



Mutii v Housing Finance Company of Kenya Limited & another (Environment and Land Appeal 7 of 2022) [2024] KEELC 4244 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 7 OF 2022
MN GICHERU, J
MAY 16, 2024**

BETWEEN

IRENE NTEPEL MUTII APPELLANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED 1ST RESPONDENT

THE LAND REGISTRAR, KAJIADO 2ND RESPONDENT

RULING

1. On 27/1/2022, the Learned Senior Principal Magistrate Ngong, dismissed the appellant's notice of motion dated 9/12/2019. This was in ELC Case No. 87/2019. In the motion, the appellant had sought a permanent injunction to restrain the respondents from selling, advertising for sale, trespassing and or dealing in the property known as Ngong/Ngong/57984 measuring 0.19 Ha, suit land.
2. Dissatisfied with the dismissal, the appellant filed this appeal vide a memorandum of appeal dated 8/2/2022. The memorandum sets out the following nine (9) grounds of appeal. That the Learned Magistrate erred in law and in fact:-
 - i. by not considering the fact that the allegations that the 1st respondent had notified the applicant/appellant that her property had been sold without following due process under the Land Act, 2012 and the Land Control Act,
 - ii. by not allowing the fact the appellant was asked to hand over the property without the bank having due respect to the process leading to the sale of the charged property,
 - iii. by not considering the fact that the entire sale of the land herein is shrewed (shrouded) in fraud and suspicion and was bought by the officer in the bank which is a conflict of interest,
 - iv. by ignoring the fact that the provisions of the Auctioneers Act had been flouted and clothed in non-transparencies,



- v. in not finding that the interest and penalties charged were illegal,
 - vi. by ignoring the fact that the applicant/appellant stood to suffer irreparable damages if property was sold without due process of law as the same was greatly undervalued,
 - vii. by dismissing the entire application without considering its merits,
 - viii. by finding that the appellant was not deserving of a permanent injunction pending the hearing and determination of the case,
 - ix. in not considering materials laid down by the appellant and issuing drastic orders without submissions from the second respondent.
3. The appellant sought three orders as follows.
- a. Stay of execution pending the determination of this appeal.
 - b. A permanent injunction restraining the respondents, agents or persons acting on their behalf from selling, advertising for sale, trespassing, and/or dealing in the suit land pending the hearing and determination of the case.
 - c. That the 2nd respondent be restrained from transferring and or dealing in the suit land pending the hearing and determination of this case.
 - d. Costs of the appeal.
4. In urging the motion dated 9/12/2019 before the learned trial Magistrate the appellant had deposed as follows in her affidavit dated 9/12/2019.
- Firstly, that he had obtained a loan of Kshs. 7 million but had defaulted after paying Kshs. 4 million owing to personal problems which included the death of her mother.
- Secondly, the 1st respondent attempted to sell the suit land in July 2019 and this prompted her to engage the 1st respondent with a view to having a rescheduling of the loan repayment.
- Thirdly, she was surprised to receive an email requiring her to hand over the property to a third party yet she had not been served with a statutory notice re-advertising the suit land for sale.
- Fourthly, the 1st respondent alleges to have sold the property on 2/10/2019 yet the auctioneer had sent the prospectors on 23/11/2019.
- Fifthly, even though the suit property was valued at Kshs. 25 million, it had been sold for a song.
- Sixthly, the suit property is a family home and the family stood to suffer irreparable loss if the property was sold irregularly.
- Seventhly, the 1st respondent was insincere in calculation of interest which was lumped on the account with illegal interest and penalties.
- Finally, as at 30th November 2019, the suit land had not been transferred to anyone and it was still in the name of the appellant.
- For the above and other reasons, the appellant sought the same orders that she seeks in this case.
5. In opposing the motion, the 1st appellant, through its assistant legal manager Joseph Lule, replied as follows.



Firstly, the appellant obtained a loan of Kshs. 7 million on 22/8/2013 by charging the suit land and defaulted in repayment.

Secondly, the 1st appellant sent the requisite notices under the land and Auctioneers Acts on 8/9/2017 and 11/1/2018 respectively.

Thirdly, the suit property was valued by an independent valuer.

Fourthly, even though the sale was postponed twice on 12/2/2019 and 23/8/2019, it was advertised on 16/9/2019 and it took place as scheduled on 2/10/2019 and the plaintiff notified of the outcome on 9/11/2019 as well as of the shortfall of Kshs. 916, 942.93.

Fifthly, any loss that the plaintiff may prove can be adequately compensated by an award of damages.

Sixthly, the 1st respondent was well within the law to purchase the suit land since it submitted the highest bid.

Seventhly, the appellant is not disputing having defaulted in the loan repayment.

For the above and other reasons, the 1st appellant sought for the dismissal of the appellant's motion.

6. In dismissing the motion dated 9/12/2019, the learned Magistrate gave two reasons for her decision. The first reason was that she could not grant a permanent injunction at an interim stage of the proceedings. If she did so, she would have fully determined the suit before hearing the parties. The second reason given by the learned Magistrate was that the event sought to be stopped had already taken place and the only thing that the appellant disagreed with was the manner in which it had happened.
7. Counsel for the parties were to file written submission by 1/4/2024. By 8/4/2024, no submissions had been filed and as I write this ruling in mid April, I am doing so without the benefit of the submissions by learned counsel for the parties. In the absence of the submissions, I will treat the nine (9) grounds of appeal as the issues that I have to determine in this matter.
8. I have carefully considered the appeal in its entirety including the entire record of appeal especially the motion dated 9/12/2019, the replying affidavit and the grounds of appeal and I make the following findings. On the first ground, I find that the Magistrate did not err because the question of whether or not a notice of sale had been issued to the appellant was not yet settled. The appellant could not therefore be heard at that stage to say that the property had been sold without due process. This reason covers the second and sixth grounds of appeal.
9. Regarding the third ground, I find that the trial Magistrate did not err because no evidence of fraud and conflict of interest was proved, at that stage, by the appellant. In the case of *Elizabeth Kamene Ndolo – versus- George Matata Ndolo*, Civil Appeal No. 128 of 1995 it was held that where a party alleges fraud, such fraud must be proved to a standard higher than that of a balance of probabilities. The appellant was therefore expected to prove fraud, even at the interlocutory level to that high standard and I find that she did not.
10. Looking at the 4th and 5th grounds of appeal, I am unable to find any fault on the part of the learned trial Magistrate because the evidence of an auctioneers prospectus after the sale is controverted by credible evidence and nothing to show the agreed interest and the overcharged interest is on record. The illegal penalties are merely alleged without proof.
11. The trial Magistrate gave two reasons for dismissing the motion and I find both of them valid. The application should have been for a temporary injunction not permanent as the suit was still pending.



Secondly, the sale had already taken place when the application was filed. This finding covers the seventh ground.

12. Even though the learned Magistrate did not expressly mention the three prerequisites to the grant of an order of injunction, she took a common sense approach to the case by noting that she could not grant a permanent injunction at the interlocutory stage and that the event sought to be stopped had already taken place. Had she applied the test in *Giella –versus- Cassman Brown*, she would have arrived at the same conclusion especially because a party that had admitted default of loan repayment cannot be said to have established a prima facie case with a probability of success. Neither can such a party say that they stand to suffer irreparable loss that cannot be adequately compensated by an award of damages. It is my findings that if the appellant were to prove that there was no statutory notice before sale of the suit land, damages would be adequate compensation. This was not something that the appellant did not contemplate because even as she charged the suit land, she knew that sale was inevitable in the event of default in repayment of the loan.
13. Finally, on the 9th ground, I find that the trial Magistrate cannot be blamed for the failure by the 2nd respondent to respond to the motion by the appellant or to file written submissions. The court could not compel the 2nd respondent, or any party at that, to file their responses. It was purely up to the parties to do as they wished.
14. For the above stated reasons, I find no merit in the appeal dated 8/2/2022 and I dismiss it with costs to the 1st respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF MAY 2024.

M.N. GICHERU

JUDGE

