



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit No. 407 of 2009

between

GREENHAM MURAGE GACHENGO 1ST PLAINTIFF/APPLICANT

GEORGE GACHENGO MURAGE

T/A GAVI STORES 2ND PLAINTIFF/APPLICANT

VERSUS

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION (ICDC) DEFENDANT/RESPONDENT

RULING

1. This case was scheduled for hearing on the 10 July, 2012. Unfortunately on that day, the case could not proceed for the reason that the second Plaintiff in this matter had proceeded to India for pancreatic cancer treatment. Consequently, I stood over the matter for hearing until 24 September, 2012 and directed the parties to consider and act upon the provisions of **Order 11** of the *Civil Procedure Rules*. Parties do not seem to have done much about my direction as regards **Order 11** and instead the Plaintiffs herein had to file a Notice of Motion seeking orders for temporary injunctions to issue, restraining the Defendant, its servants, employees and/or agents from, in any way, alienating, charging, transferring, or howsoever dealing with, disposing, selling and/or proceeding with the scheduled intended sale by way Public Auction of the second Plaintiff's property known as Molo South/Ikumbi Block 1/232 ("the suit property") which properly had been advertised for sale scheduled to take place on 20 September, 2012 at twelve noon outside the premises of the Standard Chartered Bank Ltd, Nakuru Town. That application is the subject of a Notice of Motion currently before court and dated 6 September, 2012.

2. The Plaintiffs' said Notice of Motion is supported on the following grounds:

“a) The intended sale by Public Auction on the 20th September 2012 at 12.00 noon of the suit property all that parcel known as L.R. Molo South/Ikumbi Block 1/232 Nakuru was advertised in the Daily Nation Newspaper of Monday 3rd September 2012.

b) The 2nd Plaintiff was served with a notification of sale dated 16/7/2012 by M/s Garam Investments upon the instructions of the defendant which notification gave the 2nd defendant 45 days within which to pay a sum of Kshs.16,237,980.45 (Provision) as at 31st July 2012 failure to

which the 2nd plaintiffs property Molo South/Ikumbi Block 1/232 shall be sold by Public Auction on the 20th September 2012 at 12.00 noon.

c) The defendant has not and did not issue or serve the plaintiff with the requisite 3 months statutory notice of its intention to exercise its statutory power of sale or any notice whatsoever demanding compliance as mandated by law prior to instructing M/s Garam Auctioneers to give or serve the 2nd plaintiff with their notification of sale dated 16/7/2012.

d) The failure by the defendant to issue its 3 months statutory notice of its intention to exercise its statutory power of sale or any notice at all prior to instructing M/s Garam Investments to issue the notification of sale dated 16/7/2012 renders the said notification invalid and unlawful and also denies the 2nd plaintiff his right under statute.

e) Further and the above notwithstanding this suit is scheduled and confirmed for hearing on the 24th September 2012 at 11.00 a.m. before the Honourable Mr. Justice Havelock.

f) The suit on the 10th July 2012 came up for hearing before the Honourable Mr. Justice Havelock but the same did not proceed as the 2nd plaintiff/applicant was away in India undergoing intensive treatment and a major Surgery for Pancreatic Cancer and the matter was taken out and a fresh date of 24th September 2012 at 11.00 a.m. was taken in court.

g) On the 11th July 2012 at 3.30 p.m. the defendant was duly served with a Hearing Notice dated 10th July 2012 informing it of the confirmed hearing date and time and thus became aware of the confirmed hearing dated of 24th September 2012 at 11.00 a.m.

h) Despite having been served with a hearing notice together with a letter detailing and informing the defendant of the directions/orders of the court the defendant proceeded to instruct M/s. Garam Investments on the 12th July 2012 to issue a Notification of sale to the 2nd plaintiff dated 16th July 2012.

i) The said Notification which was delivered through registered mail gave the 2nd plaintiff 45 days within which pay a sum of Kshs.16,237,980.45 (Provisional) as at 31st July 2012 plus interest failure to which the 2nd plaintiffs property shall be sold by way of Public Auction.

j) The intended sale by public auction of the 2nd applicant/plaintiffs property being LR No. Molo South/ Ikumbi Block 1/232 is scheduled to take place on 20th September 2012 at 12.00 noon in Nakuru Town.

k) The defendant and the plaintiffs had been since 15th December 2010 to 13th January 2012 actively engaged in negotiations with a view at arriving at a settlement.

l) All these events transpired when the 2nd plaintiff/applicant was recuperating from a major surgery he went through while receiving intensive medical treatment for Pancreatic Cancer in India and which information was also well within the defendant's knowledge having been notified through the letter dated 28th June 2012.

m) The amount of Kshs.16,237,980.45 is a colossal amount by any standard for any person let alone the 2nd plaintiff especially in his present condition to raise within the manifestly short period of 45 days given in the Notice.

n) The plaintiff stands to suffer irreparably and in a way which cannot be compensated by an award of damages as the suit property is his only residence home to his family and where the 2nd

plaintiffs wife and daughter who are the 1st plaintiffs mother and sister respectively are buried.

o) No prejudice will be occasioned to the defendant should the orders sought herein be granted as this application has been brought without undue delay.

p) In the circumstances it is the interest of Justice and fairness that this Honourable Court does exercise its discretion in favour of the plaintiff/applicants and grant the orders sought herein”.

The Notice of Motion is supported by the Affidavit of George Gachengo Murage, who is the first Plaintiff herein, sworn on 5 September, 2012.

3. In his said affidavit Mr. Murage detailed in the history of this matter before court stating that he had sought an injunction against the Defendant from selling the suit property by way of an application dated 28 May, 2009. On 17 September, 2010 Lady Justice Koome (as she then was) rule against the application and thereafter the deponent's advocates on record prepared, filed and served a Notice of Appeal and apply for copies of the said Ruling and types proceedings for the purposes of pursuing an appeal against the Lady Justice's findings. The deponent went on to say that he actively entered into negotiations with the Defendant seeking settlement of the matter and such negotiations had been going on up to 13 January, 2012. The deponent spent some time detailing to court the progress and outcome of the settlement negotiations as between him and the Defendant. However, he said that the negotiations stalled and in March 2012 this suit was listed for hearing as to why the same should not be dismissed for want of prosecution. At that time, Mr. Murage stated that he had paid a total of Shs. 3,720,718/- towards settlement of the outstanding loan and that he always been ready to pay the same despite his advanced age of sixty-seven years, failing health diagnosis and treatment for pancreatic cancer and diabetes. The deponent recorded that the last payment at the end major was on 1 August, 2011 in the amount of Shs. 1,100,000/-. He then stated that during the month of May 2012, he was taken ill and had to travel to India for treatment. He attached to his said Affidavit copies of medical reports and doctors' notes. He further deponent to the fact that his advocates had appeared before this court on 10 July, 2012 and a fresh hearing date was taken as detailed above. His advocates thereafter served a hearing notice on the advocates for the Defendant.

4. Mr. Murage continued with his Affidavit in support of the Application by stating that when he returned from India he received a letter and a notification of sale sent to him by Messrs. Garam Investments dated 16 July, 2012 in which the brokers firm demanded an amount of Shs. 16,237,980.45 within forty-five days of the said notification of sale. The deponent clarified the position as regards the suit property in relation to 2 other parcels of land linked to the same. He noted that the suit property comprised of the deponent's house and thereafter there was Molo South/Ikumbi/Block 1/158 which was the lower part of his property and Molo South/Ikumbi/Block 1/233 covering the area occupied by his pump. Although the deponent admitted receiving the Notification of Sale from the brokers, he detailed that he had never been served with a three-month Statutory Notice of intention to exercise its statutory power of sale by the Defendant. Finally he detailed that he believed that that the intended sale of the suit property by public auction was invalid an unlawful and further the manner and the timing in which the sale was scheduled was a calculated attempt by the Defendant to deny the deponent his rights under the law and to defeat justice by selling this suit property just days before the confirmed the hearing date in this matter. He drew the attention of the court to the fact that the Defendant had been duly served with a hearing notice and was fully aware of the hearing date. The court also noted that the Affidavit in support of the Chamber Summons seeking leave to bring this application in the court vacation, contained much of the same detail as the Affidavit in support of the Application.

5. The Defendant responded to the Plaintiff's' Application by filing a Replying Affidavit sworn by Grace M. Magunga, the Defendant's Corporation Secretary dated tenth of September 2012 as well as a Statement of Grounds of Opposition dated the same day. The Replying Affidavit opened by saying that the second Plaintiff had admitted charging the suit property in favour of the Defendant for a loan facility of Shs. 2 million and referred the court to a Chamber Summons dated 28 May, 2009 as well as paragraph 2 of the second Plaintiff's Supporting Affidavit filed in court on 4 June 2009 and as well as paragraph 23 of the second Plaintiff's Supporting Affidavit to the Application. The deponent said that the second

Plaintiff had also acknowledged that he had fallen into arrears in the payment of the loan. She then went into details of settlement proposals made back and forth over several years and which had been clearly detailed in the application before Lady Justice Koome and upon which she had ruled. Thereafter, the deponent stated that the Defendant had complied with the provisions of the law relating to the suit property by issuing a three-month statutory notice to the second Plaintiff dated tenth of November 2008. A copy of that statutory notice was annexed to the second Plaintiff's Supporting Affidavit filed in court on 4 June, 2009. As regards the partial settlement to which the second Plaintiff had referred to in his Supporting Affidavit to the Application, Ms. Magunga stated that such was only to be reached by the mutual consent of both parties and did not do away with the Plaintiffs' contractual duty to liquidate their debt to the Defendant hence the latter has used such expression as "without prejudice and subject to the approval of the Board". Finally, the deponent detailed that the Plaintiffs' suit herein had no merit and was meant to draw this court into the Plaintiffs' greater scheme frustrating the realization of the Defendant's statutorily guaranteed rights.

6. The Defendant detailed seven grounds of opposition to the Plaintiffs' Application. These are set out as follows:

“1. THAT the Plaintiffs’ Notice of Motion dated 6th September 2012 in its entirety is terminally and substantively defective because it seeks for an order that “a temporary injunction do issue restraining the Defendant ... pending the hearing and determination of this suit”. In the present case, the Plaintiffs have never filed a “Plaint” or any other pleading that would form the basis of the trial of a main suit. In any event, the Plaintiffs have never served the Defendant with any such “Plaint” or its attendant and requisite Summons to Enter an Appearance at all. This means that no court fees were paid for any “Pliant” and consequently the court should conclude that indeed no “Plaint” has been filed in court. If there is no “Plaint” in this case, then the entire application for an temporary injunction by the Plaintiffs must fail on the ground that they cannot establish a prima facie case when there is no main case at all.

2. THAT the Plaintiffs are guilty of forum shopping because they are attempting to hoodwink this Honourable Court to issue a temporary injunction whereas a similar application for a temporary injunction has already been dismissed by this Honourable Court in this very cause through the Ruling of this Honourable Court read and signed by Lady Justice M. K. Koome on 17th September 2010. Furthermore, the subject matter of the Plaintiffs’ Notice of Motion dated 6th September 2012 conjures up the very issues that had been directly and substantially in issue in the Plaintiffs’ Chambers Summons dated 28th May 2009 which was dismissed with costs to the Defendant.

3. THAT in light of the fact that the Plaintiffs have never filed and or served the Defendant with a “Plaint” or its attendant and requisite Summons to Enter an Appearance at all, it means that the only matter to be decided upon was the Plaintiffs’” Chamber Summons dated 28th May 2009. This Honourable Court having considered the merits and demerits of the said Chamber Summons dated 28th May 2009 as well as its supporting documents, the Replying Affidavit by Grace M. Magunga filed in court on 6th July 2009 and submissions by counsel for all the parties concerned, dismissed the application by way of the Chamber Summons dated 28th May 2009 with costs to the Defendant through the Ruling of this Honourable Court read and signed by Lady Justice M. K. Koome on 17th September 2010. The Chamber Summons dated 28th May 2009 having been dismissed, no suit now subsists to form the basis of any application for temporary injunction (whether by way of the Plaintiffs’ Notice of Motion dated 6th September 2012 or otherwise at all).

4. THAT the issue of service of a 3 months statutory notice of the Defendant’s intention to exercise its statutory power of sale was categorically admitted by all the parties concerned and therefore the Plaintiffs are not estopped from denying the existence of such a statutory notice [Please see ground (iv) of the Plaintiffs’” Chamber Summons dated 28th May 2009 and paragraph 15 of the 2nd Plaintiff’s Supporting Affidavit filed in court on 4th June 2009 as well as paragraph 22 of the Replying Affidavit of Grace M. Magunga filed in court on 6th July 2009.]

5. THAT all the parties concerned having rightly admitted that a 3 months statutory notice had already been served upon the Plaintiffs, and this Honourable Court having dismissed the Plaintiff's Chamber Summons dated 28th May 2009 (that sought a temporary injunction) with costs to the Defendant through the Ruling of this Honourable Court read and signed by Lady Justice M. K. Koome on 17th September 2012, there was thenceforth nothing in law to bar the Defendant from issuing a fresh notification of sale with a view to exercising its statutory power of sale as alleged by the Plaintiffs at paragraph 25 of 2nd Plaintiff's Supporting Affidavit filed in court on 6th September 2012.

6. THAT the Plaintiffs herein have been slothful in regard to this suit and the Plaintiffs' Notice of Motion dated 6th September 2012 has been brought only as an afterthought in reaction to the Defendant's Notification of Sale dated 16th July 2012 and thus this Honourable Court should not aid the indolent Plaintiffs by entertaining this application. The court should take cognizance of the fact that the Plaintiffs have already filed a Notice of Appeal dated 20th September 2010 which intends to challenge the entire Ruling and Order of this Honourable Court ready and signed by Lady Justice M. K. Koome on 17th September 2010.

7. THAT if the entire suit herein is misconceived and bad in law, then the Plaintiffs' Notice of Motion dated 6th September 2012 must fail on the ground that the Plaintiff cannot establish a prima facie case when there is no main case at all".

7. Mr. Kabita for the Plaintiffs submitted to court for an order in terms of prayer 2 of the Plaintiffs' Application noting that the hearing of the same was fixed for 24 September, 2012 while the auction of the suit property was fixed for 4 days earlier on 20 September, 2012. In his opinion, the Defendant would suffer no prejudice should the order sought be granted. He stated that the Application was brought under the provisions of section 63 of the Civil Procedure Act as well as sections 1 A and 1 B thereof. He submitted that the section prevented the ends of justice from being defeated. He noted that the Hearing Notice had been served upon the Defendant detailing the return date of 24 September, 2012 but nevertheless the Defendant had proceeded to instruct the auctioneers to issue Notification of Sale the forty-five day notice of which ended on the 20 September, 2012. The sale had already been advertised in the Daily Nation of 3 September, 2012. Counsel prayed that the court to exercise its discretion in favour of the Plaintiff and granted Application in terms of the prayers 2 and 3 thereof.

8. In his term, Mr. Odongo opposed the application for temporary injunction stating that such had been previously canvassed by the Plaintiff, duly considered by this court and determined in the Defendant's favour. In the circumstances, the Plaintiff having failed to obtain the temporary injunction, there was nothing to stop the Defendant so advertising the suit property for sale. Secondly counsel pointed out that before court there is no suit which can form the basis of the issue of a temporary injunction. The earlier application had been brought by way of Chamber Summons. To the Defendant's knowledge, no Plaintiff has been filed or served upon the Defendant. The Chamber Summons herein having been dismissed by this court, nothing was left of the Plaintiff's suit. Finally, Mr. Odongo referred this court and to the Ruling of my learned sister **Mwili J.** Delivered in *HCCC No. 407 of 2009 – Greenham M. Gachengo v Industrial & Commercial Development Corp* (unreported). He pointed out the principles therein as to the granting of an interlocutory injunction as per the celebrated case of **Giella v Cassman Brown & Co. Limited** (1973) EA 358. He submitted that the Plaintiffs herein had not satisfied the tests for a temporary injunction to be granted as the Plaintiffs have admitted owing monies to the Respondent quoting the learned Judge as follows:

"Whatever the correct amount due and owing be, there is a default which is admitted by the Applicant and this default entitles the Respondent to call in the guarantee. The Respondent has rightly exercised its rights under the guarantee. I do not see what success the applicant expects, it having admitted owing to the Respondent."

9. Quite expectedly, Mr. Kabita rose to his feet to assure the court that a Plaintiff had been duly filed on 9 June 2012 together with the Application in hand. The matter has also been listed for notice to show cause

before Kimondo. J. who directed that the same be fixed or hearing within 90 days. (See the court record for 13 March, 2012, when the notice for dismissal of the suit was vacated). As regards the application that was dismissed, counsel noted that the parties had entered into negotiations to settle the amounts due and Shs. 1.1 million was paid by the Plaintiffs in August 2011 towards a negotiated settlement. In that regard, the current Application was properly before court. However, counsel admitted that the Defendant has the right to realize its security but that this should not preclude the procedure laid down. He stated that no statutory notice had been issued in this case by the Defendant to the Plaintiffs.

10. I have carefully perused the Court record herein. I believe that Mr. Kabita is somewhat confused as to the pleadings filed in relation to this suit. There is only one Plaintiff filed and that was on 4th June, 2009. There is no trace of any other Plaintiff having been filed certainly not on 9 June, 2012. Mr. Kabita is correct in that on the 4 June, 2009 eight Chamber Summons was filed seeking an injunction to prevent the Defendant herein from disposing of or selling the suit property pending first, the determination of that application and secondly, pending the hearing of the suit. As previously indicated, that application has been disposed of. The Plaintiff filed on 4 June, 2009 had the following prayers:

“(a) A declaration that the defendant having received a sum of Kshs.910,000.00 from the 1st plaintiff is bound by the terms of settlement agreed therein and on payment of the balance of Kshs.1,590,000 agreed between the 1st Plaintiff and the defendant, the defendant do forthwith discharge the charged parcels of land that is being Molo South/Ikumbi Block 1/232.

(b) Upon granting prayer (a) and (b) above, and without prejudice to order (e) hereunder, an order of injunction do issue against the defendant, its agents, servants and/or employee restraining them from alienating or selling or any way deals adversely or otherwise with all that property known as Molo South/Ikumbi Block 1/232 until its compliance with orders (a) above.

(c) Damages.

(d) Aggravated damages.

(e) Costs of the suit”.

To my mind, the prayer for injunction as expressed in the Plaintiff was dependent upon prayer (a) being granted. As the record shows, prayer (a) was never granted by this court. That being the case, I am prepared to accept Mr. Odongo's submission as above that there is no prayer in the Plaintiff that I can grant in respect of the Application before me. It seems therefore that the Plaintiffs' Application was doomed before even it was filed.

11. Despite my finding as above, I find it necessary to comment upon Mr. Kabita's further submission that the Defendant herein had not given the necessary three months' notice to exercise its statutory power of sale in respect of the suit property. Exhibited to the Supporting Affidavit of the second Plaintiff as regards the said Chamber Summons filed on 4 June, 2009, as "GGM 13a" is a letter dated 10 November, 2008 under the hand of the Defendant's Legal Officer at the time which quite clearly to my mind is the Statutory Notice which Mr. Kabita states was never issued by the Defendant to the Plaintiffs. Further, in accordance with the principles of the Giella case (supra), I do not find that the Plaintiffs herein have established a prima facie case with a probability of success at the trial. I regard the Plaintiffs' Application as before this court as a desperate attempt to stave off the inevitable sale of the suit property. The conclusion to what I have detailed above is that I dismiss the Plaintiffs' Application by way of Notice of Motion dated 6 September, 2012 with costs to the Defendant.

DATED and delivered at Nairobi this 18th day of September 2012.

**J. B. HAVELOCK
JUDGE**