REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit 291 of 2006

JOHNSON MAINA MIGWI …….....……...1ST PLAINTIFF

FELISTER WANJA MWANGI (Both suing as the Administrator and Legal representatives of ALICE WANJIKU MWANGI (deceased)) ……...…..**2ND PLAINTIFF**

VERSUS

EQUITY BANK LIMITED …….…….....….1st DEFENDANT

GITAU NGANGA T/A SHEFFLO AUCTIONEERS …….....….**2ND DEFENDANT**

BERNARD KABIO …….....……..…..3RD DEFENDANT

RULING

The plaintiffs are the Administrators and Legal Representatives of the estate of the late Alice Wanjiku Mwangi.

They have brought this application, seeking an injunction to restrain the defendants from alienating, dealing or transferring the suit property L.R. No. NAIROBI/BLOCK 62/311, Ayany Estate Nairobi.

The 1st plaintiff was the husband to Alice Wanjiku Mwangi, (now deceased), whilst the 2nd plaintiff was a sister to the said deceased. The two of them applied for and were granted Limited grant of letters of administration ad litem, for the purposes of instituting this suit. The letters were granted on 3rd April 2006, after which the Plaint was filed on 31st May 2006.

It is the plaintiff's case that Alice Wanjiku Mwangi had charged the suit property, to the 1st defendant on 15th June, 1995. The said charge was registered against the title to the suit property so as to secure a loan amount of Kshs.600,000/-, which the 1st plaintiff had obtained from the 1st defendant, (who shall hereinafter be cited as "Equity Bank").

For the sake of completeness of the record, it is important to note that the Equity Bank is the successor in title to Equity Building Society, which is the entity that provided the loan to the 1st plaintiff. Nothing turns on that fact.

At paragraph 7 of the Plaint, it was stated that as at the time of the death of Alice Wanjiku Mwangi, on 18th July 2002, there was an outstanding loan.

Following her death, the 1st plaintiff says that he notified the 1st defendant about the demise of Alice W. Mwangi. The 1st defendant has not disputed that assertion, and therefore it must be deemed to be factually correct.

Whilst not disputing his indebtedness to Equity Bank, the 1st plaintiff nonetheless asks that the said bank be restrained from selling or alienating the suit property. The first ground for seeking that relief is that the charge instrument was defective ab initio, for failure to comply with section 65 (1) of the Registered Land Act.

In particular, it is pointed out that the chargor did not sign the charge, nor were the contents thereof explained to her by an advocate.

Section 65 (1) of the Registered Land Act stipulates as follows;

"**A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition, and the instrument shall, except where section 74 of this Act has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effects of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation by one of the persons attesting the affixation of the common seal.**"

A look at the Certificate of Lease discloses that the proprietor of the suit property was Alice Wanjiku Mwangi. Therefore, pursuant to S. 65 (1) of the Registered Land Act, she ought to have signed a special acknowledgement that she understood the effect of Section 74 of that Act.

However, the charge which formed the foundation of the exercise of the statutory power of sale in issue, was not signed by Alice Wanjiku Mwangi. Instead, the acknowledgement was signed by the 1st plaintiff. Therefore, on the face of the instrument, there would appear to be a failure to comply with Section 65 (1).

The other ground upon which the application is founded is the contention that the chargor was never served with a statutory notice, as she was already deceased at the material time.

Thirdly, the plaintiffs insist that the sale of the suit property was suspicious and fraudulent. As I understand it, the plaintiffs suspicion emanates from the contention that the sale price was about one-third (1/3) of the true market value of the property; and also because the 1st plaintiff had introduced to Equity Bank, an interested buyer, who was ready to pay Kshs.2.8 million, some two days before the auction was conducted. The plaintiffs are therefore saying that the defendants had absolutely no justification for proceeding with the sale, or for accepting a bid for Kshs.1,050,000/-, in any event.

In the face of the application, Equity Bank pointed out that the 1st plaintiff was not entitled to the equitable relief of an injunction, on the grounds that he had been guilty of material non-disclosure. So, what exactly is he accused of keeping under wraps?

Equity Bank drew the court's attention to the fact that the 1st plaintiff was the donee of the Power of Attorney issued by Alice Wanjiku Mwangi. The said power of attorney is dated 15th June 1995, and was thereafter registered on 6th July 1995.

It specifies the powers conferred by the instrument as being:

"To charge the above piece of land to secure a loan of Kshs.600,000/- from Equity Building

Society."

By virtue of having been conferred with the authority and power to charge the suit property to Equity Bank, the 1st plaintiff became, for all intents and purposes, the chargor.

Yet, he did not as much as disclose to this court that he was the holder of a power of attorney, through which he derived authority to charge the suit property. At all times, he presented his case (and that of his co-administrator) as being one in which the chargor was Alice Wanjiku Mwangi. That was not right.

Secondly, when confronted with the fact that he held a power of attorney, his reaction was that the Power of Attorney which had been registered on 6th July 1995 could not have been used in relation to a charge instrument dated 15th June 1995.

If the 1st plaintiff was so convinced in his mind that that proposition was solid, he should have first brought it to the attention of the court that he was the holder of the power of attorney. Then he could have sought to demonstrate to the court that the power of attorney had no application to the charge instrument.

In that regard, I doubt that the 1st plaintiff would have gone far, as the power of attorney actually bears the same date as the date when the charge instrument was executed. In other words, the charge did not come into being prior to the said power of attorney.

Also, the power of attorney expressly cites the Title No. L. R. No. NAIROBI/BLOCK 62/311, as well as the fact that the donee was being empowered to charge that specific property, to secure a loan of Kshs.600,000/- from Equity Building Society.

The fact that Equity Bank registered the power of attorney on 6th July 1995 could not invalidate it, vis-à-vis the charge in issue. If anything S. 116 (6) of the Registered Land Act does acknowledge the fact that there can be delays between the time a power of attorney is executed, and the time it is registered. In the event of such delay, the Registrar may require evidence that the power had not been revoked, and he may decline to register it until satisfactory evidence was produced.

In this case, I hold that the validity of the power of attorney vis-à-vis the charge; as well as the validity of the charge vis-à-vis the power of attorney does not appear to be in doubt.

But even if there could have been some doubt, none of which I can see, the 1st plaintiff was obliged to have disclosed to the court, the fact that he was the holder of the power of attorney. That fact was doubtlessly material to the application before me.

Having been granted the power of attorney, the 1st plaintiff executed the charge instrument. Therefore, inasmuch as he stood in the shoes of the registered proprietor, by virtue of the power of attorney, the chargor is deemed to have executed the charge.

Furthermore, Mr. J. B. Gathirwa Advocate did issue a signed certificate, acknowledging that the 1st plaintiff had;

"freely and voluntarily executed this instrument and understood its contents."

In the light of the foregoing, I am satisfied that there was due compliance with the provisions of Section 65 (1) of the Registered Land Act.

Meanwhile, as regards the service of a statutory notice, I am satisfied that the 1st plaintiff, as well as Alice Wanjiku Mwangi were duly served, on 17th May 2001.

On record, there is ample evidence of communication which shows that the 1st plaintiff defaulted in the payment of the instalments necessary to service his loan account. He also failed to honour the proposals which he gave from time to time. For instance, Equity Bank cancelled a sale of the suit property which had been set for 1st September 2004. That step was taken, in response to a request from the advocates of the 1st plaintiff. But thereafter, it appears that he did not remit payments, thus prompting the bank to instruct auctioneers to realise the security.

Upon receipt of a Notification of Sale, the 1st plaintiff wrote to Equity Bank on 26th September 2005, requesting that the sale scheduled for 18th October 2005 be put-off. He promised to sell the suit property by private treaty, if given five months to do so.

Although Equity Bank put-off the sale, the 1st plaintiff did not honour his word. As a consequence thereof, Equity Bank once again instructed the 2nd defendant, M/s Sheflo Auctioneers, to auction the suit property. The said auction, which was scheduled for 17th March 2006 did take place, and the 3rd defendant was declared the highest bidder, at the price of Kshs.1,050,000/-.

Immediately before the date of sale, (to be precise on 15th March 2006), the 1st plaintiff got one, Miriam Juma Ismail to write to Equity Bank. Ms. Ismail was apparently ready to buy the suit property for Kshs.2.8 million, which sum, she said would be available immediately.

The bank received the letter from Ms. Ismail on 15th March 2006, but did not respond thereto. Instead, they allowed the auction to proceed.

In view of that fact, Equity Bank has been accused of being fraudulent. The accusations arise from the fact that the Bank did not respond positively to Ms. Ismail's offer, to buy the suit property for Kshs.2.8 million.

That fact coupled with the price which was realised at the auction, does not make the Bank look good. That is even more so in the face of the Valuation Report by G. K. Mutugi, a valuation surveyor. Mr. Mutugi, who had been commissioned by the 1st plaintiff, had valued the property at Kshs.3.2 million. And the valuation report is dated 5th September 2005.

Given the fact that on 5th April 2006, the firm of Rachier & Amollo Advocates sent a cheque of Kshs.280,000/- to the bank, on behalf of Miriam Juma Ismail, it would appear that the said lady had been a serious potential purchaser. But, that assessment can only be made at this point in time, with the benefit of hindsight.

In the light of the numerous proposals which the 1st plaintiff had previously given, but which were not honoured, I think that it would be unreasonable to find fault with the Bank , for not putting off the sale which was scheduled for 17th March 2006, on the strength of nothing more than the letter from Miriam Juma Ismail, dated 15th March 2006. By that letter, Ms. Ismail expressed an interest to buy the suit property. She also offered the sum of Kshs.2.8 million for it, indicating her ability to make payment immediately. Then she concluded the letter by asking Equity Bank to let her know whether the offer was acceptable.

Nowhere did she indicate that the price of Kshs.2.8 million was acceptable to the 1st plaintiff. Therefore, one wonders how the Bank was supposed to conclude that Ms. Ismail had been "introduced" by the 1st plaintiff.

Also as the said offer was coming so close to the auction date, yet it was not backed with anything, I do not think that the Bank should be faulted for not taking it seriously. It would have possibly been very different if the Bank had received a letter whose contents were similar to those in the letter from Rachier & Amollo Advocates, dated 5th April 2006.

In **AGGREY PETER THANDE –VS- ABN AMBRO BANK & 2 OTHERS, MILIMANI HCCC NO. 20 of 2005,** the Hon. L. Njagi J. held as follows;

"Failure to make a disclosure of such great import renders the applicant unworthy of receiving any equitable reliefs. And yet he has come to a court of equity asking for an equitable remedy. He that comes to equity must do equity and come with clean hands. Even without going into the issue of his capacity to come to court in the way he did, and inspite of having scored positives on the other issues, I find that the applicant is not worthy of the orders sought from a court of equity, on account of non-disclosure of a material fact. His application is accordingly dismissed with costs."

The issue which the learned judge had observed as being one which would have had a profound effect on the proceedings, but which the applicant in that case had failed to disclose, was that some eight months prior to the institution of the proceedings, a receiving order had been made against the applicant.

In this case, I have also come to the conclusion that the existence of the power of attorney, which was held by the 1st plaintiff, was material to this case. Therefore, the question that I must now address is whether or not the failure to disclose that fact would, without more, disentitle the applicants to the injunction orders sought.

Ordinarily, I too should proceed to dismiss the application on that ground alone. However, I have had to agonize long and hard over the issue. My reason for the said agony stems from the fact that the 2nd defendant does not seem to have served a Notification of Sale.

As stated at paragraph 6 (xiv) of the Replying Affidavit of Ambrose M. Ngari, the notification of sale which was issued on 24th August 2005 was **"for the sale of the suit premises on 18th October 2005."**

Thereafter, at paragraph 6(xvi) of his affidavit, Mr. Ngari stated that the bank **"cancelled the sale scheduled for 18th October 2005 for a period five (5) months, at the 1st Applicant's request."**

Following the said cancellation, there might arise the question as to whether or not there was need for a new notification of sale to be served, in the event that the Bank decided to put up the property for sale at a subsequent date.

In **SIMIYU –VS- HOUSING FINANCE COMPANY OF KENYA [2001] 2 E.A. 540 at 548,** the Hon. RINGERA J. (as he then was) said;

" The above understanding of pertinent provisions of the RLA and the Auctioneers Rules leads me to the conclusion that the service of both an adequate statutory notice and a notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under RLA. Without compliance with those statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it be properly contended that the chargor's remedy, if any such sale has taken place, is in damages as provided in section 77 (3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor. Taking that view of the matter, I find that the Plaintiff has shown a prima facie case with a probability of success at the trial, that the sale of her property may be declared illegal, null and void as she craves."

On the one hand, it appears that the application should be dismissed on the grounds of non-disclosure of a material fact; on the other hand there is a serious issue for determination, as demonstrated in the citation above.

Of course I do fully appreciate that the Hon. Ringera J. was not dealing with a case wherein the issue was about whether or not to serve a fresh notification of sale. That fact would serve to distinguish that case from the one before me.

I therefore hold the view that the plaintiff's have failed to satisfy me that, they have a prima facie case with a probability of success. It was their obligation to discharge that burden, but they have failed to do so.

On the issue as to whether or not the refusal of an injunction would cause the plaintiff's to suffer irreparable loss, which could not be compensated in damages, I hold that they did not meet the requirements. They failed to elaborate on the nature of loss or damage they might suffer.

In any event, the property has already been valued at Kshs.3.2 million, as far as the plaintiffs were concerned. Then, they were ready to sell it off for Kshs.2.8 million. That implies that if the plaintiffs suit was finally successful, the loss which they would have suffered would be easily quantifiable. And as Equity Bank is generally perceived to be a vibrant financial institution, the plaintiffs have not as much as suggested that the said bank could be unable to compensate them, if the suit were successful.

For all those reasons, I find no merit in the application dated 31st May 2006. But any such merit as there might otherwise have been would have been completely erased by the plaintiffs' non-disclosure of a material fact. Accordingly, the application is dismissed, with costs to the three defendants.

Dated and Delivered at Nairobi this 9th day of November 2006.

FRED A. OCHIENG

JUDGE