



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 734 OF 2010**

**EDWARD GATIBA MBUGUA ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK (K) LIMITED ..... DEFENDANT**

**RULING**

1. On 16th July 2013, the Interested Party filed a Notice of Motion dated 17th June 2013 seeking prayers that this Court do lift the Prohibitory Orders against the Land Registrar, Thika Lands Office prohibiting him from registering any transfer that pertains to land parcel **Chania/Kairi/876** (hereinafter “the suit property”). The Application also sought an Order that the said Land Registrar do register a Transfer which had been lodged at the Registry as between the Defendant and the Interested Party pertaining to the suit property. The Application was brought under the provisions of **sections 1A, 1B and 3A** of the Civil Procedure Act, **Order 51 rule 1** of the *Civil Procedure Rules* and **section 70.d** of the *Land Registration Act*.
2. The Application before Court was supported by the annexed Affidavits of the Interested Party sworn on 18th June 2013 and **Castro Mutai**, the Legal Counsel of the Defendant, sworn on 31st May 2013. The Application was brought upon the following grounds:

**“1. The Defendant offered the above property for sale by public auction and the same was purchased by Rajan R. Dhahani (hereinafter the purchaser).**

**2. The Plaintiff instituted a suit against the Defendant vide a plaint dated 26<sup>th</sup> October 2010 and filed on 27<sup>th</sup> October 2010 and the same was followed up by a Chamber Summons application dated 26<sup>th</sup> October 2010 and filed on 27<sup>th</sup> October 2010 seeking among others orders to prohibit the District Land Registrar of Thika from registering any transfer on land parcels Chania/Kairi/876 (which is subject of the application), Chania/Kairi/ 1032 (Original No. 59), Chania/Kanyoni/753 and Chania/Ngorongo/T.379.**

**3. The Plaintiff was issued with exparte prohibitory orders against the District Land Registrar of thika which prohibited him from registering any transfer on the land parcels mentioned above.**

**4. Through a ruling delivered on 21<sup>st</sup> November 2012, the Plaintiff’s Chamber Summons application was dismissed for lack of merit.**

5. **The Plaintiff thereafter filed a Notice of motion application dated 5<sup>th</sup> December 2012 seeking orders that transfer of the land parcels Chania/Kairi/876 (which is subject of the application), Chania/Kairi/ 1032 (Original No. 59), Chania/Kanyoni/753 and Chania/Ngorongo/T.379 be stopped and an injunction be issued restraining the Defendant from transferring the said properties until hearing and determination of the suit.**
  6. **Through a ruling delivered on 11<sup>th</sup> February 2013, the Plaintiff's Notice of Motion application was dismissed.**
  7. **In light of the above, the Defendant should be allowed to transfer the land parcel Chania/Kairi/876 as the interim injunctions issued stands discharged.**
  8. **However, the District Land Registrar has refused/failed/neglected to register the transfer for the above named parcel despite the fact that it is his duty to register any transfers by charge in exercise of its power of sale.**
  9. **It is in the interest of justice that this matter comes to its conclusion and that the Defendant be allowed to effect the overdue transfer of the above land parcels to the intended purchaser.**
  10. **The delay occasioned due to the Plaintiff's incessant litigious nature has caused the Defendant anxiety, undue prejudice and unnecessary costs.**
  11. **That the orders by this court cannot be seen to be issued in vain and should subsequently be enforceable.**
  12. **That the Honourable court has jurisdiction to grant the orders sought".**
3. The Supporting Affidavits repeated much of what was detailed in the Grounds in support of the said Application. That of the Interested Party however contained the history of the purchase of the suit property at a public auction through his duly appointed agent on 13th October 2010. He related details as to how he had paid a deposit of Shs. 375,000/- as against the purchase price for the suit property at auction being Shs. 1,300,000/-. He noted that a Transfer was duly executed by the Defendant bank dated 19th November 2010, in exercise of its statutory power of sale. The Interested Party noted that the District Land Registrar at Thika had refused to register the said Transfer hence the necessity for the Application before Court. The supporting Affidavit of the said **Castro Mutai** confirmed the purchase of the suit property by the Interested Party at the public auction on 13th October 2010. The deponent noted that this suit had been filed by the Plaintiff seeking Orders prohibiting the District Land Registrar at Thika from registering a transfer in respect of not only the suit property but also land parcels **Chania/Kairi/1032, Chania/Kanyoni/753 and Chania/Ngorongo/T. 379**. The deponent went on to trace the history of this case before Court including the delivery of two Rulings dated 21st November 2012 and 11th February 2013 in which the Plaintiff's applications before Court had been dismissed as without merit. Mr. Mutai went on to say that the suit stands dismissed and consequently the injunctive Orders stood discharged. The Defendant now had the right to transfer the suit property to the Interested Party.
  4. The Plaintiff's Replying Affidavit was sworn on 25th September 2013. He opposed the Interested Party's said Application before Court. He maintained that the said public auction held on 13th October 2010 was false. He maintained that the sale was a private pre-arrangement as between the auctioneer and the Interested Party and the former had never produced the documentary evidence of the auction including a record of the bids made and the names of the bidders. As a result, the Plaintiff maintained that the public auction was a nullity. He also stated that he was taking steps to appeal against the said two Rulings as above and maintained that the delay in taking steps to appeal was due to and occasioned by the Court's Registry to give notice (presumably to him) of the date of the Rulings in the "various applications".

5. The said **Castro Mutai** swore a Further Affidavit on behalf on the Defendant dated 24th October 2013. The deponent reiterated his previous Affidavit confirming that indeed a public auction had taken place conducted by the Defendant through its appointed auctioneers, Garam Investments. He confirmed that the same had taken place on 13th October 2010 and that the suit property had been purchased by the Interested Party. He noted that the said public auction had been advertised in the newspaper as detailed in the said Affidavit in support of the Application sworn by the Interested Party. As regards the Plaintiff's intended appeal, the deponent noted that that there had been numerous applications brought before Court by the Plaintiff, in an attempt to stop the inevitable overdue transfer of the suit property, all of which had been dismissed. The deponent maintained that the Plaintiff was "grasping at straws" in attempting to blame the Court's Registry for not having given him notice of the delivery of the two Rulings. With the leave of the Court, Mr. Mutai swore a short Further Affidavit on 13th January 2014, to which he attached the notice given by the advocates for the Interested Party addressed to the District Land Registrar, Thika dated 27th May 2013. Such notice sought to complete the transfer of the suit property but the Transfer document was rejected with the said Registrar directing that the Prohibitory Orders could only be lifted by Order of this Court.
6. The Defendant's submissions were filed herein on 17th January 2014. Having set out the background to the Application before Court, the Defendant pointed out that the Plaintiff, by way of Summons dated 26th October 2010, had sought orders from the Court that the District Land Registrar, Thika be prohibited from registering any Transfer in relation to the suit property. That Application had been dismissed by **Njagi J.** by a Ruling delivered on 21st November 2012. However, even as the Application had been dismissed, the Prohibitory Order could not be lifted in the absence of an Order directing the said Registrar to do so. The Defendant referred to section 70. d of the Land Registration Act which provides that the registration of a prohibition shall not be cancelled except by an Order of the Court, hence this Application before Court. The Defendant submitted that the Defendant had every right to realise its security by way of its statutory right of sale. It noted that **Njagi J.** in his said Ruling had detailed that the Plaintiff had admitted the debt and that he was in default. As regards the Plaintiff's contention that the auction sale was conducted irregularly, the Defendant submitted that the Plaintiff's Replying Affidavit was full of mere averments which were unsubstantiated, pointing to the requirements of section 107 of the Evidence Act which basically detailed that:

**"he who asserts must prove that those facts exist".**

Even if the sale of the suit property had not been by way of public auction as alleged by the Plaintiff, the Defendant pointed out that **section 98** of the *Land Act, 2012* provided that a Chargee could exercise his power of sale vide a public auction or by private treaty. To bolster its submissions, the Defendant cited to Court the authorities of **Otieno v The Land Registrar, Trans Nzoia (2013) eKLR**, **Andrea Onditi v Andrew M. Kereu & 2 Ors (2013) eKLR**, **Mukere v The District Lands Registrar Embu & Anor (2013) eKLR** as well as **Martin M. Wangara v The Chairman Mwea Land Disputes Tribunal & 2Ors (2013) eKLR**.

7. The Plaintiff's submissions were brief and filed herein on 9th May 2014. He maintained that in view of his intention to appeal against the dismissal of his earlier applications, the Court ought not to direct the cancellation of the Prohibitory Order. Further, the right to auction the suit property was not the issue in the litigation. The issue was whether the auction had been properly conducted at law. The Plaintiff maintained that the evidence on record before the Court was hearsay affidavit evidence as the auctioneer had not tendered any records or evidence in relation to the said auction.
8. This Court has noted the provisions of **section 70d** of the *Land Registration Act, 2012*. It is clear therefrom that the registration of a Prohibitory Order shall not be cancelled except by further Order of the Court. As I understand the Supporting Affidavit of the Interested Party dated 18th June 2013 as well as the Supporting Affidavit of the said Mr. Mutai for the Defendant, this Court issued a Prohibitory ex-parte Order on 28th October 2010 addressed to the District Land Registrar, Thika prohibiting him from registering any Transfer that pertained to the suit property amongst other titles. Now that the Interested Party has come to present the Transfer from the Defendant to him of the suit property, the District Land Registrar has, quite rightly, refused to register the same

- until further Order of this Court.
9. The Plaintiff has resisted the lifting of the Prohibitory Order on the grounds that the auction sale at which the Interested Party purchased the suit property was not properly conducted at law. This Court notes that in the Ruling of **Njagi J.** delivered by **Mutava J.** on 21st November 2012, the learned Judge identified the point as to whether the sale of the suit property along with other properties was irregular or otherwise. His finding on the issue was quite clear in that if the sale was conducted irregularly then the law afforded the Plaintiff protection under the provisions of **section 99 (4)** of the *Land Act, 2012*. Further, in this Court's Ruling delivered on 11th February 2013, there was deliberate reference to the finding of **Njagi J.** as well as to the fact that the question of whether the sale was improperly conducted was *res judicata* as having been dealt with in the subordinate Court in **CMCC No. 5774 of 2010**. In that Ruling, I pointed out that, in my opinion, the Plaintiff herein was grasping at straws. There is nothing before this Court which makes me change my mind.
  10. As a result and in conclusion, I grant prayers a) and b) of the Notice of Motion dated 17th June 2013 with costs to the Defendant as well as the Interested Party.

**DATED and delivered at Nairobi this 16<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**