



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CASE NO. 537 OF 2014

COMMERCIAL INTERIOR LIMITED.....1ST PLAINTIFF/APPLICANT

FREDRICK WAWERU KARANJA.....2ND PLAINTIFF/APPLICANT

VS.

EQUITY BANK LTD1ST DEFENDANT

AUCTIONEERS AGENCIES2ND DEFENDANT

MBUTHI KINYANJUI 3RD DEFENDANT

RULING

1. The Plaintiff's application dated 27th May 2013 seeks a temporary injunction to restrain the 1st and 2nd defendants from transferring pursuant to a sale by public auction, the suit premises Muguga/Gitaru/1016 (hereinafter "the suit property") to the third Defendant, pending the hearing and determination of the suit herein. The application is based on the grounds contained in the application supported by the affidavits of the 2nd Plaintiff dated 19th November, 2014, 4th December, 2014 and 17th February, 2014 respectively.

2. The Deponent contended that he was the registered owner of the suit property. That by way of a third party charge dated 15th March, 2014 in favour of the 1st Defendant, the suit property was offered as security for a financial facility of Kshs. 5,000,000/= advanced to the 1st Plaintiff. The said financial facility was granted to the 1st Plaintiff on the terms and conditions set out in the letter of offer dated 4th February, 2013 and the Charge document therein.

3. That further to this, the 1st Plaintiff was granted a further loan, through account number 140056776809 which was overdrawn by Kshs. 485,873 by 20th January, 2014. According to the Deponent, sometime in March, 2014 the 1st Defendant's officer in the Debt Recovery Unit, one Mr. Simon Mulinge requested a meeting with the 2nd Plaintiff. That in the said meeting, the 2nd Plaintiff was informed that the 1st Plaintiff was in arrears of Kshs. 1,116,180/=. A payment plan was agreed upon by the said officer and the 2nd Plaintiff.

4. The Plaintiffs however admitted that they were unable to pay the first two payments of the arrears

within the stipulated time frame. In a rejoinder to this, the deponent however stated that a total of Kshs. 706,000/= was paid between 24th June, 2014 and 9th October, 2014 thus making it compliant with the payment plan. Subsequently, it was the Deponent's averment that the suit property was advertised for sale by public auction in the Nation Daily newspapers on 17th June, 2014 and 15th September, 2015.

5. The Plaintiff contended that he tried to negotiate with the 1st Defendant's officers to stop the sale thereof, but the same was in futility as the suit property was auctioned on 23rd September, 2014 for Kshs. 12,000,000/=. That a deposit of Kshs. 706,000/= had been paid to the 1st Defendant by the successful bidder. It was the contention of the 2nd Plaintiff that the suit property was sold at an undervalued price of Kshs. 12,000,000/= since a comparable parcel of land was now valued at Kshs. 30,000,000/= in the open market. The Deponent was in doubt that the 1st defendant carried out a proper valuation of the suit property prior to the public auction.

6. The Plaintiffs further faulted the 1st and 2nd Defendant for the sale of the suit property since no demand notices for sale were ever served on them. That further the mandatory statutory notices under the Land Act 2012 and the Auctioneers act were also not served upon the Plaintiffs. That further, the 3rd Defendant, as the purchaser of the suit property did not pay the balance of the purchase price as scheduled by the 1st and the 2nd defendant, leading the Plaintiff to believe that the sale of the suit property was fraught with fraud and manipulation.

7. In response to the application the 1st Defendant filed the replying affidavit and further replying affidavits of Caroline Wambui sworn on 24th November 2014, 26th February, 2015 and 3rd March, 2015 respectively. It was stated that the 1st Plaintiff applied and obtained a financial facility of Kshs. 5,000,000/= vide a letter of offer and acceptance dated 4th February, 2013. That in addition to this, the 1st Plaintiff was also granted a further loan of Kshs. 410,000/= on the terms and conditions set out in the letter of offer dated 13th March, 2013. The said loan facilities were secured by a legal charge over the suit property and a personal guarantee by the directors of the 1st plaintiff.

8. That it was a term of the agreement that the loan advanced by way of the overdraft facility would be paid within 180 days from the date of drawdown in full from the Local Purchase Order financed thereby and in default whereof, the 1st Defendant would be at liberty to realize the security in recovery of the amounts outstanding and due. According to the 1st Defendant, the 1st Plaintiff defaulted in its obligations from the repayment of the loan and its arrears stood at Kshs. 1,116,180 at all material times to this suit.

9. That as a result of this, the 1st Defendant made formal demand for payment of the amount in arrears where a statutory notice of sale was issued on 27th November, 2013 vide registered post on the address provided by the Plaintiffs. That despite the service of the statutory notices of sale, the 1st Plaintiff failed to pay the outstanding amount, leading the 1st Defendant to instruct the 2nd Defendant to proceed and dispose the suit property by way of public auction in exercise of the 1st Defendant's statutory power of sale.

10. In line with this, on 23rd September, 2014, the 2nd Defendant proceeded to dispose of the suit property where the 3rd Defendant purchased the same for Kshs. 12,050,000/=. That the 3rd Defendant having satisfied the conditions of sale, the completion documents were thereafter forwarded to him through his advocates. The Deponent further denied the assertions of the Plaintiffs that the 1st Defendant agreed to reschedule the loan or vary any terms. With respect to the value of the property, the Defendants contended that the estimated value of Kshs. 30,000,000 was presumptuous and speculative and cannot be relied upon by the court. The 1st Defendant maintained that a valuation done by M/s Zenith Management valuers Limited indicated that the suit property could be sold on a forced value of Kshs. 12,000,000/= as at 23rd June, 2014. With regard to the payment of the deposit, the 1st Defendant reiterated that the same were deposited with the 2nd defendant.

11. That further there was no requirement in law or conditions of sale that a purchaser should pay the purchase price to the principal within a stipulated period of time as long as the same is paid to the auctioneer conducting the sale, who is the agent of the principal within a particular period of time provided in the conditions of sale. That in any case the 3rd Defendant paid the 2nd Defendant the deposit at the fall of the hammer and the balance. The 1st Defendant further denied withdrawing any or part of the said funds from the account and thereby benefiting from the proceeds of the sale.

12. The 2nd Defendant also opposed the application through the Replying affidavit and further replying affidavit of George M. Kinuthia sworn on 27th November, 2014 and 18th March, 2015 respectively. It was averred that the 2nd Defendant received instructions from the 1st Defendant bank to dispose the suit property by way of public auction. In line with this instructions, the deponent contended that the 2nd Defendant took out the necessary notices and served them upon the 2nd Plaintiff as the registered proprietor through the addresses that the applicants supplied to the 1st Defendant Bank.

13. That after two initial cancellation of the scheduled auctions, the suit property was finally sold to the 3rd Defendant who emerged as the highest bidder on 23rd September, 2014. According to the 2nd Defendant the suit property was sold at Kshs. 12,050,000/= which was above the forced sale price indicated by the valuation report of M/s Zenith Management valuers that provided for a forced sale value of Kshs. 12,000,000/=. The Deponent went on to add that upon the sale and receipt of the 25% deposit of the purchase price, which included the sum of Kshs. 2,525,000/= and the bid deposit of Kshs. 500,000/=, the 3rd Defendant was issued with a memorandum/ certificate of sale upon the compliance with terms of the sale.

14. It was also contended that the 3rd Defendant has since settled on the balance of the purchase price which he paid directly to the bank. The 2nd Defendant further claimed that the completion documents towards the sale of the suit property had also been released to the third defendant. In conclusion, the 2nd Defendant contended that the Plaintiffs were not entitled to the orders sought in the application.

15. The Third Defendant also filed a Replying Affidavit sworn on 29th January, 2015. In it, the 3rd Defendant recalled that he saw an advertisement in the Daily Nation Newspapers by the 2nd Defendant for the intended sale of the suit property by way of public auction. That thereafter he approached the 2nd Defendant whereupon he expressed his wish to view the said suit property, a request that was readily acceded to. After viewing the suit property, the 3rd Defendant proceeded to make a bidding deposit of Kshs. 500,000/= to the 2nd Defendant.

16. Subsequently, the 3rd Defendant attended the public auction slated for 23rd September, 2014 at the fig Tree Hotel in Nairobi at 11.00 am. According to the deponent, the 2nd Defendant informed the bidders that the reserve price for the suit property was Kshs. 12,000,000/=. That at the close of the auction, the 3rd Defendant emerged as the highest bidder for the suit property, which he bid at Kshs. 12,050,000/=. A deposit of Kshs. 2,525,000/= was immediately paid in cash whereupon the 3rd Defendant was issued with a receipt of the same.

17. The 3rd Defendant therefore claimed that the 25% of the deposit was paid in line with the conditions of sale. A memorandum of sale was thereby executed after the auction which required that the payment of the balance of the purchase price would be paid on or before 24th November, 2014. According to the 3rd Defendant, he was able to settle the deposit through financing from Jamii Bora Bank, through the stipulated timelines.

18. The said monies were then credited to the account of the 1st and 2nd Applicants, clearing the outstanding loan amounts. It was also the 3rd Defendants contention that immediately the money was banked into the said loan accounts, the plaintiffs withdrew Kshs. 1,210,702.87/= an indication that they had acquiesced to the sale of the suit property. As such, the 3rd Defendant contended that the Plaintiffs

had come to this court with unclean hands and they are not entitled to the injunctive orders sought.

19. It was agreed by parties' counsel that the Plaintiffs' Application would be dealt with by way of written submissions. The Plaintiffs Submissions dated 19th February, 2015 commenced by setting out the facts as per affidavits of the 2nd Plaintiff. As regards the law, it was the contention of the Plaintiff that there was no service of the statutory notice of sale as provided for in the Land Act, 2012. That as such, the lack of service thereof was fatal to the auction held on the sale of the suit property on 23rd September, 2014. As such, it was argued that the no property passed to the 3rd Defendant as held in the case of **Simiyu –vs- Housing Finance Co. Kenya Limited HCCC No. 937 of 2001** and **Trust Bank Limited –vs-Eros Chemist & Another Civil Appeal No. 133 of 1999.**

20. It was also the argument of the plaintiff that the auction itself was vitiated by the breach of the terms of the auction. According to the Plaintiff, the 3rd Defendant did not pay the required 25% of the purchase price immediately he was declared as the highest bidder and the balance of the same within the mandatory 30 days from the date of the sale. In essence, it was the Plaintiffs' argument that a prima facie case had been established for the grant of injunctive orders.

21. That further, the balance of convenience lies in favour of the plaintiffs since they have the capacity to pay the loan arrears. It was also submitted that section 99 of the Land Act, did not apply in this case as it does not affect the mandatory statutory requirement of section 90 of the Land Act, that a statutory notice of sale is a pre-condition to the sale of property whether by private treaty or public auction. As such, the Plaintiffs urged the court to grant the orders sought.

22. On their part, the 1st and 2nd Defendants filed their joint written submissions on 25th March, 2015. In their submissions, the aforesaid defendants maintained that the 1st Defendant's action in realizing the security by way of sale of the suit property was justifiable and well within its rights as a chargee since the Plaintiffs were in breach of the terms of the charge and loan agreements. According to the 1st and 2nd Defendants, it had been demonstrated that the Plaintiffs were in default in their obligation to pay the loan advanced as required. As such, the 1st and 2nd Defendant's maintained that the plaintiff's had failed to make out a prima facie case with a probability of success.

23. With regard to the issuance of the statutory notices, the 1st and 2nd Defendants submitted that the same were served on the Plaintiffs through registered mail to the address provided by the Plaintiff in the loan application forms. That essentially, the certificate of postage duly annexed to the affidavits of Caroline Wambui was proof of that fact. That a redemption notice was further served on the Plaintiffs by the 2nd Defendant.

24. The 1st and 2nd Defendant further argued that the sale of the suit property was carried out in accordance with the law and that the plaintiffs' assertions to the contrary were misguided. The 1st and 2nd Defendants also submitted that the plaintiff is estopped from challenging the sale of the suit property since the 2nd Plaintiff benefitted from the proceeds of the sale. That as pleaded in the affidavits in opposition to the application, the 2nd Plaintiff withdrew Kshs. 1, 210,702.87/= on 3rd March, 2015 from the accounts which had been credited with the proceeds of the sale. That in the foregoing, a party cannot resile from a sale whose proceeds it has appropriated.

25. The 1st and 2nd Defendant relied on inter alia the cases of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003)**, **Joseph Okoth Waudi –vs-National Bank of Kenya, C.A No.77 of 2004 (U.R)**, **Nairobi HCCC Samuel Mwaura Felix Kariuki –vs- Equity Bank Limited (UR)** and **Esther Akinyi Odidi & 2 Others –vs- Sagar Hardware Stores Limited & Another (2006) eKLR**. In conclusion, the 1st and 2nd Defendants submitted that the application before the court was frivolous and disclosed no course of action. That in the foregoing the threshold for attaining an injunction had not been met and the application should be dismissed with costs.

26. The 3rd Defendant on his part submitted that the application before the court was devoid of merit. Central to this argument, the 3rd Defendant submitted that the 2nd Plaintiff had lost his right of redemption upon the fall of the hammer at the auction sale. The case of **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Ors (2005) eKLR** was cited, where the court held that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished.

27. That therefore the only remedy for a chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages. According to the 3rd Defendant, the said principles were enshrined in section 99 of the Land Act, which protects him as an innocent purchaser. That further, the Plaintiffs were not able to demonstrate that there was fraud involved in the sale of the suit property of the auction as no particulars of fraud had been provided. According to the 3rd Defendant, the Plaintiffs did not meet the threshold for the grant of injunction as expounded in the case of **Giella v Cassman Brown**. The 3rd Defendant therefore urged the court to dismiss the application with costs to the defendants.

28. I have carefully considered the application and the various affidavits of the respective parties. I have also considered the written submissions and cited authorities made by Counsel. This being an application for injunction, it is vital to point out that the principles that guide the court when considering an application for an injunction are set out in the case of **Giella –v- Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss; and that if the court is in doubt, it will decide the said application on a balance of convenience. Further, it is of note that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial.

29. As such, I find that the issues that fall for determination is whether the Plaintiff has placed enough material before the court to persuade it to grant the interim orders sought. The first question I must therefore answer is whether the Plaintiffs have established a prima facie case.

30. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** as follows:

- a. ***“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

31. The Plaintiffs argued that they had established a prima facie case with a probability of success for reasons that lack of a statutory notice made the sale of the suit property a nullity and unlawful, and also for reasons that the legality of the transfer of the suit property to the 3rd Defendant is disputed. The Plaintiff relied on sections 90(1) and 90(2)(b) of the Land Act of 2012 to submit that the 1st Defendant did not serve them with any statutory notice for the auction conducted on 23rd September, 2014 nor did the 2nd defendant serve them with the redemption notice and notification of sale. Therefore, that the 1st Defendant’s statutory power of sale had not accrued or crystallized when the auction was held on 23rd September, 2014.

32. The Plaintiffs further argued that section 97(2) of the Land Act of 2012 required a valuation to be carried out before the auction, and that the valuation report relied on by the 1st and 2nd Defendant dated 23rd June 2006 by Zenith Management Valuers Limited was not a true reflection of the true value of the suit property. Further it was the contention of the Plaintiffs that the 3rd Respondent did not meet the conditions of sale which included the payment of 25% of the purchase price at the fall of the hammer.

33. The defendants on their part vehemently refuted the above claims. It was argued that the subject auction sale took place on 23rd September, 2014 and was governed by the Auctioneers Act of 1996,

Auctioneers Rules of 1997, as well as the provisions of the Land Act of 2012. That further all the statutory notices were served upon the Plaintiffs in accordance to the law. Further the 3rd Defendant argued that being the highest bidder for the suit property, he bought the said property legally. The Defendants also argued that in the circumstances the Plaintiff had not established a prima facie case as there was no right in existence that had been infringed, as the suit property had been sold at an auction. The Defendants further submitted that even if the Plaintiffs' rights were to be found to have been infringed by virtue of the same, the only right that could accrue in the circumstances would be in damages.

34. I must state that I agree with the Defendants' arguments for various reasons. Firstly, I find that the Plaintiffs have not established a prima facie case for the reason that even if it were to be found that the sale of the suit property to the 3rd Defendant was irregular, the only remedy that can be available to the Plaintiff in the circumstances is that of damages.

35. There is no dispute that there was indeed a sale that took place with regard to the suit property. The only dispute is whether the sale was regular or not. As such, it is my finding that the 2nd Plaintiff has lost his right of redemption upon the fall of the hammer at the auction sale. This principle was clarified by **Kimaru J.** in the aforementioned case of **Bomet Beer Distributors Ltd (supra)** in which he detailed:

- i. ***“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for a chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”***

36. The learned judge then proceeded to consider the position with regard to the granting of injunctive Orders as per **Giella v Cassman Brown (supra)** where he stated thus:

- i. ***“..... it was held that an injunction would be granted where an applicant establishes a prima facie case. The applicant is further required to establish that he would suffer irreparable loss which may not be compensated by an award of damages. If the court fails to decide the case on the two principles stated above, then it will decide whether or not to grant the injunction based on a balance of convenience.***
- ii. ***In the present application, the plaintiffs have not established a prima facie case. The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they were/are entitled to the orders of injunction sought. Statutory provision in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5th defendant who purchased the property in the public auction. He has invested his financial resources but has been unable to enjoy the use of the said property. It would be inequitable to keep the 5th defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction.”***

xxxvii. In my opinion, the situation in this case falls similarly along the lines and facts of the above mentioned case. The 2nd Plaintiff in this matter has claimed, rightly so, that the statutory notice issued by the 1st Defendant was invalid. He also complains that the 1st and 2nd Defendant did not have a valuation of the suit property carried out before sale. The above facts may be so, but I do not consider that the Plaintiff has made out a prima facie case entitling him to an injunction and, I am of the view that he would well be compensated in damages.

xxxviii. Despite his argument that the suit property has been sold at an under-valuation, the Plaintiff has not put in evidence before this Court, any alternative valuation to prove his point in that regard. As I have detailed above, the Plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction held on 6th November 2012. My reasoning

is further fortified by the cited Section 99 of the Land Act, 2012 which details the protection to which the purchaser of the suit property at auction is entitled. It reads as follows:

i. **“99. Protection of purchaser**

This section applies to –

a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the charge if the charge and the person so claiming obtained the charged land in good faith and for value.

A person to whom this section applies –

is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

is not obliged to see to the application of the purchase price;

is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

39. The section now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Plaintiff’s remedy lies in this case and not an order of injunction as pleaded. See the case of **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014]eKLR**.

40. Secondly, I am of the view that there are many contested facts in the Plaintiffs suit, particularly as to the circumstances in which the public auction of the suit property took place, and the transfer of the same to the 3rd Defendant that will still require further evidence and legal argument. In my view, the evidence presented before this court can only be tested through cross examination of the witnesses. See the case of **Narendra Chaganlal Solanki Vs Neepu Auto Spaces Ltd , Kisumu High Court Civil Case No. 90 of 2003**, where the Court held that;-

- i. ***“In an interlocutory application for injunction, the Court must warn itself of the gravity of danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise some cautionary steps”***

41. I accordingly decline to grant the prayers in the Plaintiff’s Notice of Motion dated 19th November 2014 for the foregoing reasons, and the Plaintiffs shall bear the costs of the said Notice of Motion.

Dated, signed and delivered in court at Nairobi this 16th day of December, 2015.

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C. KARIUKI

JUDGE