

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMM/061/2020

(FORMERLY ELC/E210/2020)

AMOS KABOGO KURIA.....PLAINTIFF/APPLICANT

Versus

STEPHEN K. KANGETHE, T/A DALALI

AUCTIONEERS.....1STDEFENDANT/RESPONDENT

SBM BANK (K) LTD.....2NDDEFENDANT/RESPONDENT

RULING

Introduction

1. This ruling disposes the Plaintiff's/applicant's application dated 29th October 2020 seeking the following orders: -

a. *Spent.*

b. ***That** pending the inter partes hearing of this application, this honourable court do issue a temporary injunction restraining the defendant/Respondent by themselves or their employees, servants and or agents or otherwise assigns and or any person whatsoever acting on their behalf and or under their mandate and or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with the property known as L.R. No. 12608/43 (IR No. 120721) situate within the County of Nairobi.*

c. ***That** pending the hearing and determination of this suit, this honourable court do issue a temporary injunction restraining the defendant/Respondent by themselves or their employees, servants and/or agents or otherwise assigns and or any person whatsoever acting on their behalf and or under their mandate and or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with the property known as L.R. No. 12608/43 (I.R. No. 120721) situate within the County of Nairobi.*

d. ***That** this Honourable Court be pleased to grant any other orders it deems mete and just.*

e. ***That** costs of this application be provided for.*

Grounds relied upon

2. The application is grounded on the annexed affidavit of Mr. Amos Kabogo Kuria, the applicant herein, the annexures to the said affidavit and the grounds enumerated on the face of the application. The core ground is that the applicant purchased **L. R. No. 12608/43(I.R. No. 120721)**, Nairobi in a public auction on 21st July 2020 after emerging as the highest bidder. It is the applicant's case that upon paying of the requisite deposit of **Kshs. 8,750,000.00** he acquired an interest in the property.

3. He contends that the subject auction has never been declared illegal or revoked, and that, he entered into an agreement with the 1st Defendant/Respondent, the 2nd Defendant's agent, which agreement has never been revoked, repudiated, or varied in any way.

4. He maintains that despite his interest in the property, a fact known to the defendants, the defendants have advertised the property for auction on 13th November 2020. He pleads that unless this court intervenes, there is a likelihood that the defendants will dispose the property. Further, he states that the 2nd Defendant/Respondent has continued to receive funds from him the latest being Kshs. 2,000,000.00 paid as late as 22nd October 2020, and that it is unfair for the bank to accept payments and still auction the property.

5. In his supporting affidavit, he avers that his advocates wrote to the 2nd Defendant providing elaborate arrangements he had put in place to pay the balance of the price. Further, he depones that vide a letter dated 26th October 2020, his Advocates informed the bank details of his expected funds which would be applied to defray the balance of the purchase price.

6. He deposed that the advertisement of the property is marred by illegalities because it seeks to auction a property which had already been sold to him. Also, that the 2nd Defendant has continued to accept payments from him, hence they have no right to “have their cake and eat it.” He states that the defendants have not made any plans to refund the amount he had already paid.

7. The applicant avers that the irregular sale if allowed to proceed is tantamount to unjust enrichment on the part of the 2nd defendant because the bank will have received funds from him as well as the new purchaser in excess of the bank's claim. Additionally, he deposed that he stands to suffer immense prejudice if the auction proceeds, hence, it is in the interests of justice that the application be allowed.

The second Defendant's Response

8. M/s Martha Wanjiku the 2nd defendant's Debt Recovery Officer swore the Replying Affidavit dated 6th November 2020 in opposition to the application. She deposed that the application is incurably defective, incompetent, misconceived, has no merits, it is an abuse of court process and does not disclose any reasonable grounds to warrant the prayers sought as it is based on falsehood and misrepresentation of facts.

9. She deposed that the 2nd defendant as the chargee advertised the subject property for sale by public auction on the 21st July, 2020 in which the applicant emerged as the highest bidder at the fall of the hammer. Further, she deposed that prior to the auction, all the bidders, including the applicant were issued with the auction terms and conditions which the applicant signed signalling his agreement to the terms thereof. Further, she deposed that besides the bidding Terms and Conditions, the auction terms and conditions were advertised in a local daily which were: -

- a. *25% of the Purchase Price to be paid by the successful bidder at the fall of the hammer;*
- b. *The balance of 75% of the Purchase Price to be paid within 90 days from the date of the auction;*
- c. *Time is of essence;*
- d. *In default by the Purchaser paying the balance of the Purchase Price within 90 days, the Chargee shall forfeit the balance paid absolutely;*
- e. *In the event of a default, the Chargee, without notice to the Purchaser re-sale the Suit Property.*

10. M/s Wanjiku deposed that as the highest bidder, the applicant was issued with the Memorandum of Sale as the law requires which he signed and agreed to the terms which stipulated that the balance of the auction price would be paid within 90 days from the date of the execution of the Memorandum of Sale which was to lapse on 21st July, 2020.

11. She averred that the applicant paid the 25% deposit as per the terms of the auction but has failed to pay the balance of the auction price within the stipulated timelines. Further, she deposed that the Terms and Conditions of the auction together with the Memorandum of Sale formed a contract between the applicant and the 2nd defendant. She averred that a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the written contract.

12. Further, she deposed that parties are bound by the terms of their contract, they must respect the rights of each party in the contract and a party cannot seek unilaterally rewrite a contract nor can a court of law rewrite a contract between the parties.

13. She deposed that the applicant noting that he was running out of the 90 days period, wrote the letter dated 21st October, 2020 seeking a further 45 days to complete the purchase but the 2nd defendant rejected the request in writing and returned the bankers cheques valued at **Kshs. 2,000,000/-** to the applicant. She averred that the applicant has misinformed the court on the said sum of **Kshs. 2,000,000/=** because he is seeking equitable remedies, he approaches the court with clean hands.

14. Lastly, she deposed that the application does not satisfy the conditions set out in CASSMAN BROWN for granting a temporary injunction, and that the 2nd defendant is within its rights to proceed with the auction, and that the applicant does not deserve this court's discretion.

The applicant's advocates' submissions

15. Mr. Oweya, the applicant's counsel essentially reiterated the grounds on the face of the application and the supporting affidavit and argued that owing to the COVID 19 repercussions, the applicant could not meet the 90 days deadline. He argued that the applicant sought an extension of time from the 2nd defendant to clear the balance and he paid **Ksh. 2,000,000/=** which was accepted. He referred to the second Respondent's letter dated 23rd October 2020 and stated that the Bank had offered him an opportunity to pay after the expiry of the 90 days, and with this in mind, the applicant made arrangements to pay outside the contractual period.

16. He submitted that the Bank having indulged the applicant as aforesaid, it is estopped from enforcing the original agreement. It was his submission the applicant will pay within 45 days as opposed to the 90 days it will be paid if the auction proceeds, hence, the Bank will be prejudiced if it rejects the applicant's proposal. He urged the court to allow the application, even if it would be subject to conditions, including a Bank guarantee which the applicant was prepared to provide.

The Respondent's Advocates' submissions

17. Mr. Kazungu, the second Respondent's submitted that the applicant has not established a *prima facie* case. He argued that the parties signed a Memorandum of Sale agreeing to be bound by its terms. Further, he submitted that the advertisement stated the Conditions of Sale and all the bidders signed the conditions, and, one of the terms was that time was of essence, hence, the applicant ought to have cleared the price within **90** days.

18. Counsel argued that whereas the **90** days were to lapse on **23rd** October 2020, the applicant sought for extension on **22nd** October 2020 which the **2nd** defendant declined on **23rd** October 2020 and notified the applicant to collect his Bankers cheque of **Ksh. 2,000,000/=**. He submitted that the applicant is not being truthful by stating that the extension was granted, hence, he does not deserve an equitable remedy. He argued that a party cannot unilaterally alter the terms of a contract nor can a court rewrite a contract for the parties.

19. Mr. Kazungu submitted that the applicant has not demonstrated that he will suffer irreparable harm which cannot be compensated by way of damages. He argued that the **2nd** Respondent is a company of means and in the event of the suit succeeding, it can refund the money. Lastly, he argued that the applicant is not barred from participating in the auction. Lastly, he argued that the balance of convenience tilts in favour of the second Respondent.

Determination

20. The purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the *status quo* pending the determination of the parties' rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

21. The jurisdiction to grant injunctions is discretionary and very wide. However, this power does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights.

22. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so." In the celebrated case of *Giella v Cassman Brown and Co. Ltd*^[1] the court set out the principles for Interlocutory Injunctions. Curiously, despite the fact that this application would inevitably stand or fall on the principles laid down in the said case and reiterated in many judicial pronouncements, the applicant's counsel in his submissions did not address them. He only briefly mentioning them in his reply, while responding to the Respondent's counsel's submissions. The principles as laid down in the said case are: -

- a. The Plaintiff must establish that he has a **prima facie** case with high chances of success;
- b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;
- c. If the court is in doubt, it will decide on a balance of convenience.

23. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)*^[2] laid down three-part test of granting an injunction as follows: -

- a. Is there a serious issue to be tried?
- b. Will the applicant suffer irreparable harm if the injunction is not granted?
- c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

24. Locally, in *Mbuthia v Jimba Credit Corporation Ltd*^[3] Platt JA echoed the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid* ^[4] and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

25. Lord Hoffman in *Films Rover International Ltd v Cannon Film Sales Ltd*^[5] stated that in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). (Interestingly, this is a stated basis for requiring the plaintiff to provide an undertaking as to damages, in case the decision to grant the injunction should be wrong).

26. In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

27. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms - carries the lower risk of

injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

28. The *prima facie* case test represents the law in relation to the grant of interlocutory injunctions. A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases.

29. Also, I can profitably benefit from a passage in *Interlocutory Injunctions: Practical Considerations*^[6] thus: -

"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald v Canada (Attorney General)^[7]*"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."^[8] It is usually a brief examination of the facts and law.*

In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a stronger prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."

30. I now apply the principles discussed above to the instant case. It is common ground that the 2nd Respondent advertised the auction stating the applicable terms/conditions. There is no dispute that the applicant was the highest bidder. He signed the Memorandum of Sale thereby submitting to the terms and conditions of sale. Upon signing the said document, a binding contract with the 2nd defendant came into force. The applicant failed to pay the balance of the purchase price within the contractual period. The question whether or not he breached a valid agreement and the effect of the default will be a live issue at the main trial. The failure to pay and the import thereof will be weighed against the rights of the defendants and the obligations of the parties under the contract.

31. The applicant concedes that he did not pay the balance within the agreed period. He claims he sought and was granted an extension of time. However, this assertion is hotly disputed. The 2nd defendant states that it declined the request for extension of time. The question of which version is true on a balance of probabilities will be an issue for determination at the trial.

32. The applicant states that if granted 45 days, he will pay. The core issue here is whether the applicant breached the terms of the sale. This is a dispositive question either way. Where a buyer at an auction fails to pay the bid price within the agreed period, what are his rights. Closely tied to this issue is the question whether the 2nd defendant is under an obligation to extend the contractual period. A reading of the plaint shows that the claim is not anchored on specific performance of a contract. Instead it seeks a declaration that the applicant is the legal proprietor of the property. Whether such a declaration can issue will be a matter for trial.

33. The other issue is whether the 2nd defendant's statutory power of sale has arisen. Put differently, did the 2nd defendant legally advertise the property. Is the intended sale lawful? Guidance can be obtained in *Woodcraft Industries Ltd & 3 others v EAST African Building Society*^[9] which held that:-

"To give an injunction to restrain a party from exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce contractual rights. It would be to render securities useless."

34. The foregoing questions are weighty and highly dispositive either way. Viewed from the lens of what constitutes a *prima facie* case, I find no difficulty in concluding that the applicant has not demonstrated a *prima facie* case. A reading of the said issues show that the applicant has not established that his case has a likelihood of success.

35. The other test is whether the applicant has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England*^[10] is instructive on what constitutes irreparable harm. It reads: -

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

36. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.^[11] Robert Sharpe, in *"Injunctions and Specific Performance,"*^[12] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case." In my view, the applicant has not established that if the sale proceeds, he cannot be adequately compensated by way of damages. In fact, the contrary is true. In the event of the auction proceeding, the applicant's loss (if any) can be quantified into monetary terms. The 2nd defendant can refund the deposit paid. In

my view, the facts of this case are crystal clear that the applicant has failed to demonstrate irreparable harm.

37. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.^[13] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.^[14]

38. Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

39. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a *prima facie* case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. It is my conclusion that the balance of convenience is in favour of refusing the injunction.

40. Lastly, an injunction is a discretionary remedy. As was held in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*,^[15] *"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.* A reading of the application shows that the applicant was not candid in his disclosure. He deposed that his request for extension of time was granted, yet the contrary is the correct position.

41. Lastly, as was held in *Njenga v Njenga*^[16] *"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."* Flowing from my analysis of the facts and the law discussed above and the conclusions arrived at, it is my finding that the applicant's application is unmerited. The applicant has failed to established the tests for granting the injunction sought. Accordingly, I dismiss the applicant's Notice of Motion dated 29th October 2020 with no orders as to costs.

Orders accordingly

Signed and Dated at **Nairobi** this **13th** day of **November** 2020

John M. Mativo

Judge

[1] {1973} E A 358.

[2] {1994} 1 S.C.R. 311.

[3] {1988} KLR 1

[4] {1975} AC 396 at 407.

[5] {1987} 1WLR 670 at 680-681.

[6] Steven Mason & McCathy Tetraut , available at www.mccarthy.ca.

[7] Supra

[8] Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[9] HCCC No. 602 of 2000

[10]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[11] Supra note 3.

[12] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aurora, Ont: Canada Law Book, 1992), P 2-27

[13] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[14] Ibid

[15] {1990} K.L.R 557

[16]{1991} KLR 401