



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 642 OF 2012

CHARLES MAANA DARIAPLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA LIMITED 1ST DEFENDANT

AXAMAC HOLDINGS LIMITED 2ND DEFENDANT

S. M. GATHOGO T/A VALLEY AUCTIONEERS3RD DEFENDANT

RULING

1. The Application before court is the Plaintiff's Notice of Motion dated 4 October 2012. It is brought under the provisions of **Order 40 rules 1 and 2, Order 5 rule 17 and Order 50 rule 1** of the Civil Procedure Rules as well as the general inherent jurisdiction provisions of the *Civil Procedure Act*. Prayers 2 and 3 of the said Application ask that firstly, pending the hearing and determination of the Application but also pending the hearing and determination of the suit, that the Defendant be restrained from in any way interfering with or advertising, leasing, alienating, charging, selling, transferring or any way dealing with the Plaintiff's property Nairobi/Block 82/33 (hereinafter "the suit property"). Further, the prayers sought the Order that the Defendant's be restrained from in any way demanding rent either from the Plaintiff or the tenants of the suit property.
2. The Application was brought on the following grounds namely that the Plaintiff was the registered owner of the suit property which had been charged to the first Defendant which exercised its statutory power of sale and was purported to have sold the property at Shs. 15 million on 30 March 2012. The third Defendant had advertised the suit property for auction only on 29 March 2012 and the auction was reportedly held on 30 March 2012, one day after the advertisement had been placed. The second Defendant was purportedly the highest bidder and had paid a 25% deposit on 2 April 2012, two days after the said auction. The first Defendant had, apparently, continued debiting the Plaintiff's account in satisfaction of the loan, even after the purported sale of the property and had refused to give the Plaintiff any information as regards the sale. Further, the second Defendant had contracted with the third Defendant to demand of the Plaintiff as well as the tenants of the suit property that they do vacate the same or pay rent to the second Defendant.

3. The Application was supported by the Affidavit of the Plaintiff sworn on 4 October 2012. He deponed to the fact that he was the registered owner of the suit property and was in possession of the same having rented out part of the suit property to tenants. He was residing on the other part. The Plaintiff then gave details of the monies that he had borrowed from the first Defendant and admitted defaulting on the loan amount of Shs. 7 million. He also confirmed having received a Statutory Notice issued by the first Defendant calling for repayment of the loan under cover of a letter dated 20 May 2011. Then on 20 December 2012 (which I think should read 2011), the Plaintiff stated that he had received a Notification of Sale from the third Defendant detailing that unless he repaid the term loan, the property would be auctioned for sale on 21 February 2012. Although on that day, the deponent stated that he attended the auction of the suit property, it was not sold as it did not reach the reserve price. Then, on or about the 14 September 2012, the Plaintiff stated that the tenants of the suit property had called him and had indicated to him that the third Defendant had delivered a letter, dated the same day, from the advocates of the second Defendant, detailing to them that the suit premises were now owned by the second Defendant and gave them a copy of the title to the suit property. Although his enquiries at the first Defendant's offices came to naught, the Plaintiff stated that he had found out that the auction of the suit property had taken place on the 30 March 2012, having only been advertised the previous day – 29 March 2012. Thereafter, the Plaintiff stated that he had obtained copies of his bank statements from the first Defendant which indicated that there was a credit to his account in the amount of Shs. 3,756,250/- on 2 April 2012. According to the Plaintiff, that sum was the 25% deposit but he noted that there had been no further credit to his account of the balance of the purchase price. Consequently, he believed that the auction was improper, fraudulent and illegal. On top of that, the second and third Defendants had then asked the tenants, as well as the Plaintiff, to either vacate the premises or pay rent to the second Defendant. The Plaintiff believed that the Defendants were now threatening to evict the tenants and himself from the suit property and requested this court to endorse his application for an injunction to prevent that.
4. It should be noted that the Plaintiff's said Application came by way of Certificate of Urgency and was heard *ex parte* on 10 October 2012 wherein this court granted an order restraining the Defendants from in any way interfering with the Plaintiff's quiet possession of the suit property nor should they in any way sell, alienate or transfer the same. One **Celestine Aoko Otieno** the Company Secretary of the first Defendant bank swore a Replying Affidavit on 18 October 2012. She recounted the lending of Shs. 7,000,000/- to the Plaintiff and detailed that under the Charge which was taken as security for the lending, the first Defendant reserved its statutory power of sale of the suit property in the event of default by the Plaintiff. She also detailed how the first Defendant bank had sent to the Plaintiff statutory notices upon his default, which he had acknowledged. Before instructing the third Defendant to sell the suit property, the first Defendant had a valuation taken which gave a forced sale value of Shs. 15 million. The deponent confirmed that at the public auction which took place on the 21 February 2012, the reserve price had not been reached. The Plaintiff had requested the first Defendant to allow him 14 days in which to pay the outstanding loan balance, along with the auctioneer's fees, failing which the first Defendant was to re-advertise the auction of the suit property. The Plaintiff failed to come up with the redemption monies and the suit property was re-advertised by the third Defendant for a public auction to take place on 30 March 2012. That auction was advertised in the Daily Nation of both the 15 and 29 of March 2012. The deponent confirmed that she had been notified by a Mr. Gathogo of the third Defendant, which information she believed to be correct, that on both the 27 and 30 March 2012, the Plaintiff had called Mr. Gathogo and asked him to call off the public auction so as to allow him time to redeem the loan account.
5. Thereafter, Ms. Otieno detailed that the second Defendant paid to the third Defendant the sum of Shs. 3,756,250/- in 5 banker's cheques on the day of the auction and the same were banked on 2 April 2012, this being the 25% deposit required upon the fall of the hammer. As far as the deponent was concerned, the deposit could either be paid to the auctioneer or secured by a banker's cheque or other acceptable instrument in favour of the first Defendant bank. There was nothing illegal about the auction sale as stated by the Plaintiff. The deponent wrapped up her Replying Affidavit by stating that in her opinion the suit did not disclose a *prima facie* case and did not meet the requirements for the granting of an interlocutory injunction in that:

“(i) both the debt and default are repeatedly admitted;

(ii) statutory notices were served and duly acknowledged;

(iii) the plaintiff was afforded an extended time to repay the loan, did not pay and brings to court no repayment proposal;

(iv) the alleged loss or damage if proved can properly be secured in damages; and

(v) the orders sought will serve no useful purpose.”

9. Mr. **Samuel Mutahi Gathogo** of the auctioneers firm, being the third Defendant herein, swore a Replying Affidavit on 18 October 2012. That Affidavit set out the facts concerning the two auction sales as per the Affidavit of Ms Otieno. He stated that he could not conclude the first auction sale since the highest bid was Shs. 13 million, below the reserve price. At the second sale, which he had advertised twice in the Daily Nation on 15 March and 29 March 2012, the reserve price of Shs.15 million had been achieved and the suit property was sold to the second Defendant at Shs 15,025,000/-. He confirmed that the second Defendant had paid the 25% required deposit amounting to Shs. 3,756,250/-on the same day of the auction – 30 March 2012. The second Defendant filed a Replying Affidavit on 18 October 2012 sworn by its director **Anthony Ndirangu**. He stated that he had seen the suit property advertised for sale by way of auction on 30 March 2012. He recounted the events at the auction sale which, he maintained, was hotly contested but he had emerged the highest bidder at Kenya shillings 15,025,000/-. He had paid the required 25% deposit of Shs. 3,756,250/- to the third Defendant on the day of the auction sale. In paragraph 13 of his Affidavit, Mr. Ndirangu stated that the balance of the purchase price in the sum of Shs. 11,268,750/-was financed by Bank of Africa Kenya Ltd who duly issued an undertaking through its advocates letter dated 17 May 2012 to the first Defendant. Later, the suit property was transferred into the name of the second Defendant and a Certificate of Lease was issued on 27 August 2012. The same was subsequently charged to the said Bank of Africa Kenya Limited. Thereafter, upon assuming ownership of the suit property, the second Defendant instructed its advocates to notify all the tenants in the suit property of the change of ownership and invited the Defendant and the tenants of the suit property either to vacate the same or enter into a tenancy relationship with the second Defendant. The deponent noted that, despite the sale and transfer of the suit property to the second Defendant, the Plaintiff had refused to vacate the same and has been residing illegally on the suit property as a trespasser. Further, he had been illegally collecting monthly rents from the tenants residing thereon. After complaining to the first Defendant, the second Defendant had noted, that as a consequence of the above, the tenants had filed complaints at the Business Premises Rent Tribunal and had obtained an order directing that they should pay the rent to the Tribunal until this matter has been sorted out.

10. On the 23 October 2012, the matter came up before Lady Justice Ougo. She granted the Plaintiff leave to file a supplementary Affidavit in relation to his said Application. She also directed that the tenants in the suit property rather than paying rent to the Business Premises Rent Tribunal, would now deposit the same into a joint account in the name of the advocates for the Plaintiff and the second Defendant, on or before the fifth day of every month commencing November 2012. The Lady Justice also extended the Interim orders pending the hearing and determination of the Plaintiff’s Application. By way of record, the said Bank of Africa Kenya Ltd filed an application by way of Chamber Summons on 26 November 2012, to be enjoined as an Interested Party. It is noted that the advocates for the Plaintiff and the Defendants, along with the advocates for the Interested Party have filed a consent letter dated 29 November 2012, agreeing that the said Bank of Africa Kenya Ltd be enjoined in the suit.

11. In actual fact, the Plaintiff did not file a Supplementary Affidavit but instead filed a list of authorities on 3 December 2012. The second Defendant filed its list of authorities 29 November 2012 and the first and third Defendants filed their lists of authorities again on 3 December 2012.

Counsel for the parties made oral submissions before court on 4 December 2012. Mr Anzala, learned counsel for the Plaintiff outlined the lending by the first Defendant to the Plaintiff and the default in repayment thereof. He then noted that the suit property had been advertised for sale on the 30 March 2012. It had been claimed by the first and third Defendants that the property was sold for just over Shs. 15 million. The Plaintiff's complaint against those Defendants was whether there was a sale by public auction at all. In the event that the court found that there was no public auction, in terms of the representation by the first and third Defendants, then everything else that followed would fall away. Counsel noted that at pages 67, 68 and 69 of the bundle attached to the Plaintiff's Affidavit in support of the Application, he had written to the advocates for the first, second and third Defendants but had received no reply to any of his letters. Accordingly, he had no alternative but to advise his client, the Plaintiff, to file suit. Counsel maintained that the initial question of whether or not there had been an auction at all was never answered. He stated that the question could only be answered by the persons who attended the auction, noted the bids et cetera. He noted that at paragraph 10 of the Replying Affidavit of the second Defendant, the deponent had said that it was a hotly contested auction. Counsel wondered who were the people who had attended such hotly contested auction. No answers had been received from the Defendant leading to the one conclusion – there was no auction.

12. Thereafter, Mr. Anzala maintained that the second Defendant had colluded with both the first and the third Defendants as regards the fraudulent auction sale. The answer to the question he had posed was to be found on page 11 of the exhibit to the Replying Affidavit of the second Defendant. This is the advertisement of the third Defendant auctioneer who detailed amongst the conditions in the advertisement that the balance of the purchase price for the suit property would be paid within 30 days of the auction. Then at page 18 of the same exhibit, the Memorandum of Sale executed by the second Defendant on the 30 March 2012, the purchase price was to be paid within 60 days. Counsel did not dispute that parties are allowed to negotiate but there was no evidence before the court to that extent. If one assumes that the auction did take place, then the 60 days would have expired on the 30 May 2012. Counsel noted that in order to purchase the suit property, the second Defendant had obtained a facility from the Interested Party. That undertaking from the Interested Party was very open-ended and did not take into account the 60 day period as per the Memorandum of Sale as above. From the search of the property dated 5 September 2012, the Transfer to the second Defendant and the Charge to the Interested Party were only registered on 27 August 2012. Counsel noted that full payment of the purchase price ought to have been completed by 18 September 2012 but this is not the case. The transfer of the monies was done on 1 October 2012, 33 days after the registration of the Transfer and the Charge. Counsel commented that there seemed to be no urgency between the Defendants and the second Defendant was given considerable time to complete. Mr. Anzala wrapped up his submissions by stating that in view of the above facts, he considered that the Plaintiff had made out a *prima facie* case justifying the injunction to issue. The first Defendant may argue, counsel said, that the Plaintiff could be compensated in damages but this did not mean that the first Defendant can infringe upon the rights of the rightful owner of the suit property.

13. Mr. Muiruri appearing for the first and third Defendants noted that the first auction was advertised on 7 February 2012 and it was not successful as the reserve price was not achieved. The Plaintiff had been allowed more time to pay off what he owed to the first Defendant but he failed to do so. Consequently, counsel noted that the second auction was advertised in the Daily Nation on 16 March 2012 (as well as on 29 March 2012) for the auction to take place on 30 March 2012. The auction did take place on that date and that is evidenced by the Memorandum of Sale. Counsel noted that the sale had now been duly completed and in his opinion, the Plaintiff has no rights to the granting of an injunction. Proper procedures were followed to the letter. The Plaintiff had made efforts to postpone the sale but he only made empty promises. In counsel's opinion, if he felt aggrieved, then his remedy lies in damages not injunction. The Plaintiff had not satisfied the conditions for injunction as per the principles in **Giella versus Cassman Brown**. Finally, counsel commented that the injunctioning the third Defendant, who is the first Defendant's agent, will have no value. Interim orders of injunction would serve no purpose as against either the first Defendant or the third Defendant who have no interest whatsoever in the suit property.

14. Learned counsel for the second Defendant, Mr. Kibaiko put forward his submissions by stating that what the Plaintiff had put before court was premised on two grounds. The first was that the suit property had been advertised only on 29 March 2012 and thereafter sold on 30 March 2012. The second ground was that the deposit of 25% was not paid on 30 March 2012 but on 2 April 2012. All the other issues raised from the bar by counsel for the Plaintiff had not been pleaded. Counsel maintained that what the court had been told was outside the grounds of the Application bringing forth new grounds that were not pleaded. The issue to be considered was that the Plaintiff was only aware of the intended auction sale on the 29 March 2012 as he had missed the advertisement in the Daily Nation of 15 March 2012. Counsel noted that the banker's cheques totalling Shs. 3,756,250/- were all dated 30 March 2012 and stamped as received by the auctioneer on that date, which was a Friday. Consequently the deposit was paid to the auctioneer at the fall of the hammer. Whether the cheques were encashed on the Monday 2 April 2012 was irrelevant. The Memorandum of Sale had been signed on 30 March 2012 and could not have been so signed unless the deposit had been paid. By **section 72 (1)** of the *Registered Land Act*, the execution of a valid contract extinguished the right of redemption. Counsel then referred me to the case of **Mbuthia versus Jimba Credit Finance Corporation & Anor (1988) KLR** in which it was held:

“The equity of redemption is lost on the completion of a valid agreement for a valid sale and it is not allowed to continue until conveyance nor until registration. Even though the mortgagee and purchaser may adjust the conditions of the contract as they agree, the mortgagor has no ground on which he can intervene.”

He then noted that the undertaking of the advocate as regards the balance of the purchase price was given on 17 May 2012 within the 60 days provided in the Memorandum of Sale. He cited as per **section 77 (3)** of the *Registered Land Act* that a Transfer may be accepted by the Registrar and any person affected may have his remedy in damages only where the auction sale was irregular. The suit herein was filed after the property had been transferred into the name of the second Defendant. There is nothing to show that the second Defendant had participated in any fraud. Finally, counsel referred the court to paragraph 13 of Plaintiff which he said confirmed that the Plaintiff, so far as the second Defendant is concerned, relied upon the fact that he did not pay the 25% deposit at the fall of the hammer not that he did not pay the balance of the purchase price.

15. I have perused the authorities cited to court by counsel more particularly the **Mbuthia** case as well as **Marco M. Kieti versus Official Receiver & Anor. (2010) eKLR**, **Ze Yu Yang versus Nova Industrial Product Ltd (2003) 1 EA 362**, **Central Kenya Ltd versus Trust Bank Ltd & 4 Ors (1996) eKLR**, **S. N. Kihara versus Housing Finance Company of Kenya Ltd & 2 Ors (2006) eKLR**, **J. M. Ngumbe versus Kenya Commercial Bank Ltd & Anor. (2006) eKLR** and **Joseph K. H. Mwethaga versus Chris M. Gaturu T/A Crima Enterprises & 3 Ors HCCC No. 1353 of 1998 (unreported)**. The majority of these cases touched upon the equity of redemption and all to a large extent adopted the finding of the Court of Appeal in the **Mbuthia** Case (supra). As Nyamu J. put it in the **Ze Yu Yang** case (supra):

“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with the celebrated case of *Mbuthia v Jimba Credit Corporation (1986) LLR 3292 (CAK)*. In this case the decision of Chief Justice Apaloo at 5 clearly states that the equity of redemption is extinguished by a valid contract under section 60 of Transfer of Property Act. The majority decisions of Platt JA and the late Masime JA wavered on this and generally tended to indicate that the equity did linger on until registration.”

16. It seems then that the decision before this court is whether there was a valid auction sale held on 30 March 2012 which resulted in a valid contract for sale of the suit property. There is no doubt in my mind that the Plaintiff herein did his best to avoid having the suit property sold over

his head, as it were. Indeed, I have no doubt that he attended the first auction sale held on 21 February 2012 which was aborted due to the reserve price for the suit property having not been attained. However, it does appear that the Plaintiff missed the advertisement in the Daily Nation of 15 March 2012 advertising the second auction sale for the 30 March 2012. By his own admission in the Affidavit in support of the Application, the Plaintiff only noted the advertisement in the Daily Nation which appeared on 29 March 2012. There is also evidence from the Replying Affidavit of the third Defendant dated 18 October 2012 that the Plaintiff was aware of the auction sale fixed for the 30 March 2012. Paragraph 7 of that Affidavit reads:

“That in response to paragraphs 9 and 10 of the Supporting Affidavit, the Plaintiff and his advocate Mr. Anzala were aware of the date of the auction and they both called me on my mobile phone on 27/3/2012 and 30/3/2012 pleading with me to suspend the auction. I told them that I had no power to suspend the auction which power lay with the 1st Defendant Bank.”

This court has no reason to disbelieve the third Defendant with regard to the above quoted paragraph and I have no hesitation in holding that the auction sale that took place on 30 March 2012 was properly convened and held. Arising out of that sale, the second Defendant executed the Memorandum of Sale dated 30 March 2012, at page 18 of the exhibit “AN 3” to the Replying Affidavit of the second Defendant dated 18 October 2012. I accept the version of events as detailed by the deponent to that Affidavit. To my mind, and accepting/adopting the principle expounded in the Mbuthia case above, I find that the Plaintiff’s equity of redemption was lost on the completion/execution of the aforesaid Memorandum of Sale. I find that the fact that the Daily Nation advertisement read that completion should be in 30 days after the auction sale, to be of little relevance for, as Mr. Anzala conceded in his submissions, the parties were allowed to negotiate terms. I also take the point raised by Mr. Kibaiko that this suit was filed after the property had been transferred and registered in the name of the second Defendant and the fresh Certificate of Lease issued by the Registrar. Quite clearly therefore, in coming to court at what amounts to this late stage, the Plaintiff’s equity of redemption had long been extinguished.

17. As a consequence of the above, I dismiss the Plaintiff’s Notice of Motion dated 4 October 2012 with costs to the Defendants. The second Defendant will be entitled to the rents arising from the suit property as from the date upon which the Registrar issued the Certificate of Lease to it, namely 27 August 2012. Any such monies paid into the Business Premises Rent Tribunal by the tenants of the suit property will be for the second Defendant from that date, as well as the monies held in the joint account in the names of the Advocates for the Plaintiff and the advocates for the second Defendant. Order accordingly.

DATED and delivered at Nairobi this 23rd day of January 2013.

J. B.HAVELOCK

JUDGE