



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO.18 OF 2009**

SUISSE LIMITED.....1<sup>ST</sup> PLAINTIFF

MONDO PROPERTIES LIMITED.....2<sup>ND</sup> PLAINTIFF

- VERSUS -

HABIB BANK AG ZURICH.....DEFENDANT

**RULING**

1. The Notice of Motion dated 6<sup>th</sup> March, 2015 and filed herein on 9<sup>th</sup> March, 2015 seeks orders that:
  - a. The Honourable Court be pleased to certify this application as extremely urgent and that it be heard on priority basis; (spent).
  - b. That pending the *inter partes* hearing and determination of this application, a temporary injunction do issue restraining the Defendant by itself or its agents or persons claiming under or through it, from interfering with the 2<sup>nd</sup> Plaintiff's quiet possession of all that property known as **LR No. 1870/11/208 (IR 62259) Nairobi** (hereinafter referred to as the suit property).
  - c. That the Statutory Notification of Sale herein dated 27<sup>th</sup> August, 2014 from the Defendant's agents be declared invalid
  - d. The public auction and/ or such other disposal of all that property known as **LR No. 1870/11/208 (IR 62259) Nairobi** based on the aforesaid Statutory Notification of Sale be set aside for being void *ab initio*; and that
  - e. Costs of this application be provided for.
2. The application is premised on the grounds that the Defendant/Respondent through its agents, Kenya Shield Auctioneers, issued to the 2<sup>nd</sup> Plaintiff/Applicant a purported Statutory Notice of Sale dated 27<sup>th</sup> August, 2014 in respect of the suit property for the recovery of a sum of Kshs 495,421, 581/52. It is the contention of the 2<sup>nd</sup> Plaintiff/Applicant that that figure is not only unconscionable but is also so exorbitant, and therefore not an accurate reflection of the 2<sup>nd</sup> Plaintiff/Applicant's debt to the Defendant/Respondent.
3. The 2<sup>nd</sup> Plaintiff/Applicant further pointed out that on the 23<sup>rd</sup> October, 2014 he had moved the Court for a temporary injunction to stop the Defendant/Respondent from interfering with his possession of the suit property and that although in its Ruling delivered on 28<sup>th</sup> October, 2014 the Court did not grant injunction as sought, it found as a fact that the Statutory Notice of Sale was invalid for the reason that it was addressed to a non-existing entity.

4. The Applicant now contends that it is on the verge of losing possession of property of very high value to an irregular process. He therefore seeks that the purported sale be declared void *ab initio* and be set aside. The irregularities cited are:-

- a. **That the Defendant never served a Notice of Sale in the prescribed form as mandatorily required by Section 96 of the Land Act, 2012.**
- b. **That the purported Notification of Sale contains a manifestly excessive and unjustifiable figure of Kshs 495,421,581/52 which figure contradicts an earlier Notification of Sale which, as at 23<sup>rd</sup> October, 2008 had indicated the outstanding debt to be Kshs 41,511,835/=.**
- c. **That the Notice was issued against the 2<sup>nd</sup> Plaintiff/Applicant who had infact ceased to exist following its dissolution and deregistration by the Registrar of Companies.**

5. The foregoing grounds are supported by the affidavit sworn by **Ngige Mondo** on the 6<sup>th</sup> March, 2015 as well as the Written Submissions filed on behalf of the 2<sup>nd</sup> Plaintiff/Applicant by M/s Mohamed Muigai Advocates on 28<sup>th</sup> April, 2015.

6. The Defendant/Respondent opposed the application contending that the same is unmerited, misplaced and a gross abuse of the court process and therefore should not be entertained. In the Replying Affidavit sworn by **Andrew G. Mungai**, it has been deponed that the application merely seeks to re-visit matters that have already been conclusively determined by the Court. It was further contended by the Defendant that the 2<sup>nd</sup> Plaintiff/Applicant has not been keen on prosecuting his case, which he filed way back in 2009 and which has never been listed for hearing, yet he has been filing numerous applications over time since the commencement of this suit. It was thus the Defendant/Respondent's case that the instant application offends the basic tenets of litigation, namely, that once a Court has made a determination on an issue, a party should not be allowed to re-litigate the very same issue in a different application. He therefore urged that this application be struck out for being an abuse of the court process.

7. It was the Defendant's further submission that the Application has, in any case, been overtaken by events, as the property in question has already been sold and ownership/possession transferred to an innocent 3<sup>rd</sup> party for value. The Defendant questioned, and rightly so in my view, why the 2<sup>nd</sup> Plaintiff/Application took six months from 28<sup>th</sup> October 2014, when the auction took place, to file the instant application, given the sense of urgency and importance expressed by him in connection with the matter.

8. Be that as it may, the Court has considered the grounds set out in the Notice of Motion dated 6<sup>th</sup> March, 2015, the affidavits filed in support and opposition thereto as well as the submissions made on behalf of the parties, including the authorities cited. It is not in dispute that the Plaintiffs filed a Complaint along with a Chamber Application on 13<sup>th</sup> January, 2009 seeking an interim injunction restraining the Defendant from selling the suit property. The property had been charged to the Defendant to secure banking facilities granted to the Plaintiffs, which are said to be sister companies, to the tune of Kshs. 13 million. That application was heard and determined on 9<sup>th</sup> July, 2010, whereupon the Plaintiffs were ordered to pay the sum of Ksh. 25,863,438/93, which they admitted to be due at that point in time. The said amount was to be paid within 30 days from the date of the order, failing which the injunction order would lapse.

9. A perusal of the record shows that the Plaintiffs did not pay the amount aforesaid, but proceeded to file 3 other applications in quick succession, seeking more or less the same relief, notwithstanding the order of Njagi, J of 20<sup>th</sup> December, 2011 to the effect that the Court would not entertain any further applications of a similar nature. Following the court's dismissal of the Notice of Motion dated 23<sup>rd</sup> October 2014, the sale by public auction that had been scheduled for 28<sup>th</sup> October, 2014 was proceeded with and the suit property accordingly disposed of.

10. The 2<sup>nd</sup> Plaintiff/Applicant now contends that that sale was held pursuant to an invalid Statutory Notification of Sale, a Notification that did not comply with the mandatory requirements of the Land Act,

No. 6 of 2012 in that:

- a. **The purported Notification was not served on the 2<sup>nd</sup> Plaintiff, the proprietor of the suit property.**
- b. **That the purported Notification did not indicate the correct outstanding debt as required by law.**

11. A careful perusal of the record reveals that these issues were raised in the Applicant's application dated 23<sup>rd</sup> October, 2014 and that the court had occasion to give them due consideration before making its determination on the 28<sup>th</sup> October 2014. This is evident at Paragraphs 12 and 13 of the Court's Ruling dated 28<sup>th</sup> October 2014 thus:

***“Upon hearing the oral submissions by Counsel for the Plaintiffs and Defendant...the Court found that the issue in contention appeared to be whether or not the Defendant could purport to exercise its Statutory Power of Sale of the property owned by Mondo Properties Limited...a party that was non-existent...”***

12. The Court thus had occasion to dispose of the issue in the following terms:

***“...the Court agrees with the Defendant's submission that the debt the Plaintiffs owed it was not extinguished as the debt was secured by a charge. In the absence of any evidence by the Plaintiffs to the contrary the said property did not therefore automatically escheat to the Government. From the facts presented before this Court, the subject property had a finder and as the chargee herein the Defendant had a right to lay a claim on it. Suisse Limited admitted that it was the principal debtor while Mondo Properties Limited was the guarantor and could not escape its liability to pay the monies due to the Defendant on the basis that the said monies were guaranteed by Mondo Properties Limited, which was now non-existent.”*** (at paragraphs 22 and 23)

13. It is noted that with regard to the validity of the Notification of Sale, the 2<sup>nd</sup> Plaintiff/Applicant's argument is that the chargee's obligations under sections 90 and 96 of the Land Act, No. 6 of 2012 had not been discharged before the sale of the suit property on 28<sup>th</sup> October 2014, since the Notification of Sale was served on a non-existent entity. It was further submitted on behalf of the 2<sup>nd</sup> Plaintiff/Applicant that in its Ruling of 28<sup>th</sup> October 2014, the Court found as a fact that that Notification of Sale was invalid. However, a look at paragraphs 25 and 27 of the Court's Ruling shows that no final determination was made on the point on account of the fact that Mondo Properties had been de-registered and had not been restored to the Register of Companies, though an application to that effect was pending. This position obtained until 17<sup>th</sup> November 2014 when the order of restoration was ultimately given. The court's Ruling on this aspect reads:

***“...the court finds that the question of whether or not the Defendant's Statutory Notice dated 10<sup>th</sup> January 2008 and the Notifications of Sale by M/s Garam Auctioneers dates 27<sup>th</sup> October 2008 and M/s Kenya Shield Auctioneers dated 27<sup>th</sup> August 2014 were valid, to have been a pertinent issue. This is because the said notices were issued way after Mondo Properties Limited had been de-registered. The notices were invalid as they could not be addressed to Mondo Properties Limited which was non-existent and for all purposes and intent, dead for a long period... As Mondo Properties Limited was not present before the court to argue that the notices that were sent to it were invalid and Suisse Limited had no locus standi to argue the said issue on its behalf, the court cannot grant an injunction on this basis...”*** (emphasis supplied)

Clearly, no final decision was made by the court on the issue of invalidity of the Notification of Sale by M/s Kenya Shield Auctioneers dated 27<sup>th</sup> August 2014. If indeed that was the case, then Prayer No. 3 of the Plaintiff's Notice of Motion would be superfluous, thus augmenting the Defendant/Respondent's argument that the application is indeed an abuse of the process of the court.

14. From the foregoing, it is evident that the 2<sup>nd</sup> Plaintiff/Applicant has come back to Court seeking more or less the same reliefs that it failed to obtain via the Application of 23<sup>rd</sup> October, 2014. It is noteworthy that while the 2<sup>nd</sup> Plaintiff/Applicant argued that the Company was non-existent for purposes of the realization by the Defendant of the security for the loan it granted, it filed, sustained and argued all the various applications filed herein that defect notwithstanding, and which defect was not remedied until 17<sup>th</sup> November 2014 (per 2<sup>nd</sup> Plaintiff/Applicant's Annex NM-7). More importantly, the property having been disposed of by way of sale at public auction, the best way forward is for the 2<sup>nd</sup> Plaintiff/Applicant to consider prosecuting his substantive suit for a final determination of the issues that still remain in contest, granted the protection afforded by section 99 of the Land Act, 2012. I would therefore agree with the Defendant/Respondent that in these circumstances, the instant application is an abuse of the court process and is for dismissal with costs.

It is so ordered.

**SIGNED, DATED and DELIVERED at NAIROBI this 25<sup>th</sup> DAY OF SEPTEMBER, 2015**

**OLGA A. SEWE**

**JUDGE**