



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 322 of 2003

**GRACE WANDIA MWATHE (Administrator
Of the Estate of Christopher Ndegwa Mwathe) PLAINTIFF**

VERSUS

NATIONAL BANK OF KENYA LTD. DEFENDANT

RULING

The application before the Court is brought by a Chamber Summons dated 4th January, 2011, and taken out under **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010**, and all enabling provisions of the law. By the application, the Applicant seeks the following orders:-

- (1) ... (spent)**
- (2) *The court be pleased to grant a temporary injunction restraining the defendant whether by itself, its agents and/or servants from advertising for sale, disposing off or selling the plaintiff's property being Title No. Nairobi/Block 75/205 pending hearing and determination of this application.***
- (3) *The court be pleased to grant an injunction restraining the defendant whether by itself, its agents and/or servants from advertising for sale, disposing off or selling the plaintiff's property being Title No. Nairobi/Block 75/205 pending hearing and determination of this suit.***
- (4) *The costs of this application be provided for.***
- (5) *The honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.***

The application is supported by the annexed affidavit of Grace

Wandia Mwathe, the Plaintiff/Applicant herein, and is based on the following grounds –

- (a) *That the dispute in this case concerns the plaintiff's claim against the defendant for a declaration that the defendant has no valid statutory power of sale and an injunction to restrain the defendant from purporting to exercise such right to sell the suit premises.***
- (b) *That the plaintiff is in occupation of the suit premises aforesaid.***
- (c) *That despite the said matter pending hearing in court on 17.5.11 the defendant through its***

agents Messrs Garam Investments has advertised the said property for sale by public auction scheduled on 11.1.11 in total disregard and in defiance of the fact that same is the subject matter of this case that is still pending for determination in this honourable court.

(d) That unless restrained the defendant and its agents will dispose off the said property to 3rd parties and render the suit nugatory.

In opposition to the application, the Respondent filed a replying

affidavit sworn by one Zipporah K. Mogaka, the Plaintiff's General Manager – Credit Remedial and Legal Services Manager. In the said affidavit, she avers that the Respondent served upon the Applicant a fresh Statutory Notice dated 3rd June, 2010, which has nothing to do with this suit which was only reinstated on 12th November, 2010. She further deposes that she verily believes, upon the advice of the Respondent's Advocates on record, that the mere existence of a suit does not constitute a clog to the exercise of a Statutory Power of Sale which has arisen. In any event, she states, the issues raised by this suit have nothing to do with the sale sought vide the Statutory Notice dated 3rd June, 2010, which is not a subject of this suit whatsoever or at all.

At the oral canvassing of this application, Mr. Rombo appeared for the Applicant while Mr. Mose appeared for the Respondent. In his submissions, Mr. Rombo argued that the Respondent has threatened to sell the suit property while the suit is pending hearing on 17th May, 2011, and that in defiance of a Court order, the Defendant put up an advertisement on 28th December, 2010. He submitted that if the suit property is sold, it will render the suit nugatory and that this is a proper matter for an injunction as no reason was advanced for rushing to sell the property when hearing is pending. He finally submitted the Plaintiff leaves in that house, which is a matrimonial house, and therefore the balance of convenience tilts in her favour.

Mr. Mose for Respondent opposed the application and stated that the Respondent issued a fresh Statutory Notice dated 3rd June, 2010. That Notice was the one which gave rise to the advertisement which has not been challenged. He argued that the pending suit has nothing to do with the Statutory Right of Sale and that mere pendency of a suit is not a clog or fetter to the Defendant's right to realize the property. He submitted, that this suit therefore has nothing to do with the orders of 3rd June, 2010. He finally submitted that the argument about the property being matrimonial property was untenable as it was offered by way of security and they relinquished any claims to retain it as it became a commodity for sale. He thereupon asked the Court to dismiss the application with costs.

After considering the pleadings and hearing Counsel for the respective parties, I note that on 28th November, 2010, the Respondent's Advocates on record fixed the suit for hearing on 17th May, 2011. They followed the fixing of the hearing date by serving the Applicant's Advocates with a hearing notice dated 1st December, 2010, which the latter Advocates received on the same date.

As the parties awaited the hearing date, on 28th December, 2010, M/S Garam Investments, auctioneers, advertised the property for sale by public auction, ostensibly "... under instructions received from the chargee's Advocates." According to the advertisement, the suit property was scheduled to be sold on 11th January, 2011, thereby provoking the chargor to file this application. It is surprising that the advocates who took the hearing date ex parte on 28th November, 2010, and notified the other side on 1st December, 2010, are the same ones who are now turning their back on that date and threatening to sell the property.

According to the Court record, it is noteworthy that on 4th January, 2011, the Court gave an interim order of injunction for 14 days in terms of prayer (2) of the application (*supra*). On 19th January, 2011, the court extended the said interim orders to 7th February 2011. In the circumstances it follows that the advertisement for the sale of the property on 11th January 2011 was overtaken by a court order. Any

attempted sale of the property on 11th January 2011 in terms of the advertisement would therefore constitute a breach of a court order in force and would also amount to contempt of court.

On 19th January, 2011, this Court extended the said interim order to 7th February, 2011. In the circumstances, it follows that any sale of the suit property on 11th January, 2011 would amount to a naked contravention of a Court order which was in force, and this would amount to contempt of Court. By advertising the sale of the suit property after the taking of a hearing date was also an attempt by the Respondent to steal a march on the Applicant, a step which a Court of equity will frown upon and will not countenance.

To sell that property soon after the reinstatement of the suit would defeat the purpose for which the suit was reinstated. As this is an old matter in respect of which a hearing date as been taken, it will serve the cause of justice much better if the suit proceeds to hearing. Since there was a temporary injunction in force at the date of the advertised sale, I am satisfied that the Applicant has made out a *prima facie* case for the grant of an injunction as enunciated in **GIELLA'S CASE**, [1973] EA 358.

The 2nd principle in that case requires that an interlocutory injunction would not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The word "normally" in the context of this statement should be applied to suit the circumstances of every particular case. The circumstances of this case are fairly peculiar in the sense that the advertised sale, if executed, would be contrary to a temporary Court order which was granted soon after the date of the advertisement. The Court would be contradicting itself if it did not enforce its own orders. This is not a normal situation as envisaged in the 2nd principle in **GIELLA'S CASE**. I therefore find it prudent that the Court should enforce its own order.

As for the 3rd principle, I am not in any doubt, and if I was in any such doubt, I would find that the balance of convenience tilts in favour of the Applicant who is currently residing in the premises. To hold otherwise would be tantamount to promising the Applicant that she would have her day in Court in one breath, and taking away that promise in the next breath. The sale of the suit property at this juncture would automatically compromise the suit to the detriment of the Applicant and the latter would have been awaiting the hearing date in vain. Yet, that date was taken by the Respondents themselves. As this is an old matter which has come for hearing severally but failed to take off for one reason or another, I am satisfied that the Applicant deserves the grant of the prayers sought. Prayer (3) of the application by Chamber Summons dated 4th January, 2011, is accordingly granted as prayed.

Costs in the Cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 16th day of May, 2011.

L. NJAGI
JUDGE