REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 50 OF 2002

KITUR...APPLICANT

VERSUS

STANDARD CHARTERED BANK & 2 OTHERS............RESPONDENTS

RULING

Simultaneously with the plaint, the Plaintiff/Applicant (hereinafter called "the applicant") filed a Chamber application in this court on the 14th March, 2002 under O.XXXIX Rules 1,2,3 and 9 Civil Procedure Rules. The prayer are for orders that:

(i) …………….

(ii) Pending the hearing and determination of this application *inter partes* the Defendants jointly and severally be restrained by means of a temporary injunction from transferring, selling, taking possession of or otherwise interfering with the Plaintiff's ownership of all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 13/244.

(iii) Pending the hearing and determination of this suit the Defendants jointly and severally be restrained by means of a temporary injunction from transferring, selling, taking possession of or otherwise interfering with the Plaintiff's ownership of all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 13/ 244.

(iv) Costs be provided for.

The application is based on the six grounds on the face thereof and on the sworn affidavit of the applicant dated 14th March, 2002 and the annexures thereto.

Mr Kimaru, learned counsel for the applicant, while relying on the grounds and affidavit in support of the application also made lengthy submissions on behalf of the applicant. I will briefly summarize those arguments. Counsel submitted that the suit premises are registered in the name of, and occupied as a residence by, the applicant and his family. On 12th March, 1998 he charged the suit premises (hereinafter "the property") to the 1st respondent as a guarantor to his company, namely, Bandaptai Agro & Hardware Ltd ("the company") which defaulted in repayment of a loan and fell in arrears. This prompted the 1st respondent to exercise its statutory power of sale, duly advertised the property for sale on 7th March, 2002 by a public auction after the 1st respondent obtained a valuation report of Shs 3,750,000/= and set it as a reserve price. It was further submitted that no public auction took place for

lack of bidders and that apart from the applicant, no members of public were present at the auction site. The applicant contends that despite the fact that no members of public attended to bid, there was a purported sale to the 3rd respondent which sale was at Shs 1,250,000/= far below the reserve price, and thus in breach of conditions of sale advertised earlier.

Further, counsel argued that the denial of a request to redeem the property before sale at the reserve proposed by the applicant was a clog on the applicant's right of redemption which rendered the subsequent sale void. The end result of it all, argued Mr Kimaru was that a sale by private treaty was conducted without the leave of the court which is mandatory; the price accepted was too low; the sale was therefore *prima facie* void and should be set aside. The speed with which the property was transferred was suspicious and evidence of fraud against the applicant.

Learned counsel stated that since the applicant and his family reside on the property, the probable loss and injury is not adequately compensable by an award of damages. It was also submitted that as a guarantor, the applicant should pay only the value of the security and not the entire outstanding loan.

Relying on *Nyagilo Ochieng' and Another vs Fanuel Ochieng' and Another*, Kisumu Civil Appeal No 148 of 1995, counsel submitted that the applicant is not foreclosed from obtaining injunction simply because the property has been transferred, and that the court can order cancellation or registration of a void transfer. In *Russell v CBA and Another* Nairobi Civil Appeal No 31 of 1995 counsel submitted that the Court of Appeal held that where a *prima facie* fraud is proved, an injunction can be granted even after a transfer to a third party. He also relied on *Mbuthia vs Jimba Credit* Nairobi Civil Appeal No 111 of 1986 on the same point. Finally, counsel made a magnificent summary of his case on fraud:-

i) Applicant was denied an opportunity to redeem his property at forced sale price.

ii) Property sold at below reserve price.

iii) No public auction held as by law recognized on 7.3.2002

iv) Speed with which transfer was effected of 2 days indicative of fraud.

v) No reasons for selling at below reserve price when applicant offered it.

vi) Fraud having been established, applicant is entitled to injunction and any other matters be subjected to oral evidence.

Mr Paul Gicheru, learned counsel who held the brief of M/S Amolo & Gachoka Company Advocates who are on record for the 1st and 2nd respondents, opposed the application. He relied on the replying affidavit sworn by Franklin Jenner on 16th April, 2002; that sworn by Kinyanjui Wanjuu for the 2nd respondent on the 3rd April, 2002. Counsel also relied on his Notice of Preliminary Objection. I now wish to set down in brief his arguments in opposition to the applicant's application. Counsel submitted that the applicant is in violation of the mandatory provisions of O.VII Rule 1(1) (e) Civil Procedure Rules by falsely averring in paragraph 20 of the plaint and paragraph 3 of the verifying affidavit filed with the plaint that there has been no previous suit or proceedings between the parties and yet Eldoret H.C.C.C No 183 of 1999 was such a suit between the applicant and 1st respondent and the issue of a statutory notice should have come up for determination. Secondly, where the substantive prayer in a suit is for redemption and reconveyance, proceedings should commence by an Originating Summons and not a plaint, otherwise the suit is bad in law. Though he submitted on whether or not a statutory notice was served, eventually the counsel for the applicant conceded it was and was no longer pursuing the point.

In response to the applicant's offer to redeem his property/security, counsel submitted that there was no exhibit of such an offer, that such offer could only be for repayment of the entire sum outstanding with interest and costs, and that after a sale and transfer, the question of redemption is closed. He relied on *George Gikubu Mbuthia v Jimba Credit Finance Corp & Another* Civil Appeal No Nairobi 111 of 1986, an authority submitted by Mr Kimaru for a different point. In that case, the Court of Appeal held that

"the mortgagor's right of redemption is lost as soon a the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it."

In respect to the allegation of fraud in selling the property at a throwaway price, counsel submitted that after four attempts at sale, the one of 7th March, 2002 of Shs 2.5 million was the highest bid and if the 1st defendant was fraudulent, it could have accepted any of the previous low bids. The sale was advertised and members of public invited to and did attend, so contended counsel for the 1st and 2nd respondent. Once there was a public auction, if there was any impropriety on the part of the auctioneer, under section 26 of the Auctioneers Act (Cap 526), the applicant has his remedies in damages against the auctioneer.

On whether or not the applicant has proved a *prima facie* case with a probability of success, Mr Gicheru submitted that he has not fulfilled the principles set out in the case of *Giella v Cassman Brown* in that should he be successful in his suit, an award of damages will not be adequate compensation to him. Relying on *Robert Kibagendi Otachi & Another vs H.F Co Kenya Ltd & 3 Others,* Nairobi Civil Appeal No 251 of 1996, counsel submitted that since the 3rd respondent has paid the requisite consideration to the 1st respondent, the balance of convenience tilts in her favour to enjoy the fruits of her money.

Finally, counsel submitted that the applicant is undeserving of an equitable relief because of his conduct. That he admits being indebted to the 1st respondent and to have fallen in arrears; that he had money to redeem and offered to do so but did not either deposit it with 1st Defendant or in court; falsely swears that there is no other suit or proceedings between the parties when there is, filed by himself and that even at this late stage there is no offer to deposit the amount owing in court. He thus urged this court to dismiss the application with costs.

Mr Manani, learned counsel for the 3rd respondent, associated himself with the above submissions in opposing this application. He emphasized that any flaws in the process of auction sale could not amount to fraud but to a mere irregularity and the applicant's remedy is to be found in section 77 (3) Registered Land Act and section 26 Cap 526 and that such remedy does not lie against the 3rd respondent but against 1st respondent. Lastly, that the suit, amongst others, prays for an injunction rather than damages and is thus incompetent and an application for injunction based on it is as well incompetent and is for dismissal. In his final address, Mr Kimaru observed that the previous suit, alluded to was between the applicant and 1st respondent only while in the instant one, there are 3 defendants with a new cause of action. As to whether the suit should have been commenced by an Originating Summons under O.XXXVI Civil Procedure Rules, counsel submitted that the applicant is alleging fraud which is properly pursued in a normal suit. He stated that the applicant had established fraud *prima facie* as defined in the case of *Russell Co Ltd v Commercial Bank of Africa Ltd and Another* Civil Appeal No Nairobi 31 of 1985. In that case, he observed, the Court of Appeal held that if fraud was proved *prima facie* an injunction can issue even after a transfer to a third party. In this regard, he also cited *Nyagilo Ochieng' & Another v Fannuel Ochieng' & Another* Civil Appeal No Kisumu 148 of 1995.

In this ruling, I intend to deal with and dispose of the preliminary points of law which were argued together with the grounds of opposition. It is not a disputed fact by the plaintiff/applicant that he had previously filed a suit against the 1st respondent in Eldoret HCCC No 183 of 1999 in which the issue of

the sale of the suit property due to default in repayment of the loan in question was the subject matter. In the instant suit, it is still the subject matter save that this suit has been filed after actual sale necessitating the addition of 2nd and 3rd respondents who are the auctioneers and buyer respectively. The principal defendant still remains the 1st respondent herein. For the purpose of O.VII Rule 1(1) (e) Civil Procedure Rules it is immaterial, in my considered view, that in the previous suit only 1st defendant and the plaintiff were parties or that there were additional causes of action claimed in the present suit which did not feature in the previous suit. The provisions of O.VII are very clear and for further clarity, I reproduce them:

"1.(1) The Plaint shall contain the following particulars–
(e) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.

2.The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."

It follows, and with respect I concur with Mr Gicheru, the averment by the plaintiff in paragraph 20 of the plaint and in paragraph 3 of the verifying affidavit which accompanied it, that there has been no previous suit or proceedings over the same subject matter between the parties (meaning none of the parties) is clearly false and in contravention of the rules and law. That being so, the verifying affidavit must be, as I hereby, struck out. Having done that the plaint itself is left bare and until or unless amended, is also for striking out and I so do. The plaintiff's application can then not stand on its own without a plaint in support and likewise is also struck out.

On the point that this being a suit for redemption and reconveyance and ought to have been commenced by an Originating Summons and not a plaint, I am satisfied with Mr Kimaru's submission that other than a claim for redemption and reconveyance, fraud is alleged and a relief stemming therefrom urged. In my finding I hold that that preliminary point has no substance and is dismissed. The suit was properly brought by way of a plaint. In view of admission by Mr Kimaru that a Statutory Notice under section 74 Registered Land Act was duly served, I will not belabour the point further. That then disposes of the preliminary points of law.

In considering whether or not to grant an interlocutory injunctive reliefs the courts have been guided by the principles established in the notorious authority of *Giella vs Cassman Brown* and several others which have cited it with approval. An applicant must demonstrate *prima facie* that it has a case with a probability of success; that unless an order of injunction is granted by the court, the applicant may suffer a loss or injury which cannot be compensated by an award of damages; that in case of doubt, the court should resolve the dispute on a balance of convenience. I can do no better than reiterate the grounds given at the conclusion of Mr Kimaru's submissions when demonstrating that the applicant has a *prima facie* case with a probability of success.

In the replying affidavit sworn by Franklin Jenner on behalf of 1st respondent, what emerges is that so many opportunities were afforded the applicant to repay the loan arrears, and even proposed sales cancelled at times at his own request. It can't be said that he was denied the right to redeem, in the circumstances. If it were true that he was so denied but had the necessary funds, the court has not been shown evidence of those funds offered by any exhibit nor has the applicant offered to deposit the same in court either before the filing of this suit or within it. There is absolutely no substance in the claim of denial to the applicant to redeem his property.

Concerning the price at which the property was sold of about Shs 1.0 million below the valuation /

reserve price, the 1st respondent has explained that it did so due to previous experiences when the property either attracted no bids or very low ones and rather than go by valuation / reserve price, it resorted to market price, the actual highest bid. I am convinced that even considering the authorities relied upon by the parties, the mere fact of a sale below the reserve price is not by itself evidence of fraud or *mala fides* on the part of the chargee. Again, all affidavit evidence presented before me pointed *prima facie* to the fact that a public auction was held following publication thereof in the print media. Likewise, having sold the property to 3rd respondent, there was no reason to delay a formal transfer and the duration of two days does not raise any eyebrows. For these reasons, I do not find fraud proved *prima facie* against the respondents. What comes out of the applicant's application is that the auction was not properly conducted either as advertised with all conditions therefor fulfilled or that the sale did not conform to the law applicable, really, more or less the same argument.

If I am right that that is the position, then the applicant is well answered in section 77 (3) Registered Land Act which as far as is relevant provides as follows:-

"77. (3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, ……… and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power".

And section 26 of the Auctioneers Act, Cap 526 also provides for relief in damages by stating that:-

"26. (1) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action."

Both Mr Gicheru and Mr Manani have relied on these provisions to assert that even if the applicant were to succeed in its suit, the relief available to him is in damages only. With respect, that is what the law provides. The authorities relied on by the applicant, principally, *Nyagilo, Russell* and *Mbuthia* (supra) would apply if fraud was proved but I am not convinced that it has been proved *prima facie.* Indeed, the same authorities established that in the absence of fraud being established, an injunction cannot issue. I have perused all the authorities that were presented before me and in my considered view, they do not support the case of the applicant. It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages" Such an argument is definitely misplaced and has no merits. It is immaterial that the property is a family residence, a fact well known to the chargor at the time of offering it as security to the chargee. The upshot of all these is that following *Giella's* principles, the loss or injury that the applicant stands to suffer should he be successful in his suit is capable of being compensated in damages adequately.

Lastly, I must revisit the averment number 20 and number 30 in plaint and verifying affidavit respectively, which are false in fact. That coupled with the assertion by the applicant that he has always offered to redeem the property, the subject matter of this application but has been denied the opportunity when the facts are otherwise, are all signs of bad faith. He has come for an equitable relief with unclean hands and is undeserving of an equitable relief.

Thus on both technicalities as already stated in the body of this ruling and on the merits, the application in its entirety fails and is hereby dismissed with costs to the respondents.

Dated and delivered at Eldoret this 13th day of June, 2002

G.E.O TUNYA

JUDGE

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