



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. E3 OF 2020**

**SHAH REKHAVANTI PANKAJ.....PLAINTIFF**

**VERSUS**

**BANK OF BARODA (K) KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**SPORTLIGHT INTERCEPTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 15/9/2020 and filed contemporaneously with the plaint on the 16/9/2020, the plaint prays for orders of temporary injunction to restrain the defendant from alienating or transferring that parcel of land situate in Mombasa County and known as LR. No. MN/1/1185 CR 10161 pending the hearing and determination of the suit. There is also a prayer to declare that the sale of auction said to have taken place on the 27/8/2020 was unprocedurally and illegally conducted and should be ordered nullified and fresh auction be conducted to conform with the law.

2. The reasons advanced to ground the application and its prayers and disclosed on the face of the application and the Affidavits sworn by SHAH REKHAVANJI PANKAJ and another by SIRAJI MABONGA WAWIRE were set out to be that the plaintiff intended to attend and bid at the scheduled auction and to buy the property on the scheduled date but was told that the sale would not proceed and would be rescheduled due to a pending suit. As a consequence of such information, he asserts, was discouraged and misled not to attend the auction only to be told thereafter that the sale proceeded and the property sold. It is thus the plaintiff's contention that the auctioneer deliberately misled him so as to seal a clandestine sale to a favoured and selected buyer or buyers by collusion.

3. As evidence that the property was clandestinely sold, the plaintiff relied on a letter by the counsel for the 1<sup>st</sup> defendant dated 4/9/2020 seeking to confirm if the owners had met the conditional injunctive orders and the confirmation came in at 3.21pm and therefore the plaintiff contends that the sale took place in the evening after that confirmation and thus conducted in violation and contrary to the requirement of the Auctioneers Act Section 21 which require that the date time and place of the action be advertised as to qualify as being above board so that everybody interested in bidding attends and to enhance the prospects of the best price possible. For such reasons the plaintiff contends and swears that he had obtained legal advice that the sale was unlawful and illegal and void ab initio thus deserving nullification for a valid auction to be pursued afresh.

4. The second supporting Affidavit sworn by SIREJI MABONGA WAWIRE was to the effect that on the 26/8/2020 he was approached by the plaintiff pursuant to which approach he made inquiries about the advertised property and place of sale, made a call to the auctioneer who told him that the auction had been suspended by a court order and that on the same day when he sought to know what next date had been rescheduled he was told that the property had in fact been sold at the time he was informed the auction would not take place.

5. The application was opposed by several Affidavits sworn by Neela K Ray, a Branch Manager of the 1<sup>st</sup> defendant and PETER GICHUHI the auctioneer filed on the 02/10/2020 as well as the successful bidder among other persons who attended the auction. The gist of the Branch Manager Affidavits was that having read and understood the Affidavits in support of the application, the bank position was that all the requisite notices had been served and that the borrower and charge was still indebted the bank in the sum of Kshs. 52,022, 950 which sum continued to attract the contractual interests and was thus bludgeoning.

6. It was then added that prior to this suit there had been Mombasa ELC 106 of 2020 in which the borrower was granted an interim injunction on terms that he prays to the bank Kshs. 10,000,000/= by the 26/9/2020 which condition was never complied with hence the auction proceeded on 27/8/2020 at 11am as had been scheduled and in his presence. At the auction the manager swears that there were 7 people in attendance and he did sign the attendance register but there was no attendance by the applicant or his representative. He thus denied the allegations about an auction conducted in the evening of 27/08/202 and that the auction actually took place on the date scheduled between 11 and 11.30am after a confirmation was received from the court that the condition for grant of injunction had not been complied with in time and at all.

7. The deponent stressed the fact that there had not been the fulfilment of the preconditions requirement upon the prospective bidders to deposit a refundable auction deposit of Kshs. 1,000,000/= as advertised and therefore no substantial loss had been demonstrated by the applicant and further that there had not been demonstrated availability of funds to enable him attend and bid at the auction and pay the purchase price. He concluded by swearing that any stoppage of the auction would only escalate the debt by continued growth and therefore potentially substantial and irrecoverable loss upon the 1<sup>st</sup> defendant.

8. For the auctioneers, 2<sup>nd</sup> defendant/Respondent, the position taken was that having been instructed and handed a current valuation report he placed an advert in the Daily Nation of 10/08/2020 and 24/8/2020 and advertised the suit property for sale on the 27/8/2020 to be conducted at the premises of Ms. Kinyua & Company Auctioneers, situate at syndicate House, 1<sup>st</sup> floor, Meru Road, next to Splendid Hotel Mombasa, but was on the 26/8/2020 served with a court order issued in Mombasa ELC 106/2020 which granted interim injunction on terms that the plaintiff pays at least 10,000,000/= to the bank by close of day on 26/08/2020. He added that he sought to know from the 1<sup>st</sup> defendant if there had been fulfilment of that condition but he was informed by the branch manager of the 1<sup>st</sup> defendant that no payment was made on the due date and at all thus shedding the green light for the auction to proceed as scheduled.

9. An auction was therefore conducted at the time and venue scheduled in the presence of some six people in attendance, including one Dilipkumar Natho Meghji who emerged the highest bidder at Kshs. 65,400,000/= and was declared the purchaser at 11.30. The said buyer then paid the 25% of the purchaser price. The auctioneer therefore denied the allegation that the auction was conducted in the evening and asserted that both the plaintiff and the owner of the property did not attend the auction at all. Just as the plaintiff did not place the bid sum of Kshs.1,00,000.

10. With the leave, the defendants did file other Affidavit sworn by MALKUMAR P.M. SHAH, MAINA CHEGE, MUKESH KUMAR DILIPKUMAR NATHOOD MEGHJI SHAH as well as PETER KINYUA t/a as KINYUA & CO. ADVOCATES. All the said deponents swore to having been present at the place and time the auction was conducted and that the same was conducted in conformity with the law.

11. To begin with Mr. Peter Kinyua denied having been called by anybody and deposed that it was an outright lie that SIRAJI MABONGA WAWIRE called him on the material date.

12. MR. AMALKUPHAR SHAH affidavit was to the effect that he was requested by Mr. Dilikumar Shah to accompany him to the auction which he did and together with all in attendance signed the attendance book. On arrival Mr. Dilipkumar Shah gave out a cheque for Kshs. 1,000,000/= being the bid sum and that after the reserve price was read out Mr. Dilip gave a bid for Kshs. 65,400,000/= to emerge the highest bidder there being no other bids and paid a sum of Kshs. 16,350,000 being the 25% of the purchase price.

13. Mr. Maina Chege, swore to have been a valuer commissioned by the bank to establish the latest value of the property and he came up with a valuation report dated 14/8/2020. He said that on the 27/08/2020 he was personally present at the offices of Kinyua & Co. Auctioneers where an auction was conducted and the property sold to MR. DILIPKUMAR SHAH at Kshs. 65,400,000/=. Those same facts were deposed to by Mr. MUKESH KUMAR, the 1<sup>st</sup> defendant's branch manager at Digo Road.

14. MR. DILIKUMAR NATHOO MEGHJI SHAH, the highest bidder at the auction swore to having seen an advertisement by the 2<sup>nd</sup> defendant in the newspapers and became interested in purchasing the property. On the material day he asserted having went to the offices of Kinyua & Co. Auctioneers and was ushered into the auction room at 11am. In the room he met Neila Raj, Mukesh Kumar, Peter Gichuki, Maina Chege, James Mwangi and Amalkumar P.M. Shah but no other bidder. After the auctioneer announced the reserve price, he asserted having offered his bid of Kshs. 65,400,000 which turned out as the highest bid and paid the 25% thereof being Kshs. 16,350,000/= and then executed the memorandum of sale. The deponent then reiterated that he is keen to pay the balance of the purchase price in time in accordance with the memorandum of sale then move in to reside in the same property and that to grant an injunction would be to visit upon him a substantial loss in the form of lost deposit paid and the opportunity to own the property lawfully purchased.

15. For record prayers, the application form injunction has been opposed by some six (6) Affidavits and having been certified urgent was argued orally.

16. The arguments by the applicant's counsel was admiralty brief. He stressed that his client was ready and keen to bid and buy the property but was misled by the auctioneer not to attend, there had been a denial to participate and buy just as there had been a denial to get the best price for all concerned hence Section 21 of the Auctioneers Act had been affronted.

17. For the defendant the arguments were that the registered owner of the suit property offered same as security to secure a debt, defaulted in repayments then approached the court for an injunction and was granted conditional orders which he failed to comply with hence the right to sell had accrued after previous suits also failed. The contents of the filed Affidavits in opposition were reiterated it being stressed that a valid sale was indeed conducted and concluded in favour of a disclosed purchaser. On the question of the exact time of the sale, counsel submitted that the sale was conducted at the place and time advertised and notified and not at three pm as alleged and that the applicant had failed to meet the threshold of grant of an injunction. To counsel, issuing an injunction would visit prejudice and hardship upon the 1<sup>st</sup> respondent and the purchaser who would be kept away from the recovery of its debt and investments respectively. Two decisions on when to stop a sale were then cited being *Equip Agencies Ltd vs I & M Bank Ltd [2019] eKLR* and *George Washington Omondi vs Guilders International Bank Ltd [2019] eKLR*.

17. In his closing submissions, Mr. Rutere, Counsel for the applicant contended and submitted that there had never been a requirement to prove availability of funds save for the bid money. On the possible prejudice, he contended that none at all would result if fresh auction was staged and held as the purchase would retain his right to participate and the bank would still get its money and any additional contractual interests. He asked the court to construe the limited number of people who attended the auction as very suspect.

18. Being an application for a temporary injunction pending the suit, the plaintiff applicant is bound to prove a prima facie case with prospects of success as the cornerstone consideration; likelihood of irreparable damages incapable of repair by an award of damages if the

injunction is not granted and when the court is in doubt then it weighs and establishes where the balance of convenience rests.

19. Here the cause of action pleaded by the defendant takes the character of the tort of deceit or representation. That to this court is an action that may as well be maintainable against the auctioneer but I doubt if it can be sustained against the 1<sup>st</sup> defendant on the facts pleaded so far. That to me presents a situation where there would be no *prima facie* case disclosed against the 1<sup>st</sup> defendant yet it is the party with the claim to right to sale pursuant to the statutory power of sale in the contract of charge.

20. In addition, the right to sell is contractual even if granted by statute. That contract is between the 1<sup>st</sup> defendant and a third party not party to this suit. It is trite that a third party including the court ought to not freely and slightly interfere with contractual rights and obligations unless he is a party thereto. None should benefit or be burdened with any obligations under a contract unless he is a party. The principle of privity of contract underscores the right of parties to negotiate freely and be bound with only what has been negotiated and concluded. On the same breath it forbids, generally a non-party from benefitting or being burdened with the terms of a contract to which he is not a party the Court of Appeal in *Agricultural Finance Corporation vs Lengitia Limited, (1985) KLR 765* held, *inter alia*, that: -

**“As general rule a contract affects only the parties to it and it cannot be enforced by or against a person not a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it.”**

21. As pleaded, I discern no *prima facie* case demonstrated by the plaintiff against the 1st defendant even at this interlocutory stage. In coming to that conclusion I am not saying that the plaintiff's case is bound to fail upon hearing. No. I am reminded not to make such determinative finding just now. It is enough that without additional pleadings and evidentiary material there is no sufficient substance, also called *prima facie* case, to merit grant of a temporary injunction.

22. The foregoing would be sufficient to dispose the matter it being trite that without a *prima facie* case no excuse can exist for grant of an injunction. However, this is matter I consider important to point out, that so far the complaint seems to be squarely directed at the auctioneer and the cause revealed is in tort. The remedy of the tort pleaded must remain in damages alone. Under section 26, Auctioneers Act, even though an auctioneer acts on behalf of a principal, the law permits the auctioneer to be pursued and held liable for his transgressions. I do find that the appropriate remedy should the suit succeed after trial would be damages and not an injunction. Where damages are adequate as a remedy, the Kenyan law dictate that no injunction should issue.

23. The ultimate conclusion is that application is bereft of merits and I order it dismissed with costs.

**Dated, signed and delivered by MS TEAMS this 27<sup>th</sup> day of November 2020**

**P J O Otieno**

**Judge**