



**Wamwea t/a Mowaki General Agencies v Jamii Bora Bank Limited & another (Civil Case 002 of 2021) [2022] KEHC 16059 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16059 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 002 OF 2021  
A MABEYA, J  
NOVEMBER 25, 2022**

**BETWEEN**

**MOSES WAMWEA T/A MOWAKI GENERAL AGENCIES ..... APPELLANT**

**AND**

**JAMII BORA BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT WAWERU T/A ANTIQUE AUCTIONS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before Court is a Notice of Motion dated 1/3/2021. It was brought under Order 40 Rule 1 of the *Civil Procedure Rules* and Section 3A and 63(e) of the *Civil Procedure Act*.
2. The application sought injunctive orders to restrain the respondents from selling or in any manner disposing of or interfering with parcel Thika Municipality Block 23/2016, (“the suit property”) pending the hearing and determination of the application and the appeal.
3. The grounds for the application were set out on the face of the Motion and on the Supporting Affidavit of Moses Wamwea sworn on 1/3/2022.
4. It was the appellant’s case that it had moved the Chief Magistrate Court at Milimani Commercial Court seeking injunctive orders against the respondents from interfering with the suit property.
5. That the court ruled in favour of the respondent’s vide ruling delivered on 3/2/2021 provoking the appeal. It was contended that the magistrate erred in failing to consider the appellant’s claims that the sale of the suit property was done in bad faith. That the sale was without a valuation and was at an under value of Kshs 750,000/= while its open market value in 2016 was Kshs 1,500,000/= and forced sale value Kshs 1,300,000/=.



6. It was thus contended that the appellant had an arguable appeal which raises serious issues and a high chance of success. The appellant would therefore suffer loss if the orders sought were not granted. That the appeal would be rendered nugatory if the suit property was not preserved as the respondents would complete the sale of the suit property.
7. The respondent opposed the application vide the Replying Affidavit of Jackson Kimathi sworn on 11/8/2021. It was contended that when the appellant brought the application before the Chief Magistrate's court, the respondents established that the 1<sup>st</sup> respondent had offered a loan facility of Kshs 3 million to the appellant and the same was secured by a charge registered against the suit property.
8. That the appellant fell into arrears and the 1<sup>st</sup> respondent demonstrated that it had complied with all statutory notices, and when the appellant failed to regularize his account, the 1<sup>st</sup> respondent conducted a valuation and the report was dated 12/5/2020 valuing the property at Kshs 1million and a forced sale of Kshs 750,000/=. That the intended auction was duly advertised and the auction conducted on 22/7/2020 where one Peter Muiruri Waweru won the bid at Kshs 750,000/= and later made payment.
9. It was therefore averred that the magistrate correctly applied the law and the facts in the ruling of 3/8/2020. That section 99 of the Land Act provided legal protection for the purchaser of the suit property as a bonafide purchaser for value upon his purchase of the suit property in the auction. That this court could not restrain what had already happened and the remedy could only be damages. That the respondents demonstrated that the sale was legal and that no arguable issue had been raised in the application.
10. The application was canvassed by way of written submissions. The submissions of the 1<sup>st</sup> respondent were dated 6/10/2021. The main issue for determination is whether the appellant has made out a case for granting of injunctive orders.
11. The conditions for consideration in granting an injunction were settled in the case of Giella v Cassman Brown & Company Limited [1973] E A 358. The court held:

“First, an appellant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the appellant 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.”
12. The appellant's case is that the trial court erred in failing to consider the legal issues raised regarding the sale of the suit property at an under value. That the sale was without any valuation being undertaken.
13. The Court has looked at the ruling. The Court notes that the trial court confined itself only on the issue of Section 99 of the Land Act and determined that since the suit property had already been sold to a bona fide party without notice, he enjoyed protection under the law. For that reason, the trial court dismissed the application for injunction.
14. However, it would seem that the trial court did not consider the merits of the application which challenged the sale itself. The issue was not only whether the third-party purchaser had notice. There was the issue of whether the sale was legal. Indeed, the respondents presented evidence vide the Replying Affidavit sworn by Maurine Wambui on 23/9/2020, wherein they went to a great length to demonstrate that the sale was valid. The trial court did not consider that evidence vis a vis the appellant's contention that the sale was illegal and its completion ought to have been restrained. The issue of valid valuation is statutory and cannot be wished away peremptorily.



15. The above demonstrates that the appellant has an arguable appeal with a probability of success. This then raises the need to preserve the suit property and restrain the respondents from completing the sale pending determination of the appeal before court.
16. I say this because though the sale has been conducted, there was no evidence to show that the property had already been registered in the name of the third party. Injunctive orders are therefore applicable.
17. The appellant would suffer irreparable loss should it be found that the sale was illegal. The property will have already been registered in the name of a third party and all his proprietary rights lost. The balance of convenience lies with maintaining the *status quo*.
18. In the end, this court finds merit in the application dated March 1, 2021 and the same is allowed as prayed. Costs to be in the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

