



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL APPEAL NO. 29 OF 2019**

**GREEN SYSTEMS AFRICA LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**HOUSING FINANCE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**JAMES MUNGAI GIKONYO T/A GARAM**

**INVESTMENTS ACTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The 1<sup>st</sup> respondent herein, Housing Finance Company Limited, advanced the applicant a loan facility of Kshs 19,550,000/= which was secured by a legal charge over property known as APARTMENT NO. 2 1<sup>ST</sup> FLOOR B ROYAL GARDENS LR NO. 209/20670.
2. The applicant fell into arrears and the 1<sup>st</sup> respondent auctioned the suit property in 12<sup>th</sup> March 2019 in exercise of its statutory power of sale.
3. The applicant filed a suit before the Chief Magistrate Court NAIROBI MILIMANI CMCC No. 1687 OF 2019 in which a temporary injunction was issued to stop the transfer of the property that had been auctioned. After hearing the parties, The Chief Magistrate's Court unfortunately dismisses the applicant's application for an injunction to stop the transfer of the suit property pending hearing and determination of the suit.
4. The applicant then filed an appeal against the ruling of the Chief Magistrate's Court and simultaneously sought temporary injunctive orders to stop the transfer of the property pending hearing and determination of the appeal.
5. On 15<sup>th</sup> August 2019, this honourable court issued temporary orders to stop the transfer of the suit property pending hearing and determination of the application dated 7<sup>th</sup> August 2019.
6. It is the applicant's case that the respondent illegally and irregularly auctioned its property on 12<sup>th</sup> March 2019 and that the suit property ought to be preserved pending hearing and determination of the applicant's suit.

**Application**

7. The applicant filed an appeal following the dismissal of its application for temporary injunction to stop the transfer of the suit property after the auction. The applicant also filed the application dated 7<sup>th</sup> August 2019 seeking orders that: -

***1. Spent.***

***2. Spent.***

***3. That this honourable court be pleased to issue an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their agents, servants or any other persons acting on their behalf from registering, completing or perfecting the sale and transfer of the plaintiff's property LR No. 209/20672 Apartment B2 located at Royal Gardens Kiambere Road Upper Hill on the basis of a purported***

*auction that happened on 12<sup>th</sup> March 2019 or any other date pending hearing and determination of this appeal filed herein.*

*4. Costs of this application be provided for.*

8. The application is supported by the affidavit of the applicants Director **M/S Naomi Wambui Ndiangui** and is premised on the grounds that: -

*1. The applicant is the registered proprietor of all that property known as LR No. 209/20672 Apartment No. B2 I Royal Gardens Kiambere Road within Nairobi County.*

*2. The said property was auctioned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the grounds that the applicant's mortgage secured by a legal charge over LR No. 209/20672 Apartment No. B2 Royal Gardens Kiambere Road was in arrears to the tune of Kshs 2,347,084/-.*

*3. The 90-day notice under Section 90(2)(3) (4) of the Land Act 2012 dated 1<sup>st</sup> February 2018 demanded payment of Kshs 974,201.80/= from the applicant to rectify the default.*

*4. Further the 45-day redemption notice dated 5<sup>th</sup> September 2019 demanded full payment of kshs 19,917,060.00 inclusive arrears of Kshs 2,894,957.00/= from the applicant.*

*5. The property was allegedly auctioned on 12<sup>th</sup> March 2019 despite the applicant paying Kshs 3,000,000/=.*

*6. The respondent's conduct was calculated to frustrate the applicant's equity redemption.*

*7. There was no evidence of the 14 days' statutory advertisement before the property was allegedly auctioned.*

*8. The property was undervalued. The valuers did not realistically inspect the property and give it a real market value. The valuers acknowledged this fact in their report.*

*9. The purported sale was not done in accordance with the express provisions of the Land Act 2012.*

*10. The property has not been transferred to the purported buyer and thus there is need to preserve the subject matter of litigation pending determination of the appeal herein.*

*11. The appeal will be rendered nugatory and otiose if an injunction is not issued by this honourable court.*

*12. The appellant/applicant will suffer irreparable loss if an injunction is not granted since it will lose its investment where there is evidence to show that the respondents did not follow due process when auctioning the applicant's house.*

*13. The best interests of natural justice, equity and fair play require that the appellant be given a chance to prosecute its case by preserving the subject matter of litigation which is LR. No. 209/20672 Apartment No. B2 Royal Gardens Apartments Kiambere Road Nairobi County.*

9. The 1<sup>st</sup> respondent opposed the application through the replying affidavit of its Legal Officer **Mr. Joseph Lule** who confirms that the 1<sup>st</sup> respondent advanced a loan facility of Kshs 19,550,000/- to the applicant which facility was secured by a charge over the suit the property. He avers that applicant's loan account fell in arrears thus prompting the 1<sup>st</sup> respondent to exercise its statutory power of sale by issuing the requisite statutory notices and processes before instructing M/S Garam Auctioneers to auction the charged property. He attached copies of the said notices as annexures **JL-3** to **JL – 6d**, Newspaper Advertisement (annexure **JL-7**) and valuation report as annexure **JL-8**.

10. He states that prior to the sale of the suit property by way of public auction, the applicant sought and obtained a final chance to regularize his loan account when the 1<sup>st</sup> respondent in good faith acceded to its request for the suspension of the scheduled auction. It is the 1<sup>st</sup> respondent case that the auction only proceeded after the applicant failed/neglected to comply with the arrangement to regularize its account but not before further re-advertisement and Courtesy Notices as shown in annexures **JL12(a) b** and **c**, **JL-10a**, **JL -10b** and **JL-10c** were sent to the applicant.

11. He further states that the suit property was in 12<sup>th</sup> March 2019 sold by way of public auction to the highest bidder at Kshs 18,800,000/= as shown in the Memorandum of Sale attached as annexure **JL-13** to the replying affidavit.

12. It is the 1<sup>st</sup> respondents case that it complied with the law and acted in good faith in exercising its statutory power of sale after the applicant fell in arrears to the tune of Kshs 2,347,084.87 while the outstanding sum stood at Kshs 18,168,232.32/-. He further states that the applicant's account was in arrears as at 12<sup>th</sup> March 2019 when the auction took place and that the instant application is therefore an abuse of the due process of court and is solely intended to deny the 1<sup>st</sup> respondent its right to realize the security.

13. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of injunction pending appeal.

14. The principles governing the granting of an injunction pending appeal were spelt out in the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR as follows: -

**A. An order of injunction is a discretionary one and will be exercised against an applicant whose appeal is frivolous; in other words, one ought to have an arguable appeal (emphasis supplied).**

**B. The discretion should be refused where it would inflict greater hardship that it would avoid.**

**C. The applicant must show that to refuse the injunction would render the appeal nugatory.**

**D. The court should be guided by the principles in *Giella vs Cassman Brown Ltd 1973 E.A 358*.**

15. In advancing the argument that it has an arguable appeal the applicant submitted that the 1<sup>st</sup> respondent did not issue the mandatory 90 days' statutory notice as required under Section 90 of the Land Act, it further stated that there was no evidence of the 14 days' advertisement by the auctioneers under Rule 16 of the Auctioneers Rules and that the 1<sup>st</sup> respondent did not acknowledge the payments made towards remedying the default.

16. On its part, the 1<sup>st</sup> respondent maintained that it complied with all the requisite provisions of the Land Act and Auctioneers Rules of the suit property by public auction.

17. In determining whether the applicant has an arguable appeal against the decision of the subordinate court, this court is alive to the fact that it is not, in this ruling, determining of the merits of the said appeal. The court is however minded to consider the arguments made by the applicant in support of its claim that it has an arguable appeal.

18. I note that the applicant did not contest the fact that it is truly indebted to the 1<sup>st</sup> respondent. Indeed, the applicant concedes that it fell into arrears of the loan repayments. It is however noteworthy that the applicant did not demonstrate that it had taken any steps to remedy its default prior to or even after the impugned auction so as to satisfy this court that it is entitled to the equitable relief of injunction.

19. My take is that in the circumstances of this case the mere fact that the applicant has filed an appeal against the decision of the subordinate court does not take away the fact that it is still indebted to the 1<sup>st</sup> respondent.

20. Needless to say, a litigant seeking the equitable remedy of injunction must demonstrate that it has come to court with clean hands. My finding is that the applicant is not entitled to the remedy of injunction when it has not played its part of the bargain by repaying the debt it owes the 1<sup>st</sup> respondent.

21. The next issue for determination is whether the appeal will be rendered nugatory. The applicant argued that the suit property needs to be preserved as it is the heart beat and 'soul' of the appeal.

22. This court however notes that it was not disputed that the said suit property had already been sold at the public auction that took place on 12<sup>th</sup> March 2019 as shown in the Memorandum of Sale that was attached to the 1<sup>st</sup> respondent's replying affidavit as annexure "JL-13".

23. I note that the Land Act at Section 99, offers protection to purchasers of properties sold in the exercise of the chargee's statutory power of sale. It provides as follows: -

***Protection of purchaser***

**99. (1) This section applies to—**

**(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or**

**(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.**

**(2) A person to whom this section applies—**

**(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;**

**(b) is not obliged to see to the application of the purchase price;**

**(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.**

**(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way,**

*unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.*

***(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.***

24. A reading of the above provision shows that a purchaser is not obliged to inquire, *inter alia*, into whether the sale is necessary, proper or regular. Under Section 99 (3), the purchaser is protected unless there is fraud, misrepresentation or dishonest conduct on the part of the chargee of which the purchaser had actual or constructive notice. Section 99(4) provides that the remedy of a person affected by an unauthorised, improper or irregular exercise of the power of sale, shall have his remedy in damages against the chargee.

25. I note that the protection offered to the purchaser is quite and that it is offered even where there has been no default, where no notice has been issued, where the sale is not necessary, proper or regular. A purchaser will be protected in the face of an irregularity in the sale. In the present case, it has not been suggested that the purchaser was a party to any fraud or misrepresentation. It therefore follows that purchaser of the suit property is protected.

26. My finding is that the sale having already taken place the suit property has technically changed hands and the only remedy available to the chargor, if aggrieved by the said auction would be to sue for the damages.

27. For the reasons that I have stated in this ruling, I am not persuaded that the application dated 7<sup>th</sup> August 2019 meets the threshold set for the granting of orders of injunction pending appeal and the order that commends itself to me is to dismiss the application with orders that costs shall abide the outcome of the appeal/suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 20<sup>th</sup> day of August 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Shiku for Khakula for appellant

Mr. Mbogo for respondent/applicant

Court Assistant: Sylvia