



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 248 OF 2012

PURE WATER RESOURCES LIMITED..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED..... 1ST DEFENDANT

VALLEY AUCTIONEERS 2ND DEFENDANT

MARK NYAMITA 3RD DEFENDANT

EVERLYNE ATIENO4TH DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated and filed in court on 12th June 2014. The application is filed under Order Order 40 (1), (2), (3) of the Civil Procedure Rules, Sections 3A and 63 (C), E of the Civil Procedure Act.
2. The application seeks the following orders:-
 1. *That service of this applicaotn be dispensed with in the first instance and this applicaotn be certified urgent.*
 2. *That this Honourable court be pleased to grant a temporary injunction restraining the Defendants from evicting, locking out, transferring, selling, letting, hiring or otherwise dealing with all that land known as Town House No. 1 situate on LR No. 330/262 measuring 0.9 442 hectares, situated within Ebony Park Villas Court on Dagorretti Garden off Riara road, Thompson Residential Estate pending the hearing and determination of this this application.*
 3. *That this Honourable court be pleased to grant a temporary injunction restraining the Defendants from transferring, selling, letting, hiring or otherwise dealing with all that land known as Town House No. 1 situate on LR No. 330/262 measuring 0.9 442 hectares, situated within Eboy Park Villas Court on Dagorretti Garden off Riara road, Thompson Residential Estate pending the hearing and determination of this suit.*
 4. *That this Honourable Court do nullify and/or cancel the sale of public auction conducted on 14th May 2014 by the 2nd Respondent to the 3rd and 4th Respondents respectively.*
 5. *That the costs of this application be provided for.*
3. The application is premised on the grounds set out therein and is supported by affidavit of **Brenda Onyancha** dated **12th June 2014**, and a supplementary affidavit of the same person filed in court on 1st June 2014.

4. All the Respondents have opposed the application. The 1st Respondent filed a replying affidavit on 26th June 2014 sworn by **Kennedy Kassamba** with many annexures. The 2nd Respondent opposed the application vide a replying affidavit filed in court on 24th June 2014. The 3rd and 4th Respondents filed a joint replying and further replying affidavits dated 23rd June 2014 and 9th July 2014. Parties also filed written submissions and orally highlighted the same in court.
5. The brief history of the application is that pursuant to a mortgage transaction between the Plaintiff and the 1st Defendant over the suit property, the Plaintiff defaulted in the repayment of the mortgage due causing the 1st Defendant to exercise its statutory powers of sale over the suit property. To do this the 1st Defendant instructed the 2nd Defendant, an auctioneer firm, to carry out the auction on 19th March 2014. The auctioneer carried out all the preliminary requirements and staged the auction on 19th March 2014, but the same was objected to by the Plaintiff and was later cancelled. Another auction was then staged on 14th May 2014 after the auctioneer gave all the legal requirements. It is this second auction that the Plaintiff is not happy with and which the Plaintiff now challenges through this application on the grounds that on 14th May 2014, the auctioneer Mr. Samuel Gathogo opened the auction and he himself participated in the auction. He (Mr. Samuel Gathogo) trading as Valley Auctioneers, was the highest bidder, of Kshs.47,500,000/=. The 2nd highest bidder was Homeland Management Limited who offered Kshs.47,000,000/=. The 3rd highest bidder was a Mr. Hussein who bid at Kshs.35,000,000/=. The 4th highest bidder was Mark Nyamita (the 3rd Defendant herein) who bid Kshs.33,000,000/=. The Applicant states that the auction was riddled with fraud since the auctioneer himself is not allowed to bid and secondly he went ahead and refused to give the house to the 2nd highest bidder, Homeland Management Limited which offered Kshs.47,000,000/=. The Applicant states that the 2nd highest bidder is willing and ready to pay Kshs.47,000,000/= so that the 1st Defendant may not follow the Applicant for the mortgage balance. The 1st Defendant wanted Kshs.37,000,000/= and if the 2nd highest bidder was to pay Kshs.47,000,000/=. the Applicant was going to get the remaining balance of Kshs.10,000,000/=. The Applicant now asks this court to correct the alleged fraud perpetrated by the Defendants by denying the 2nd highest bidder the house so that the 1st Defendant may not follow the Applicant for the balance due on the mortgage.
6. Essentially the Plaintiff challenges the outcome of the said auction on fraud, and on the allegations that the auctioneer participated in the exercise and that the Plaintiff was denied the chance to have the alleged 2nd highest bidder of Kshs.47,000,000/=. If this was allowed, the Plaintiff would have been able to completely repay the 1st Defendant's loan and have a balance of a few millions of shillings to itself. So to my mind the only issue for determination is whether or not the auction on 14th May 2014 was carried out in the manner alleged by the Applicant and if the auctioneer participated in the same. I have considered all the affidavits and submission of the parties. Mr. Samuel Muthai Gathogo is the auctioneer who carried out the auction on behalf of the 2nd Defendant. In his replying affidavit filed in court on 24th June 2014, he gives his side of the story, backed with evidence as annexures. His story is compelling, and *prima facie*, believable. He states that on the day of the auction nine (9) participants showed interest in the auction and he proceeded to duly record the names of the said participants in attendance. He annexed as exhibit '**SMG 9**', a copy of the attendance sheet. He stated that he conducted the sale of the suit property by public auction in the presence of the 1st Defendant's representative, and he received a highest bid of Kshs.33,500,000/= from the 3rd and 4th Defendants which bid he accepted under the instructions of the representative of the 1st Defendant. As such the contentions in grounds 7, 8, 9 and 10 on the face of the application and paragraph 13 in the affidavit of Brenda N. Onyancha is not true, as far as Mr. Gathogo is concerned.
7. Thereafter the 3rd and 4th Defendants duly issued 4 cheques for the sum of Kshs.8,375,000/- being the 25% deposit of the purchase price of the suit property. They also signed in the presence of Antony M. Mulekyo, an Advocate and Commissioner for Oaths, a Memorandum of Sale annexed and marked as exhibits '**SMG 10a**' and '**SMG 10b**' respectively.
8. Mr. Gathogo stated that he is a stranger to the allegations under paragraph 9 and 10 of the supporting affidavit of Brenda N. Onyancha. He stated that the allegations that he personally offered a bid in the auction is scandalous and borders on assassination of his character as a professional in light of the following salient facts:-

- That it would have been of no logical or financial sense for him to make a bid for Kshs.47,500,000/= when the valuation report referred to in paragraph 6 above valued the suit property at Kshs.40,000,000/=.
 - That at the conclusion of the sale Antony M. Mulekyo, an Advocate and Commissioner of Oaths clearly witnessed the signing of the Memorandum of Sale by the 3rd and 4th Defendants.
 - That the Attendance sheet signed by the the participants in the auction clearly shows that there was no participant by the name of Homeland Management Limited who attended and/or participated in the auction.
 - That the Attendance Sheet signed by the participants in the auction clearly shows that there was no participation by the name of Mr. Hussein who attended the auction.
 - That the Attendance Sheet clearly shows that the said Brenda N. Onyancha never participated in the auction.
9. Mr. Gathogo attached the Public Auction Attendance List for the auction staged on 14th May 20214. There are 10 people in attendance. I see no name of the Homeland Management Company Limited or its representative. I see no name of M/s Brenda N. Onyancha or a Mr. Hussein. Another annexure “SMG10a” is Conditions of Sale. It is signed by the successful bidders that is the 3rd and 4th Respondents in the presence of the 1st Defendant’s lawyers. Annexure “**SMG10b**” are copies of cheques paid by the successful bidders being 25% of the purchase price. These submissions are confirmed by the affidavits of the 3rd and 4th Defendants which I believe.
 10. On the contrary, the Applicant has not submitted any document to show that they were the 2nd highest bidder either in the 1st auction or in the 2nd auction. Indeed, from the affidavits of the 3rd and 4th Respondents it is believable that after the auction the 3rd and 4th Respondents accessed the suit property with the knowledge of the Plaintiff/Applicant and that this application is an afterthought.
 11. An application such as this cannot be based on rumours or facts which are incapable of verification. I am unable to trace the Plaintiff or any of its relatives to either the first auction of 19th March 2014 or the second one of 14th May 2014. If indeed the Plaintiff has a case against any of the parties herein the Plaintiff can pursue the same in terms of damages either in this suit or in any other suit filed related to this matter. The 3rd and 4th Respondents being Purchasers of the suit property from the chargee are by Section 99 (3) of the Land Act protected. The auction carried out on 14th May 2014 was staged properly and legally, and the 3rd and 4th Respondents acquired title which it is the obligation of this court to protect.
 12. The application herein falls far short of the principles established in the case of **Giella – vs Cassman Brown [1973] EA 258** and is only for dismissal.
 13. In light of the above, the Notice of Motion application dated and filed in court on 12th June 2014 is dismissed with costs to the Respondents.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Maosa holding brief for Mogire for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Teresia – Court Clerk