REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 4 OF 2016

CAMPUS HOSTELS LIMITED……………………PLAINTIFF

VERSUS

1. HOUSING FINANCE COMPANY LTD

2. TAIFA AUCTIONEERS..................................DEFENDANTS

R U L I N G

"Once an application for injunction within a suit has been heard and determined under the principles as laid down in GIELLA –VS- CASMAN BROWN a similar application cannot be brought…" Uhuru Highway Developers Ltd –vs-Central Bank of Kenya and 2 Others [1996] Eklr".

1. Before me for determination is the Notice of Motion dated 21/10/2016 which has been spent as for as prayers 1, 2 & 4 and have the only prayer meriting determination is prayer 3 and the consequential prayer on costs.

Prayer 3 is couched as follows:-

THAT pending hearing and determination of this application and the Notice of Motion application dated 26/9/2016 the defendants by themselves or through their agents or servants be restrained by way of an injunction from selling by public auction on 27/10/2016 or otherwise, disposing, selling transferring, alienating, charging or in any other way dealing with the parcel of land known as MOMBASA BLOCK XVII/1585 pending hearing and determination of the applications and or the suit.

2. As is evident on its face, the application is premised and justified on the pendency of yet another application dated 26/9/2016 which in the main sought, stay of execution of the orders of the court issued on 5/9/2016 allowing the sale by auction of all that parcel of land known as MOMBASA/BLOCK XVII/1585. The application invoked the provisions of Order 42. The application now under consideration was supported by the affidavit of one MOSES WAWERU NDUNGU whose gist is that after the ruling of 5/9/2016, the Respondent had advertised the suit property for sale to be conducted on the 27/10/2016 yet there is pending the application for stay pending appeal which stand to be rendered nugatory. The deponent then faults the Respondents action of staging an auction during the pendency of the application for stay pending appeal and pleads that the proposed auction be stopped by an injunction pending the determination of that application for stay.

3. The application is opposed by the defendants who filed Grounds of opposition dated 25/10/2016. In

the grounds the application is challenged for being res judicata; that the court lacks jurisdiction to entertain the application and grant the orders and that the application fails to meet the threshold of grant of injunctive relief and that it is an abuse of the court process.

Analysis and determination

4. The law cited to found the application notwithstanding, the prayers I am to consider and determine grating or declining is one for injunction and must therefore be seen to be made under the provisions of order 4 Rules 1 & 2 of the Civil Procedure Rules which as of necessity invoke the principles enunciated in the case of **Giela vs Casman Brown**. Those principles are now clear and need no elaboration or repetition. They are that an applicant must demonstrate a prima facie case with probability of success and further that he is exposed to suffer an irreparable injury if the injunction is not granted. If however, the court runs into doubt after considering the two considerations then it applies the balance of inconvenience.

5. Not to be forgotten is the fact that the court has hard a chance to consider and determine an application seeking injunction pending determination of the suit and indeed made a determination dated 5/9/2016. In that determination the court rendered itself as follows:-

> **" A prima facie case is a case that may not necessarily**
>
> **succeed but that which is arguable. Put in the context of the matter before court, I find that the debt is admitted, extension of time has been sought and granted atleast twice and requisite notices have been shown to have been served and acknowledged. In those circumstances I have posed the question as to what would be the dispute between the parties regarding infringement of the plaintiffs right that deserve protection by an order of injunction….**
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> **What is born out is that the plaintiffs owes a debt, it says it is due for payment and for that purpose it was selling another asset to offset the debt. Infact it is repeated twice in the papers filed that by end of January 2016, the debt would have been paid in full. If that was the purpose of coming to court, I am in no doubt that time was given to the plaintiff when the court on 14/1/2016 granted to the plaintiff an *exparte* interim orders which cushioned it to the desired date, there is therefore as of today no dispute to disclose a prima facie case".**

6. It is the view of this court that the prerequisites set in the case of **Giela -vs- Casman Brown** are cumulative and not disjunctive. One need to prove both prima facie case as well as irreparable loss. Not just one which suffice. Both must be proved and therefore proof of only one is not good enough to avail to the applicant an order of temporary injunction.

7. Since the court determination of 5/9/2016, no additional material have been availed to change the facts as they stood them. It therefore follows that no prima facie case has been availed and proved to justify grant of a temporary injunction whether pending the determination or the suit or the pending an order strangely coached as pending the determination of an application for stay.

8. More crucial however is the now trite position in law that litigation must come to an end and that once a court determines an issue, it is not open to it to revisit the same issue unless by an application for review and only when the set thresholds have been met. What I am asked for in this application is typically what one would called the court being asked to sit on appeal of its own decision.

9. In my opinion, the counsel would have done a lot of good to his client and to the court had it sought to argue the application for a stay pending appeal. To argue an application for injunction pending yet another application in the suit when a similar one has been argued and disallowed, to this court, flies on the face of the provisions of section 7 Civil Procedure Act. I am not in doubt that it may as well be a clasicus of abuse of the court process.

10. The application dated 21/10/2016 is to this court evidently misconceived, and deserves only one fate,

dismissal with costs. I can only give to its the predetermined fate. I dismiss it with costs to the Respondents.

Dated and delivered at Mombasa this **26th** day of **October 2016**.

HON. P.J.O. OTIENO

JUDGE