatory injunction should issue. The Defendant can pursue her claim for damages, if any, as against the bank or the chargor or her former husband. The Plaintiff is not only entitled to ownership of the suit property at this stage, but also to possession of the suit property pending the hearing of the suit.

58. In the case of **Ze Yu Yang Vs Nora Industrial Products Ltd (2003) IEA 362**, it was held that the existence of a valid sale agreement extinguished the equity of redemption and no one had remedies touching on the property both as against the former mortgagee and against the person exercising it.

59. For the reasons I have given, I allow the Plaintiff's Application dated 13th October, 2014 as prayed.

Dated and delivered in Malindi this **28th** day of **November**, 2014.

O. A. Angote

Judge