



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 136 OF 2015

ABDIRAHMAN SHEIKH MOHAMED T/A.....PLAINTIFF

TOWHID SHOPPING COMPLEX

VERSUS

THIONG'O KIUNGA.....1ST DEFENDANT

PATRICK GITHINJI MWANGI T/A

RUNYEKI AND KIRITI.....2ND DEFENDANT

KENYA COMMERCIAL BANK.....3RD DEFENDANT

WATTS AUCTIONS.....4TH DEFENDANT

RULING:

The matter coming up for determination is the Plaintiff/Applicant's Notice of Motion dated **16th February 2015**, brought under **Section 1A, 3A and 63 of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 12 Rule 7, Order 40 Rule 22, Order 22 Rule (1) & Order 51 of the Civil Procedure Rules, 2010** and all other enabling provisions of the law. The applicant has sought for the following Orders:-

a. Spent

b. Spent

c. That a temporary injunction Orders to issue to restrain the 1st and 4th Respondents /Defendants from proceeding or continuing with the sale by way of Public Auction or in any other way interfering with the property known as LR No. 36/VII/500 (Original No.36/VII/47/7) in terms of the advertisement contained in the Standard Newspaper dated 23rd January 2015, pending the hearing and determination of the application.

d. That injunction orders to issue restraining the 1st, 2nd, 3rd and 4th Respondents/ Defendants by themselves, their agents and servants and/or whomsoever acting on their behalf or upon their instructions from selling by public auction or any other way alienating, evicting and/or interfering with the applicants/Plaintiffs quiet possession of the suit premises more specifically

known as LR No.36/VII/500 or any part thereof situated in Eastleigh within Nairobi area pending interpartes hearing of this application.

e. That the cost of this application be provided for

f. That the Honourable Court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.

The application is supported by the grounds stated on the face of the application and also on the supporting affidavit of **Abdirahiman Sheikh Mohammed**. These grounds are;-

i. That the applicant is the holder of a leasehold interest in the suit property situate in Eastleigh more particularly known a LR No.36/VII/500.

ii. Further that the Plaintiff/Applicant has made a capital Investment of Kshs.70,000,000/= and has developed a commercial shopping mall with other amenities and carries on business from the said premises with the understanding that the applicant will operate the premises for 15 years out of which he is remaining with 7 years.

iii. That the applicant took possession of the suit premises soon after entering into a lease agreement with the 1st Respondent and has been in occupation of the premises for a period of 8 years and there is a remainder of 7 more years of the term of the lease .

iv. That the Applicant /Plaintiff has been paying rent every month up to date and the 2nd Respondent/ Defendant has been accepting payments made by the Applicant /Plaintiff over the suit premises without disclosing between themselves any decision to sell the property.

v. That the Applicant/Plaintiff was made aware of the Public Auction over the suit property vide a Newspaper advertisement dated 23rd January 2015.

vi. That the sale is scheduled to take place on the 26th February 2015.

vii. That it is not a sale by the Chargee in exercise of statutory power of sale, but is allegedly by one of the owners of the premises.

viii. That the Applicant/Plaintiff was not notified of the impending sale although the Respondents are aware that the Applicant has a Leasehold interest over the suit property and has invested Kshs.70, 000,000/= in the development of the suit premises and has contracted a Commercial Premises with amenities and carries on business on the Suit property and will suffer irreparable damage and loss if the orders are not granted.

ix. That unless the Application is granted the 4th Respondents/ Defendants will proceed to sell the property by way of Public Auction contrary to the rights of the Applicant.

x. That the Applicant/Plaintiff is apprehensive that unless restrained by this Honourable Court the sale of the property will result in the eviction of the Applicant/Plaintiff from the suit property by the new proprietor resulting in irreparable loss and damages to the Applicant's /Plaintiff's investment.

On his supporting Affidavit, **Abdirahman Sheikh Mohamed**, the applicant herein averred that he entered into an agreement with the 2nd Respondent /Defendant for **LR No. 36/VII/500**, situated at Eastleigh as per the letter of offer marked **ASMI**. It was his contention that he took over possession and invested heavily in the development of the suit property by constructing commercial premises worth **70,000,000/=** as evidenced by **ASM3**. However on **23rd January 2015**, he saw an advertisement in the Standard Newspaper taken out by the 4th Respondent on an impending auction to sell the property at the

behest of the 1st Respondent as evidence by **ASM5**. It was therefore his contention that unless the application is granted, the Respondents threaten to sell the property by way of public auction which would cause him irreparable loss and damage. Further that the 2nd Respondent/Defendant has been accepting payments of rent made by him over the suit property without disclosing the existence of a dispute between the owners of the property or decision of an impounding sale. He also contended that this is not a sale, by the chargee exercising its statutory power of sale and granting interim injunction will not prejudice the Defendants. He further contended that he will suffer irreparable loss and damage if the sale by public auction proceeds and a new owner takes over possession of the suit property in clear disregard of his Leasehold interests.

The application is opposed by the Defendants; **Thiongo Kiunga** the 1st Defendant /Respondent swore an affidavit on his behalf and on behalf of 4th defendant. He averred that the property herein is known as **LR No.36/VII/500**, which is owned by five people namely **Mwangi Kimanga Githua, Maina Maranya, Gichuhi Macharia and Thiong'o Kiunga** (himself) as per annexure **TKI**, which is a copy of the indenture.

He further averred that he is a stranger to the purported Lease and he has not been receiving any share of rent proceeds allegedly paid by the Plaintiffs. It was his contention that he filed **HCCC 722 of 2010 (OS)** with the view of having the **title** which was being held by Kenya Commercial Bank, discharged so that he could proceed and sell his **1/5 share** . Further that the Court in its Judgement of **26th January 2012**, ordered the Bank to discharge the title and that the property be sold by public auction and the sale proceeds be shared equally between the parties as per **annexture TK2** . He therefore deposed that it was on the basis of this Judgement that the Court appointed **Watts Auctions**, who proceeded to advertise the property for sale by public auction scheduled to be held on **26th February 2015**. It was very clear from the advertisement that the auctioneers had been instructed by the High Court, pursuant to the Order made in **HCCC No.722 of 2010 (OS)** . The Deponent further deposed that if the applicant was not contended, he should have challenged the same within the same proceedings in which the Order was issued but not file a fresh suit.

It was further contended that the applicant had not disclosed to this court that, it is the court that had ordered that the property be sold by public auction but the Plaintiff made it appear like the Defendants were selling property by public auction and thereby misled the court.

He also contended that the prayers sought are **re-judicata** as the said applicant was a party to an application which sought to set aside the judgement of **26th January 2012** but the Court dismissed the application on **19th December 2014** as per annexures **TK3** . The Deponent stated that it was his belief that this suit and the application is collusion between the Plaintiff and 2nd Defendant to re-litigate an issue which has been finally determined by the Court.

The **1st & 4th** Defendants raised a **preliminary objection**, and asked the court to strike out the suit in limine for being an abuse of the court process on grounds that, it was the court that ordered the property **LR No. 36/VII/500**, to be sold by public auction and the proceeds shared equally among the five owners and the Plaintiff should have challenged the said orders either in the same proceedings in which the orders were issued or by an appeal, but not in filing a fresh suit. It was also alleged that the suit is a total abuse of the Court process.

The applicant filed grounds of opposition to the preliminary objection and averred that this matter is not **res-judicata** as the Plaintiff was not party to the **HCCC No. 722 of 2010** . Further at **HCCC No. 722 of 2010**, was a dispute on ownership and claim of redemption of property against Kenya Commercial Bank and the Plaintiff was not a party to the dispute. He also contended that this suit is a separate cause of action on leasehold interest and not dispute on ownership. He further contended that the preliminary objection does not raise any point of law, is defective, and an abuse of the Court process and the same should be dismissed with costs.

The applicant also filed a further affidavit in which he averred that he should be given the first right of

refusal to purchase the suit property and that no party would suffer any harm if the orders are granted. However, if he is denied the opportunity to purchase and the same is sold by public auction, he would be prejudiced having invested in the development of the property into a modern shopping mall on the understanding that he would operate the shopping premises for 15 years in order to recoup his investment and thereafter handover to the owners.

The Law Firm of **C.N Kihara & Co. Advocates** entered appearance for 2nd Defendant, **Runyeki and Kiriti** but did not file any Replying Affidavit.

The Law Firm of **Kale Maina & Bundotich Co. Advocates** entered appearance for 3rd Defendant, **Kenya Commercial Bank** but also did not file any Replying Affidavit. However, by a consent filed in Court on **7th April 2015**, and signed by the Advocates for the Plaintiff and for the 3rd Defendant, the Plaintiff herein withdrew his claim against the 3rd Defendant with no orders as to costs and therefore 3rd Defendant is not a party to this suit.

On **11th March 2015**, this Court directed that both the preliminary objection and the instant Notice of Motion be canvassed together by way of written submissions.

The Law Firm of **Garane & Associates** for the Plaintiff filed their written submissions on **1st July 2015**, and attached one authority thereto:- **ELC No.12 of 2015**, filed at Embu High Court ; **Michael Mugo Ileri Vs Nelson Nthiga Ikou & Another** which I have carefully read and considered.

The Law Firm of **Muriu, Mungai & Co. Advocates** filed submissions on behalf of 1st and 4th Defendants on **1st July 2015**. They did not attach any authority but made reference to **HCCC.No 722 of 2010**.

The Court has now carefully considered the pleadings herein, the relevant laws, the written submissions, and the quoted authority. The court has also considered the Judgement and Ruling in **HCCC No.722 of 2010**.

There is no doubt that the suit property herein **LR No.36/VII/500** is registered in the names of five persons being **Mwangi Kimanga,Thiongo Kiunga,Maina Marahya, Mwangi Githure** and **Gichuhi Macharia** as per the Certificate of Indenture **TK 1** issued on **24th day of October 1973**.

There is also no doubt that the 1st Defendant herein **Thiongo Kiunga** had filed a suit against Kenya Commercial Bank, being HCCC No.722 of 2010 (OS) being a redemption action. The Plaintiff in **HCCC.No 722 of 2010** (now 1st Defendant) had urged the Court to compel the Defendant therein (Kenya Commercial Bank), to exercise a conveyance of a mortgage over the suit property which is registered into the name of 1st Defendant and **four** other persons. The Court heard the matter and in a Judgement delivered on **26th January 2102**, Mutava J, directed that the Defendant (KCB) do execute and deposit to the court the conveyance and title documents over the suit property; Further that the property to be subdivided among the co-owners and individual titles issued for the sub-divided portions . It was also the court's finding that if the property was incapable of partition, or the partition would adversely affect the proper use of the land, the Deputy Registrar of this Court was to arrange for the property to be valued and sold by public auction and the proceeds thereof subdivided equally to all co owners including the Plaintiff (1st Defendant herein).

It is also evident that on **1st July 2014**, the other co-owners of the suit property filed a Notice of Motion seeking to set aside and/or vary, review or alter the judgement of the court dated **26th January 2012**. However, on **19th December 2014**, **Ogola J**, dismissed the said application with costs.

The Judgement of the Court delivered on **26th January 2012** having not been set aside, reviewed or varied is therefore valid and binding in regard to the suit property **LR No. 36/VII/500**. There is no evidence to show that the said Judgement has been appealed against or stayed. It is therefore in execution of the said

Judgement that the Deputy Registrar of Commercial Division authorized *M/s Watts Auctions* to advertise the suit property for sale through public auction. The said advertisement appeared in the Standard Newspaper of *23rd January, 2015* .

Subsequently, the applicant filed this instant Notice of Motion and sought to stay the said sale by way of public auction pending the hearing and determination of the said application. The applicant claimed to hold a leasehold interest. At the *ex parte* stage, the Court granted Interim Orders which have been extended severally. The applicant has now sought to have the said orders confirmed. The said prayers are vehemently opposed by the 1st and 4th Defendants.

There is no doubt that on *16th February 2006*, *Runyeki & Kiriti* (3rd Defendant) did offer Towhid Shopping Complex, leasehold for the suit plot *No.36/VII/500*, Eastleigh. In the said letter of offer, *Runyeki & Kiriti* are described as Landlord and Towhid Shopping Complex as the Tenant. The terms of the lease was 15 years with commencement date being *1st May 2006*. The monthly rent was given as *Kshs.250,000/=* and the purpose of the premises was shopping complex.

In *clause No.9* , it was stated that the Landlord ,may at its sole discretion before execution of the lease withdraw the offer without Notice. Though Supplemental Deed dated 9th October 2006 was attached to the Supporting Affidavit, the *formal lease* signed by both parties was not attached. From the Supplemental Deed, one can discern that *Runyeki & Kiriti* were the lessor's agent. It is therefore evident that the said *Runyeki & Kiriti* were not the registered proprietors of the suit property.

It is also very clear that the High Court did adjudicate on the suit property and ordered the same to be partitioned or in alternative the same to be sold by public auction. The said order was binding on the owners of the suit property.

Runyeki & Kiriti were agents of the owners and the lease agreement that they entered with the applicant herein cannot supersede a court order. The application for setting aside the said judgement was dismissed and there is no evidence of appeal against the said Judgement. As I stated earlier that Judgement is binding.

This Court found that the Judgement of the Court dated *26th January 2012*, is binding, then it is evident that the advertisement appearing in the Standard newspaper of *23rd January 2015*, is in execution of that Judgement. This Court being of concurrent jurisdiction or equal status as the Court that issued the orders that are now being executed cannot vary, set aside, and or injunct execution of the said order.

If the Applicant herein was dissatisfied with the judgement of the court, in *HCCC No. 722 of 2010* , the best recourse was to seek a review in the said court but not filing a fresh suit .By asking this Court to issue an injunction against the intended sale by public auction , the applicant is asking this court to vary the order of a court of equal status and/or (current jurisdiction) and that is not acceptable in law. This Court is not an *appeal court* and cannot vary or injunct the orders issued by the High Court in *HCCC No.722 of 2010*.

The Court has directed that the preliminary objection and the main Notice of Motion be canvassed together. The 1st and 4th Defendants averred that the suit herein is an abuse of the Court process since the public auction was being carried out in execution of a Court Order. Does the Respondents' objection qualifies as a preliminary objection as stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696?*, where the Court held that;-

“A preliminary objection raises pure points of law which if argued on the assumption that all the facts pleaded are correct, and it cannot be raised if any facts have to be ascertained or what is sought is the exercise of judicial discretion”.

Having considered the points raise by the 1st and 4th Defendants, the Court has to ascertain them by

having to consider the proceedings and Judgement in **HCCC No. 722/2010**. The issues raised by the 1st and 4th Defendants are not pure points of law which can dispose off the matter without having to resort to ascertaining of the facts from elsewhere apart from looking at the pleadings alone. (See the case of **Quick Enterprises Ltd Vs. Kenya Railways Corporation , Kisumu High Court Civil Case No.22 of 1999.**) This Court therefore comes to the conclusion that the preliminary objection raised by the 1st and 4th Defendants is not merited as it does not raise pure points of law. The same is dismissed.

However, on the main Notice of Motion dated 16th February ,2015 , the Court finds that the applicant was not able to meet the threshold set out in the case of **Giella Vs Cassman Brown and Co .Ltd (1973) EA 358** for grant of injunction . The principles set out in the above quoted case are:-

a. That Applicant has a prima facie case with probability of success.

b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c. When the court is in doubt, to decide the case on a balance of convenience.

On the first principle of whether the applicant has established that he has a prima facie case with probability of success. The Court finds that the public auction in issue was being carried out in execution of a valid court Judgement which Judgement has not been set aside. The applicant should have moved the court that issued the said judgement instead of filing a fresh suit.

On the second principle of whether the applicant will suffer irreparable loss and damage which cannot be compensated by an award of damages. This Court finds that the applicant's development can be quantified and he then would be compensated by an award of damages if he succeeds at the main trial. See the case of **Wairimu Mureithi Vs City Council of Nairobi Civil Appeal No.5 of 1979 EA 33.**

“However, strong the Plaintiff's case appear to be, at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay”.

On the 3rd principle of is the Court is in doubt to decide on a balance of convenience ,this Court finds that it has no doubt that there exists a judgement in favour of 1st Defendant in **HCCC .No.722 of 2010** which Judgement has not yet been varied , set aside and/or reviewed . Even if the Court was in doubt, the balance of convenience would tilt in favour of a 1st Defendant who is a Judgment holder in **HCCC No. 7222/2010**. The Court ordered that the property in issue to be sold by public auction. The Plaintiff /applicant who is a tenant in the said premises can participate in the said public auction where he would have an opportunity to purchase the said property.

Having now carefully considered the Notice of Motion dated **16th February 2015**, by the Plaintiff/Applicant herein, the Court finds it not merited and the same is accordingly dismissed with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered this **30th** day of **October, 2015**.

L.GACHERU

JUDGE

30/10/2015

In the presence of:

Mr Hassan for the Plaintiff/Applicant

None appearance for the Defendants/Respondents

Court:

Ruling Read in open Court.

L.GACHERU

JUDGE