



REPUBLIC OF KENYA



**KENYA LAW**

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**Mwaura v HFC Limited (Successor in title to House Finance Corporation) & another (Civil Case E770 of 2021) [2023] KEHC 19063 (KLR) (Commercial & Admiralty) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 19063 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**COMMERCIAL AND ADMIRALTY**  
**CIVIL CASE E770 OF 2021**  
**DO CHEPKWONY, J**  
**APRIL 28, 2023**

**BETWEEN**

**MOSES MUNYINYI MWAURA ..... PLAINTIFF**

**AND**

**HFC LIMITED (SUCCESSOR IN TITLE TO HOUSE FINANCE CORPORATION) ..... 1<sup>ST</sup> DEFENDANT**

**COMMODITY WORLD LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. There are three applications pending determination in this matter which are the subject of this ruling.
2. The first application is a Notice of Motion dated August 30, 2021 in which the Applicant, (the Plaintiff herein), Moses Munyinyi Mwaura, seeks a temporary injunction restraining the Defendants from selling, dealing, interfering, alienating, disposing, transferring, vesting, advertising for sale by public auction or private treaty all those properties known as Title No(s) Kiambaa/ruaka/2016 And 2131 – Ruaka Area, Kiambu County. The application is opposed by the 1<sup>st</sup> Defendant through the Replying Affidavit of Christine Wahome sworn on September 7, 2021 and the Plaintiff in exercising his right of reply filed their Supplementary Affidavit sworn on the September 30, 2022.
3. The second application is a Notice of Motion dated November 5, 2021 by the 2<sup>nd</sup> Defendant, Commodity World Limited which is supported by the Affidavit of Lucy W. Kiarie sworn on the November 5, 2021 which seeks to have the Plaintiff's case struck out; and/or to have the suit against the 2<sup>nd</sup> Defendant dismissed; and/or, to have the Plaintiff provide security for costs in the sum of Kenya Shillings Four Million Five Hundred Thousand (Kshs 4,500,000) or any amount the court would deem fit as security for costs for the 2<sup>nd</sup> Defendant. The application is opposed by the Plaintiff in their Replying Affidavit sworn on the September 30, 2022.



4. The Third Application is a Notice of Motion dated the June 30, 2022 in which the 1<sup>st</sup> Defendant, Housing Finance Corporation also seeks to have the Plaintiff's suit struck out. The same is opposed by the Plaintiff through their Replying Affidavit sworn on the September 30, 2022.
5. On September 8, 2021, the parties were directed to dispose of the three The three Applications contemporaneously by way of written submissions which by the time of confirming the date for ruling, only the Defendants had filed their respective submissions. The Plaintiff, it was noted had not filed his submissions but on preparing the ruling, I found the Plaintiff has filed skeleton submissions dated October 5, 2021.

### **Plaintiff' Submissions**

6. The Plaintiff argues that the 1<sup>st</sup> Defendant did not conduct any auction, or lawful process of the sale and or transfer of the subject property herein is capable of transferring title to the Defendants. Consequently, the Plaintiff's right to redemption of his property has not been extinguished, but subsists to date, hence the Plaintiff's application dated the August 30, 2021 be allowed and the court to restrain any further dealings on the subject properties pending the full trial and determination of the suit under the doctrine of lis pendens, so as to preserve the subject matter of this litigation pending the hearing and determination of the main suit.

### **1<sup>ST</sup> Defendant's Submissions**

7. On the other hand, the 1<sup>st</sup> Defendant submits that the suit properties were successfully sold through a public auction on April 20, 2021 and thereafter successfully transferred to a successful bidder being the 2<sup>nd</sup> Defendant herein, hence the Plaintiff's Application dated August 30, 2021 has been overtaken by events, thus unmerited and should be dismissed.

### **2<sup>nd</sup> Defendant's Submissions**

8. In their submissions, the 2<sup>nd</sup> Defendant has invited this Court to find that it has no Jurisdiction to entertain this suit as the same ought to have been filed in the Environment and Land Court whose Jurisdiction touches on land matters which form the subject matter of this suit. Secondly, that the 2<sup>nd</sup> Defendant is already the registered owner of the subject properties hence the Plaintiff has no rights capable of being breached or enforced in the said properties, and as such the Plaintiff's suit against the 2<sup>nd</sup> Defendant should be struck out. Thirdly, that if any of the Plaintiff's rights have been breached, the same was done by the 1<sup>st</sup> Defendant in exercising its statutory power of sale hence the remedy that lies for the Plaintiff are in damages from the 1<sup>st</sup> Defendant. The Court should therefore find that the 2<sup>nd</sup> Defendant has wrongly been enjoined in the suit.

### **Analysis and determination**

9. This Court has considered the grounds in the applications, the affidavit evidence by both parties, the written submissions filed on behalf of the parties herein, the superior courts decisions cited thereon and find the following issues arise for determination:-
  - a. Whether the Plaintiff has met the threshold for granting a temporary restraining injunction pending the hearing and determination of the suit?
    - a. Whether the suit against the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant should be dismissed?



10. In considering whether or not to grant an interlocutory injunction, courts are guided by the principles set out by the Court of Appeal in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973]E A 358 at 360, where Spry J held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

11. In their Supporting Affidavit to the Application dated August 30, 2021, the Plaintiff has challenged the Sale by Auction of the subject properties to the 2<sup>nd</sup> Defendant. The Plaintiff alleges that the 2<sup>nd</sup> Defendant did not comply with the terms of sale by auction by failing to pay the balance of the purchase price on or before the July 20, 2021 before expiry of the 90-day completion period as per Clause 7 of the Agreement of Sale. In any event, the deposit of the purchase price stood forfeited and therefore the sale by auction was null and void. On the other hand, the 1<sup>st</sup> Defendant vide a letter to the 2<sup>nd</sup> Defendant dated July 19, 2021 (CW-21) which is annexed to its Replying Affidavit whereby additional time was requested to complete the sale. By a further letter dated July 27, 2021 (annexed as CW-22) the 1<sup>st</sup> Defendant agreed to extend the completion period for the 2<sup>nd</sup> Defendant who subsequently cleared the balance of the purchase price.
12. It is the Plaintiff's contestation that the late payment of the purchase price invalidated the auction sale hence their equity of redemption was not extinguished. The Plaintiff also challenges the occurrence of the said auction, whether the same was lawfully carried out and also disputes service upon them of statutory notices, statutory notice of sale (3 months) and notification of sale(40 days) upon them through the Supplementary Affidavit sworn on September 30, 2022.
13. This Court has examined the exhibits produced by the 1<sup>st</sup> Defendant through the Replying Affidavit of Christine Wahome sworn on September 7, 2021. It has taken note that a ninety (90) day Statutory Notice of Sale was issued to the Plaintiff on February 7, 2019, via Registered Mail and the Certificate of Postage has been produced which are marked as Exhibit 10. A forty (40) day notification of sale was also issued on May 23, 2019 which is produced as Exhibit 11 and a Certificate of Posting has been produced. A forty-five (45) day redemption notice and notification of sale was served upon the Plaintiff by registered mail and a certificate of posting is produced which are annexed as Exhibit 12. The Plaintiff was also personally served by the Legacy Auctioneers and a Certificate of Service has also been produced under Exhibit 12.
14. To this end the Plaintiff's allegations that the 1<sup>st</sup> Defendant improperly or irregularly exercised their power of sale by auction which remain unsubstantiated as no concrete proof has been produced. I find that there was proper service of notices. The auction was advertised in the prescribed manner that is; in the dailies, to take place on April 1, 2021 at 11.00 am at Windsor House. The Plaintiff has failed to show that the same did not take place as advertised.
15. Accordingly, a binding contract was entered between the Defendants on April 20, 2021 at the fall of the hammer. The late payment of the balance of the purchase price by the 2<sup>nd</sup> Defendant does not invalidate the contract between the defendants. Most importantly, it is worth-noting that the Plaintiff's equity of redemption had already been extinguished. This Court agrees with this view which was also laid



down in the case of *Mbutia v Jimba Credit Finance Corporation & another* [1988] eKLR expressing the views in *Bloodstock Ltd v Emerton* [1967] 3 All ER 321.

“.. even if time is of the essence for completion of the contract, which includes payment of the price, late payment would not matter were the vendor and purchaser not to insist on strict compliance with the time fixed for completion. It is still the case that the equity of redemption is extinguished when a binding contract of sale has been entered into before completion, despite the necessity for consent of other parties or authorities.”

16. Additionally, the court having found that the first defendant exercised their power of sale properly and regularly, then the second defendant is presumed an innocent purchaser for value. No remedy for the Plaintiff lies with the second Defendant. Accordingly, Section 99(4) of the *Land Act* provides:-

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

17. It is clear that the Plaintiff has not provided concrete proof to their assertions, and as such, he has failed to prove that he has a prima facie case with a probability of success. Having failed the first test for the grant of an injunction, I need not look at the remaining two tests. The Plaintiff has no relief. In the interest of justice for all the parties the most appropriate relief for the Plaintiff's claim would not lie in granting an injunction.

### **Conclusion**

18. In view of the foregoing reasons, the Court orders that:-

- a. Plaintiff's application dated August 30, 2021 lacks merit and is hereby dismissed with costs.
- b. Plaintiff's suit against the 2<sup>nd</sup> Defendant is dismissed with costs

19. It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...28<sup>TH</sup> ... DAY OF ...APRIL... 2023.**

**D.O CHEPKWONY**

**JUDGE**

