



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 341 OF 2012**

SOSPETER NYAKUNDI NYANGAU (Suing on his

own behalf and as the manager of the estate of

ADAMS OSEKO ..... PLAINTIFF

VERSUS

ECOBANK KENYA LIMITED ..... DEFENDANT

**RULING**

1. This suit was brought by the plaintiff against the defendant on 18<sup>th</sup> September, 2012. In the plaint dated 17<sup>th</sup> September, 2012, the plaintiff sought; a permanent injunction to restrain the defendant from selling by public auction all that parcel of land known as **LR. No. Kisii Municipality/Block III/407** (hereinafter referred to as “**the suit property**”), a declaration that the defendant is in breach of an agreement that was entered into between the Plaintiff and the defendant and general damages for breach of contract. The Plaintiff averred that, at all material times, the plaintiff and his brother, **Adams Oseko** who is of unsound mind were and still are the registered proprietors of the suit property which is a business cum-residential property situated within Kisii town. The Plaintiff averred that he is a building contractor trading in the name and style of Boston General Agencies and that he was awarded a tender by St. Elizabeth Girls Secondary school, Nandi Hills, on 11<sup>th</sup> May, 2011 to construct a science laboratory, a dormitory block and Sanitary services at a cost of Ksh. 15,918,679.50. The plaintiff averred that he approached the defendant for a loan facility in the sum of Ksh. 2,200,000.00 to enable him carry out the works under the said tender which loan was secured by a first charge over the suit property. The Plaintiff averred that it was an express or implied term of the contract between the plaintiff and the defendant for the said loan facility that the same was to be repaid from the payments received by the plaintiff from St. Elizabeth Girls Secondary School for the construction aforesaid. The Plaintiff claimed that although he had executed the works that he had tendered for, St. Elizabeth Girls Secondary School did not make full payment to him of the amount that was agreed upon for the said works. The plaintiff averred that in view of this default on the part of St. Elizabeth Girls Secondary School, he was not able to meet his loan repayment obligations to the defendant. The Plaintiff averred that in breach of the terms of the contract that the plaintiff had made with the defendant aforesaid on the mode of the loan repayment, the defendant instructed auctioneers to put up the suit property for sale by public auction to recover the outstanding loan amount despite the defendant’s knowledge that the plaintiff had not yet received full payment from St. Elizabeth Girls Secondary School. It is on account of the foregoing that the plaintiff brought this suit to restrain the defendant from selling the suit property in breach of the terms of the said loan agreement.

2. Together with the Plaint, the Plaintiff filed an application by way of Notice of Motion dated 17<sup>th</sup> September, 2012 seeking a temporary injunction to restrain the defendant from selling the suit property

by public auction pending the hearing and determination of this suit. The plaintiff's application was opposed by the defendant. In a ruling that was delivered on 12<sup>th</sup> April, 2013, the plaintiff's application for injunction was dismissed with costs to the defendant. The plaintiff did not give up after the dismissal of his injunction application dated 17<sup>th</sup> September 2012. The plaintiff filed a Notice of Appeal and applied for certified copies of proceedings for the purposes of lodging an appeal to the Court of Appeal against the said decision. It is not clear as to what became of the appeal that the plaintiff intended to lodge in the Court of Appeal. However, on 18<sup>th</sup> November 2013, the plaintiff filed another application under certificate of urgency seeking a temporary injunction to restrain the defendant from selling, alienating, wasting or interfering with the suit property pending the hearing and determination of this suit. The plaintiff also sought leave to amend the plaint. The plaintiff's application was brought on among other grounds that the defendant had advertised the suit property for sale on 19<sup>th</sup> November 2013 without serving the plaintiff with the necessary statutory notices and without carrying out a fresh valuation of the suit property to ascertain its forced sale value. The plaintiff also contended that the defendant had charged interest on his loan account that had not been agreed upon contrary to section 44A of the Banking Act and that the defendant had not accounted for the sum of kshs. 1.2million that the plaintiff had paid after his application for injunction was dismissed. The plaintiff also accused the defendant of violating the provisions of Articles 10 and 40 of the Constitution of Kenya, 2010. The plaintiff's application came before me ex parte on 18<sup>th</sup> November 2013 when I directed that it be served for hearing inter-partes on 19<sup>th</sup> November 2013.

3. On 19<sup>th</sup> November 2013, I granted to the plaintiff an order of interim injunction stopping the sale that was scheduled for that day on condition that the plaintiff pays a sum of kshs.500,000/= to the defendant before 11.00am on the same day. I then fixed the application for hearing inter-partes on 2<sup>nd</sup> December 2013. The plaintiff seems not to have complied with the condition that was imposed by the court and as such the sale of the suit property proceeded on 19<sup>th</sup> November 2013 as had been scheduled by the defendant. When the plaintiff's application came up for inter-partes hearing on 2<sup>nd</sup> December 2013, the court was informed that the sale of the property had taken place and that it would be a mere academic exercise to proceed with the application. The matter was adjourned to 17<sup>th</sup> December 2013 on which day the plaintiff informed the court that he was still interested in pursuing his application dated 18<sup>th</sup> November, 2013 because the sale of the suit property had not been completed. In view of this development, I ordered that the plaintiff's application be argued by way of written submissions. The parties were directed to exchange written submissions within 42 days and the matter was listed for mention on 20<sup>th</sup> February 2014 for a ruling date. By this time, the defendant had responded to the plaintiff's application through a replying affidavit sworn by Joshua Ngari on 16<sup>th</sup> December 2013. After leaving the court, the plaintiff's advocate seems to have had a change of heart regarding the prospects of success of the plaintiff's application dated 18<sup>th</sup> November 2013. He seems to have come to terms with the fact that the application had indeed been overtaken by events.

4. On 18<sup>th</sup> December 2013, the plaintiff lodged another application by way of Notice of Motion of the same date in which the plaintiff sought among others, an order of prohibition prohibiting all further registration or change in registration of ownership(sic), leasing, sub-letting, allotment, occupation or possession of the suit property(sic) with any land registry, Government department, and all other registering authorities (sic) until further orders of the court and/or pending the hearing and determination of this suit. The plaintiff also sought an order of interim injunction to restrain the defendant from transferring, alienating or otherwise dealing with or parting with title, taking and/or interfering with possession of the suit property pending the hearing of the application inter-partes or further orders of the court. The plaintiff's application was brought on among other grounds that the defendant had purportedly sold the suit property at a public auction that was conducted on 19<sup>th</sup> November 2013. That the said auction never took place on 19<sup>th</sup> November 2013 because the memorandum of sale of the suit property was signed on 18<sup>th</sup> November 2013 before the said date of the purported public auction. The plaintiff contended that the sale of the suit property was irregular and fraudulent.

5. The plaintiff contended further that the defendant did not serve him with the requisite statutory notice

prior to the sale that was purportedly conducted on 19<sup>th</sup> November 2013 and that the auctioneer who purported to conduct the said sale did not comply with the Auctioneers Rules 1997. The plaintiff contended further that the plaintiff did not carry out fresh valuation of the suit property before the purported auction sale. The plaintiff contended that the defendant fixed the reserve price of the suit property based on a valuation that was carried out on 25<sup>th</sup> May 2011. The plaintiff contended further that the defendant has been charging interest at a rate that was not agreed upon contrary to the provisions of the Banking Act. The plaintiff contended further that he did pay to the defendant a sum of kshs. 1.2million after the dismissal of his earlier application for injunction which payment the defendant has not accounted for. The plaintiff contended that the defendant's conduct is against the provisions of Article 10 and 40 of the Constitution of Kenya, 2010.

6. The plaintiff's application was opposed by the defendant. The defendant filed a notice of preliminary objection dated 15<sup>th</sup> January 2014, grounds of opposition dated 15<sup>th</sup> January 2014, replying affidavit of Joshua Ngari sworn on 10<sup>th</sup> February 2014 and replying affidavit sworn by Samuel Mutahi Gathogo on 10<sup>th</sup> February 2014 in opposition to the application. In its grounds of opposition and notice of preliminary objection, the defendant contended that the plaintiff's application is sub judice and/or *res judicata*. The defendant contended further that the suit property has been sold and as such the reliefs sought herein are not available to the plaintiff under section 99 (4) of the Land Act, 2012. The defendant contended further that the plaintiff's application which seeks the setting aside of the sale of the suit property is not based in the plaint filed herein by the plaintiff. The defendant termed the application herein as frivolous, vexatious and an abuse of the court process.

7. In his affidavit sworn on 10<sup>th</sup> February 2014, the defendant's branch manager at Nakuru, Joshua Ngari adopted the contents of his affidavit that he had sworn on 16<sup>th</sup> December 2013 in response to the defendant's application dated 18<sup>th</sup> November 2013. He contended that the suit property was sold at a public auction that was conducted on 19<sup>th</sup> November 2013 by Valley Auctioneers and that the date of 18<sup>th</sup> November 2013 indicated on the Memorandum of sale is an error. The defendant contended that the highest bidder at the public auction aforesaid has paid the full purchase price which has been credited to the plaintiff's loan account. He contended that due process was followed prior to putting up the suit property for sale by public auction. He contended further that the defendant was not under any obligation to serve a fresh statutory notice upon the plaintiff after the plaintiff's application for injunction was dismissed. He contended that the defendant was entitled to proceed with the process of selling the suit property from where it was stopped by the court through ex parte order of injunction that was issued on 26<sup>th</sup> September 2012. The defendant contended that the suit property was sold in good faith well above its forced sale value of kshs. 2,800,000/=. The defendant contended that the orders sought by the plaintiff would affect the interest of the purchaser of the suit property who has not been made a party to these proceedings.

8. In his affidavit, Samuel Mutahi Gathogo, the auctioneer who is said to have sold the suit property by public auction stated that following the instructions that he received from the defendant on 24<sup>th</sup> July 2012 to sell the suit property by public auction in exercise of the defendant's statutory power of sale, he served the defendant with 45 days redemption notice and notification of sale on 30<sup>th</sup> July 2012. The defendant failed to redeem the suit property and as such he advertised the same for sale on 29<sup>th</sup> September 2012. That sale was stopped by an order issued by this court. On 17<sup>th</sup> April 2013, he was informed by the defendant that the plaintiff's application for injunction had been dismissed by the court and was instructed to proceed with the sale of the suit property. Following the said instructions, he advertised the suit property for sale by public auction on 19<sup>th</sup> November 2013. On 19<sup>th</sup> November 2013, the suit property was sold to the highest bidder one, Hellen Kwamboka Kombo at kshs. 3,300,000. The auctioneer stated that the date of 18<sup>th</sup> November 2013 indicated in the memorandum and certificate of sale is a typographical error. The plaintiff filed a further affidavit with leave of the court on 24<sup>th</sup> February 2014 in reply to the contents of the affidavits of Joshua Ngari and Samuel Mutahi Gathogo that I have highlighted above. In this affidavit, the plaintiff reiterated that no sale took place on 19<sup>th</sup> November 2013 near Kisii Post Office as he was present in person and saw one, David Obare Omwoyo ringing the bell to start the

auction which auction failed to take place for lack of bidders.

9. On 19<sup>th</sup> May 2014, the advocates for the parties agreed to argue the plaintiff's application dated 18<sup>th</sup> December 2013 by way of written submissions. The plaintiff's advocates filed their submissions on 19<sup>th</sup> June 2014 while the defendant's advocates filed their submissions on 21<sup>st</sup> October 2014. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the defendant's notice of preliminary objection, grounds of opposition and replying affidavits filed in opposition to the application. Finally, I have considered the written submissions filed herein by the advocates for both parties and the case law and statutory provisions cited in support thereof. The plaintiff's application before me is seeking an order to prohibit the registration of change of ownership of the suit property pending the hearing and determination of this suit. What the plaintiff is seeking is simply an injunction to restrain the defendant from finalizing the process of sale of the suit property. It is not clear why the plaintiff has termed the order sought as prohibition instead of an injunction. I don't think that this court has power in exercise of its civil jurisdiction to grant prohibitory orders. What the court can grant in case there is need to restrain any dealing with registered land is an order of injunction or an order of inhibition under section 68 of the Land Registration Act, 2012. I do not wish to say more on this issue. This is because the defendant did not take issue with the same. The plaintiff's application was treated for all intents and purposes as an application for injunction. I will treat it as such.

10. The plaintiff's application being one for injunction, the principles applicable to applications for temporary injunction shall apply to it. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd. (1973) E.A.358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that he will otherwise suffer irreparable injury if the order is not granted. If the court is in doubt, the application would be determined on a balance of convenience. When considering whether the plaintiff has established a prima facie case, the case to be considered is that which the plaintiff has pleaded in his plaint. The plaintiff's suit herein as I have stated at the beginning of this ruling was brought to restrain the defendant from selling the suit property. The plaint dated 17<sup>th</sup> September 2012 filed herein on 18<sup>th</sup> September 2012 has only two (2) prayers namely, a permanent injunction to restrain the defendant from selling the suit property by public auction and a declaration that the defendant is in breach of the agreement that the defendant had entered into with the plaintiff. In the said plaint the plaintiff stated that the defendant had advanced to him a loan in the sum of KShs.2,200,000/= secured by a charge over the suit property which amount was to be used by the plaintiff to finance a tender for the construction of a science laboratory, dormitory block and sanitary services that had been awarded to the plaintiff by St. Elizabeth Girls Secondary School.

11. The plaintiff contended that it was a term of the agreement between the plaintiff and the defendant that the plaintiff would service the loan from the proceeds of the payments that the plaintiff was to receive from St. Elizabeth Girls Secondary School. The plaintiff contended that although the defendant was aware that he had not been paid by St. Elizabeth Girls Secondary School, the defendant proceeded to advertise the suit property for sale by public auction to recover the loan amount that was due by the plaintiff to the defendant in breach of the agreement that the plaintiff had entered into with the defendant. The plaintiff sought to restrain the defendant from selling the suit property in breach of the terms of the said loan agreement. There is no dispute that the suit property has since been sold following the dismissal of the plaintiff's application for injunction dated 17<sup>th</sup> September 2012 on 12<sup>th</sup> April 2013. The application before me is not seeking to restrain the defendant from selling the suit property but from transferring the suit property to the purchaser thereof.

12. The grounds upon which the application has been brought are as I have set out above varied. The defendant has been accused of among others, failure to serve statutory notice, failure to carry out a forced sale valuation of the suit property, breach of Auctioneers Rules 1997, levying of unlawful interest rates and violation of the plaintiff's constitutional rights. The original plaint that was filed herein the contents of which I have set out above has not been amended. The plaintiff's application for leave to amend the said plaint is still pending hearing and determination. The grounds that have been put forward by the plaintiff to support his present application have no basis in his plaint on record. The same applies to the order that has been sought in the application. I am in agreement with the submission by the defendant's

advocates that plaintiff's application herein has no basis in the plaintiff's pleadings. As things stand now, the case which the plaintiff has put forward in the plaint is different from the case which he has put forward in the present application. The present application in my view offends the provisions of order 2 rule 6 of the Civil Procedure Rules which provides as follows:-

**“6(1) No party may in any pleading make any allegation of fact or raise any new ground of claim inconsistent with the previous pleading of his in the same suit.**

**(2) Subrule (1) shall not prejudice the right of a party to amend or apply for leave to amend his previous pleading so as to plead the allegations or claims in the alternative.”**

13. The law is settled that parties are bound by their pleadings and that the court is supposed to determine only the issues that arise from the parties pleadings. In the Court of Appeal case of, **Galaxy Paints Company Ltd. vs. Falcon Guards Ltd., Nairobi Civil Appeal No. 219 of 1998(unreported)**, the court cited with approval the case of **Gandy vs. Caspair [1956] EACA 139** where it was held that **“unless the pleadings are amended, the parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record”**. As I have stated above, the issues that the plaintiff has raised in support of the present application are not pleaded in the plaint. The court would not be able therefore to determine the same at the trial of this suit unless the plaint is amended. I am unable to assess on the material that the plaintiff has placed before me through the present application whether the plaintiff has a prima facie case against the defendant. The case presented before me and the case pleaded in the plaint are different. The plaintiff should have amended the plaint to introduce the new claims on the basis of which he seeks the orders set out in the present application. In the absence of such amendment, the orders sought herein are being sought in vacuum without a basis and cannot be granted by the court.

14. The issue that I have determined above is sufficient to dispose of the plaintiff's application before me. However, for the completeness of this ruling, I would consider the merits of the issues raised in the plaintiff's application to determine whether the plaintiff would have otherwise established a prima facie case against the defendant if the said issues had been pleaded. I am in agreement with the plaintiff that the reserve price for the auction sale that was conducted by the defendant on 19<sup>th</sup> November, 2013 seems to have been fixed on the basis of a valuation report that was prepared by Chrisca Real Estate Valuers on 25<sup>th</sup> May, 2011 in which the forced sale value of the suit property was given as Ksh.2,800,000/=. This was in violation of section 97(2) of the Land Act, 2012 and Rule 11(1)(b)(x) of the Auctioneers Rules, 1997. Although the plaintiff has not placed any evidence or material before the court through the two affidavits that he swore in support of the present application to show that the said reserve price was based on the said valuation report of 2011, the affidavit of Joshua Ngari, the defendant's Nakuru branch manager sworn on 10<sup>th</sup> February, 2014 leaves no doubt that, that is the case. The said valuation report was attached to the affidavit of the said manager that was sworn on 15<sup>th</sup> October, 2012 in reply to the plaintiff's application for temporary injunction that was dismissed by the court.

15. There is no doubt that the forced sale value of the suit property had appreciated by the time the defendant was conducting the sale of the suit property on 19<sup>th</sup> November, 2013. The plaintiff's argument that the suit property was sold at an under value is therefore not far-fetched. On the issue of service of statutory notice and the auctioneers 45 days redemption notice, I am in agreement with the submission by the defendant that the defendant was not under any obligation to serve upon the plaintiff fresh notices. When the plaintiff filed this suit, he admitted that he had been served with all requisite notices both by the defendant and the auctioneer. The said notices are attached to the plaintiff's bundle of documents filed herein. There is no law placing an obligation on a chargee who has been stopped from selling a property in exercise of its statutory power of sale by a court injunction which is subsequently discharged to start the process of selling such property afresh by serving fresh statutory notice, auctioneers redemption notice and notification of sale. I am of the view that a part from re-advertising the property for sale and ensuring that the reserve price is fixed based on a valuation report that is not more than one (1) year as at the date of the intended sale, the chargee is required to do no more. The plaintiff has not provided any

authority in support of this argument. I find no plausible explanation why the chargee should suffer such inconvenience.

16. The plaintiff has also contended that there was no auction sale of the suit property on 19<sup>th</sup> November 2013. I have considered the averments by the plaintiff on the issue and the material placed before the court in support of the contention. I have also considered the response by the defendant through the affidavits by the auctioneer and the defendant's Nakuru branch manager. I am of the view that whether or not there was an auction on 19<sup>th</sup> November 2013 is an issue that I cannot determine on the affidavit evidence before me. The issue will have to wait for determination at the trial.

17. On the issue of excessive interest rates and failure by the defendant to account for the payments made by the plaintiff, the law is settled that a chargee will not be prohibited from exercising its statutory power of sale merely because there is a dispute over accounts. In any event, unlike in the case of **Professor David Musyimi Ndeti –vs- Housing Finance Company of Kenya Ltd. Nairobi HCCC No. 456 OF 2006 (Unreported)** that was cited by the plaintiff, the plaintiff has not placed before the court any credible evidence that the defendant levied illegal interest rates and other charges on his loan account. In view of what I have set out herein above, I would say that if the plaintiff, had amended his plaint and pleaded among others the issue that the suit property was sold without a valid valuation being done, I would have not hesitated to hold that the plaintiff has established a prima facie case against the defendant on the issue. As the state of the plaintiff's pleadings stand now, I am unable to make that finding. Before, I conclude on this issue of prima facie case, the defendant had raised an issue which I think I should deal with at this stage. As I have stated above, there is no dispute that the suit property has been sold. Whether the sale was fraudulent or illegal would be determined at the trial if the plaint is amended. The plaintiff and the defendant both exhibited a memorandum of sale showing that the suit property was sold to one, Hellen Kwamboka Kombo for a sum of kshs. 3,300,000/=. The defendant has placed further evidence before the court showing that the said Hellen Kwamboka Kombo has paid the full purchase price to the defendant. The orders sought herein which seek to restrain the defendant from transferring the suit property to a third party would no doubt affect the said Hellen Kwamboka Kombo.

18. I am alive to the provisions of Order 1 rule 9 of the Civil Procedure Rules, 2010 which provides that no suit shall be defeated by reason only of misjoinder or non-joinder of a party. In this case however, the issue is not about misjoinder or non-joinder of a party perse. The issue is that the court is being called upon to grant orders that would affect the interest of a third party without giving her an opportunity to be heard. I think it would be against the rules of natural justice to make such order. I am of the view that when the plaintiff decided to challenge the sale of the suit property, he ought to have amended the plaint and joined Hellen Kwamboka Kombo as a party to the suit. While I agree with the decision in the case of **Joseph Kaara Henry Mwethaga –vs- Chris M. Gaturu T/A Crima Enterprises & 3 Others, Nairobi HCCC No. 1353 of 1998[2000] eKLR** that was cited by the plaintiff that an injunction can issue to stop a chargee from completing the sale of a charged property which has been sold where it is proved that the sale was conducted in bad faith and was liable to be set aside, the purchaser of the property must be made a party to a suit seeking such relief. That has not been done here. For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case against the defendant.

19. Having reached the conclusion that the plaintiff has not established a prima facie case against the defendant, I am not obliged to consider whether the plaintiff would suffer irreparable injury if the order sought is not granted. I wish to state however that I am in agreement with the submission by the defendant's advocates that under section 99 (4) of the Land Act, 2012 any person prejudiced by unauthorized, improper or irregular exercise of chargee's statutory power of sale has a remedy in damages against the person exercising the power. This statutory remedy is available to the plaintiff in the event that he succeeds at the trial of this suit. There is no evidence before me that the defendant herein would not be able to pay damages to the plaintiff. The upshot of the foregoing is that the plaintiff's application dated 18<sup>th</sup> December 2013 is not for granting. The same is accordingly dismissed with costs to the defendant.

**Delivered, signed and dated at KISII this 19<sup>th</sup> day of December, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the plaintiffs

Mr. Mose L. for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**