Kenya Walking Survivors Safaris Limited & another v NCBA Bank Kenya Limited & another (Civil Suit E014 of 2023) [2024] KEHC 1741 (KLR) (Commercial and Tax) (26 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1741 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E014 OF 2023

JWW MONG'ARE, J

FEBRUARY 26, 2024

BETWEEN

KENYA WALKING SURVIVORS SAFARIS LIMITED ..... 1ST APPLICANT

OTIENO LYSANIASH ONJWAYO ..... 2ND APPLICANT

AND

NCBA BANK KENYA LIMITED ..... 1ST RESPONDENT

PURPLE ROYAL AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. For determination is the Plaintiffs' Notice of Motion application dated 16/3/2023 filed pursuant to section 3A, 63(e) of the *Civil Procedure Act* and Order 51(1) of the *Civil Procedure Rules* 2010. The Plaintiffs seeks an order of temporary injunction to restrain the Defendants from evicting the 2nd Plaintiff from LR No.12715/9612 (the suit property) pending the determination of the main suit.

The Plaintiff's Case:-

2. The application is supported by the supporting affidavit and a supplementary affidavit by the 2nd Plaintiff, Otieno Lysaniash Onjwayo sworn on 16/3/2023 and 18/7/2023 respectively. The Application is predicated on the grounds that the Defendants intend to evict the Plaintiff from his matrimonial home located on the suit property as it claims to have sold the subject land in exercise of its statutory power of sale under section 96 of the *Land Act*

3. It is the Plaintiffs contention that the purported sale was illegal as they were not served with the mandatory statutory notices and in the manner provided under Section 90 and 96(1)(2) and (3) of the *Land Act*. Further, that the Plaintiffs were never served with the mandatory 45 days' redemption

notice by the 2nd Respondent and if the suit property was sold as claimed then it was sold at a gross undervalue and therefore the purported sale was illegal and a nullity under Section 97 of the *Land Act*.

4. The Plaintiffs further pleaded that unless this court stops the 1st Defendant, it shall benefit from the illegal sale causing great injustice, loss and suffering on the Plaintiffs which cannot be compensated in damages.

5. In the supplementary affidavit of 18/7/2023, the Plaintiff emphasised that although the Plaintiffs are indebted to the 1st Defendant the manner in which the sale was conducted was in contravention of the mandatory provisions of the law and specifically it violated Section 90, 96 and 97 of the *Land Act*. That even from the pleadings filed by the Defendant in response to this Application, it was not clear who the property was sold to as the 1st Defendant had made different and contradictory assertions as to who had bought the property.

6. The Plaintiff further averred that the purported sale of the suit property was grossly undervalued. The Plaintiff maintained that the suit premises comprised of the matrimonial home where the 2nd Applicant resides with his family and that he was likely to suffer loss which cannot be compensated in damages if the orders sought are not granted.

The Defendant's Case

7. In opposition to the application, the 1st Defendant filed a replying affidavit sworn on 27/6/2023 by STEPHEN ATENYA, its principal legal counsel. The 1st Defendant averred that the instant application had been overtaken by events and that the suit property was sold due to the non-payment of the loan facility secured by the suit property by the Plaintiffs and that it was sold in strict compliance with procedural and substantive laws in respect Charges and Mortgages and since the sale, the ownership of the suit property had since passed to a third party who was not enjoined to this suit and could therefore not be expected to comply with orders not directed to him.

8. It was the 1st Defendant's case that it advanced loan facilities amounting to USD 150,000 to the 1st Plaintiff which was secured by a Charge and Further Charge on the suit property which was formerly owned by the 2nd Plaintiff. The 1st Defendant maintained that the Plaintiff failed to remit monthly instalment payments which compelled the 1st Defendant to issue demand notices for the Applicant's to regularise the default failure situation on the loan and proceeded to exercise its statutory power of sale for the recovery of the loan advanced to the 1st Plaintiff. That the Plaintiffs failed to regularise the said the repayment of the loans and once it went into default, despite being given an opportunity to do so, and therefore the bank was left with little or no choice but to exercise its statutory power of sale under the Charge.

9. The 1st Defendant submitted that after successfully conducting a public sale by way of an auction of the property, the same was sold to one Stephen Wanyee and therefore the only remedy available to the Plaintiffs, if any, would be to pursue a claim in damages and not to try and reverse the sale and forestall the possession of the suit property by the successful party at the auction.

10. Further and in addition thereto, the 1st Defendant maintained that the Plaintiff had not met the threshold set by law for a grant of an order of a temporary injunction as was being pursued in the present suit and that the application's sole purpose was aimed at to frustrating the transfer of the suit property to its now rightful proprietor.

11. Pursuant to the directions of the Court, the application was canvassed by way of written submissions, which I have considered carefully.

Analysis and Determination

12. I have carefully considered the pleadings and the supporting and supplementary affidavits filed by the Applicants. I have equally carefully considered the responses filed by the Defendant and the rival submissions by the parties. To my mind, there is only one issue for determination before the court, to wit; "whether the Applicant has satisfied the threshold for grant of an order of injunction".

13. The threshold for a grant of an order of Injunction has been well articulated in the Locus Classica case of *Giella v Cassman Brown Company limited*,(1973) E.A at page 353 and elaborated in the Court of Appeal case of *Nguruman Limited V. Jan Bode Nielsen & 2 Others*, (2014)EKLR, the court stated that:-

> "In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour."

14. As was articulated in the case of *Nguruman Limited V. Jan Bode Nielsen & 2 Others*, (2014) eKLR, by the Court of appeal, these three principles are to be considered sequentially, such that once the court is satisfied the applicant has not satisfied the first one, then it need not move to consider the remaining two. The Court is therefore expected to first establish whether the Applicant has made out a prima facie case with a likelihood of success in the first instance. The Court will therefore move sequentially and consider the first limb on the prima facie case.

15. The Court in the case of *Mrao Ltd V First American Bank Of Kenya Ltd & 2 Others* Civil Appeal No 39 OF 2002 described prima facie case to be:-

> "... in civil cases it is a case in 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 to call for an explanation or rebuttal from the latter."

16. The Plaintiffs submitted that they have established prima facie with a probability of success. The Plaintiff argued that the 1st Defendant did not adhere to the provisions of the *Land Act* in purportedly selling the suit property and further due to the fact that the suit property was sold at a gross undervalue of Kshs.10,500,000/-. That the law requires that before a Chargee can proceed to realise a property under its statutory power of sale, it must establish the market and forced sale values of the said property by conducting a valuation which should not be more that twelve months prior to the sale by auction.

17. The Plaintiff argues that prior to the purported sale, a valuation report dated 7/7/2021 carried out by Landmark Realtors Limited indicated that the market value of the property was Kshs.20,000,000/- while the forced sale value was Kshs.15,000,000/-. This valuation was a decline from the values placed on the property as at the time of charging the property where the valuation report issued earlier on by Centenary Valuers on 28/2/2019 returned a market value of the suit property was Ksh.28,000,000/- and the forced sale value was Ksh.22,000,000/-. The Plaintiff argued that the purported sale at a price way below the forced market value was suspicious and reeked of collusion between the buyer and the bank. This was despite and against the common trend in Kenya where property tends to appreciate in value over time and not to decrease.

18. The Plaintiff argued that the above situation was reinforced by the court in the case of *Minolta Limited v National Bank of Kenya Limited* KJD HCCC No. 32 of 2018 [2018] eKLR cited by the Applicants, where the court held thus:-

> "I have considered the 2014 valuation marked as ML6 and another valuation conducted in July 2016, marked as ML7 herein. It defeats logic that the valuation done on 9 April 2014 estimated the open market value of the property at 110 Million Shillings and a forced, market value of 80 million and the same property in 2018 is valued at a much lesser market value of 90 Million Shillings and forced value of 67,500,000 Shillings. That in itself raises very pertinent question as to the objectivity of the valuer. Further, taking judicial notice of the Kenyan market as far as sale of property is concerned, it is in very rare cases that such happens. I put forward the question of valuation report that I found not to have been properly prepared due to unreasonable deterioration in value of the suit properties as valued by the 2011report vis-à-vis the current valuation report prepared for the purposes of selling the suit property."

19. Flowing from the above decision and taking into consideration the facts of this case, I am inclined to agree with the Plaintiff that the sale of the suit property for Kshs.10,500,000/- was questionable as the price fetched was way below the two valuations carried out by the 1St Defendant and with no explanation as what factors led to the property fetching such a low price.

20. Be that as it may, two factors remain undisputed: Firstly, that the 1st Defendant advanced a loan of USD Dollars 150,000 to the Plaintiffs and secondly, that the loan fell into arrears necessitating the action of the 1St Defendant in pursuing its rights under the charge. Documents attached to the 1st Defendant's replying affidavit confirm that indeed the Plaintiff was issued with the requisite statutory notices as required by law and these were produced as evidence before this court. Further documents produced by the 1st Defendant confirm that indeed there was a sale for Kshs.10,500,000/- by public auction to one Stephen Wanyee who is not been made a party to these proceedings. The Defendants argue that Stephen Wanyee is the bonafide purchaser pursuant to its exercising of its rights under the charge. There is attached to the 1st Defendants Replying affidavit, a certificate of sale to Stephen Wanyee to prove that there was indeed a sale.

21. Section 97 of the *Land Act* which provides as follows:-

    1. "A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale."

22. While the issue of the value for the property is of great concern, I am not satisfied that it is enough to say that by that alone the Plaintiff has established a prima facie case with high likelihood of success. As has been held by the courts in various decisions elsewhere, a sale below value of the suit property is not sufficient to warrant a stoppage of the sale as the Plaintiff can always be compensated by damages once it is established that the property was valued at much higher price than it was sold for.

23. I have considered the fact that the loan is not disputed and noted that letter of offer evidencing the same was produced in evidence. I have also considered the fact there was default in remitting the monthly instalments leading to the arrears and the fact that as evidenced by the 1st Defendant all the requisite statutory notices were issued with the Plaintiff even approaching the Defendant for more time to regularise the loan. Indeed, these statutory notices were not denied or controverted.

24. In addition, and from the material placed before me, I have noted that the Plaintiffs offered no cogent proposals on how they planned to repay the outstanding loan if granted the prayers sough. If indeed the property was sold at a price below the market price as alluded to by the Plaintiff, there is a remedy in law, upon proof of the said under valuation, for compensation by way of damages, a factor that also the 1st Defendant has proposed.

25. The other argument put forward by the Plaintiff that the property constitutes a matrimonial home. I have perused the charge document executed by the Plaintiff and annexed to the replying affidavit of the Defendant. I note from the said instrument that indeed a spousal consent was given by one Judith Awuor Otieno of P.O. Box 20659-00200 NAIROBI and a marriage Certificate attached thereto to confirm that she was the spouse. This brings me to the realisation that the 2nd Defendant understood the impact of what he was doing when he offered the suit property as security for the loan. Courts have held that once a property is offered as security, it becomes a commodity for sale and the fact that it is matrimonial property is irrelevant as was held by the Court of Appeal in the decision in Anita Chelegat v Fredrick Kumah Civil Appeal No. 300 of 2018 wherein it was held:-

> "The law has long been that once a property is offered as security for financial advances, it immediately becomes liable to be liquidated as a commodity in the property market the tender memories and deep emotions associated with it notwithstanding. We think the learned judge did well to follow and apply this court's holding in *Joseph Gitai Gachau- Vs-Pioneer Holdings* [2009] e KLR:
>
> However, we recognize the argument put forward by the applicants that the suit property is matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however, great, perse, would operate against the exercise of statutory power of sale by the mortgage"(Emphasis added).

It is patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be found upon the hearing of the case that there was irregularity or impropriety in the sale, such property is well- capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss. On the aspect was well find the complaints against the learned judge to be misplaced."

26. The totality of my observations is that the reasons advanced by the Plaintiff in this matter do not establish a prima facie case with a likelihood of success. In the absence of any other evidence of irregularity on the part of the Chargee in its exercise of its statutory power of sale, I believe whatever loss that the Plaintiff has suffered (if any) can always be compensated by an award of damages, if it is established that the property was sold at an under valuation. Based on the foregoing, I am not satisfied that the Plaintiff has established that they have a prima facie case with a likelihood of success to warrant this court to grant the orders sought.

27. Having determined that the Plaintiff has failed the first test set out in Giella(supra) I will therefore not venture to consider the other two principles, that is whether the Plaintiffs will suffer irreparable loss and damage or if the injunction is not granted where the balance of convenience lies.

28. The upshot of my holding is that the Application as filed has no merit. The same fails and is dismissed with costs to the Defendants. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. N/A for the Plaintiff/Applicant.

2. Mr. Makori for the Respondent.

3. Amos - Court Assistant