



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang J.)

CIVIL SUIT NO. 11 OF 2004

1. NGENGI MUIGAI
2. CATHERINE WANGUI NGENGIPLAINTIFFS/APPLICANTS

-VERSUS-

1. EAST AFRICAN BUILDING SOCIETY LTD.
2. LUCY MBUGUADEFENDANTS/RESPONDENTS
3. EAST AFRICA BUILDING SOCIETY BANK LTD
4. ECO-BANK (K) LIMITED

RULING

The plaintiffs moved the Court by amended Chamber Summons dated **16th February, 2010** and brought under the earlier edition of the Civil Procedure Rules, Orders VIA (Rules 3, 5, 7 and 8) and XXXIX (Rules 1, 2 and 3), and ss.3 and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carries two main prayers:

- (i) ***THAT a temporary injunction do issue, restraining 1st, 2nd and 3rd defendants, their servants and agents from taking possession of L.R. Block XVII/587 Kenyatta Road, Mombasa, or in any way interfering with the plaintiffs' quiet possession and use of the suit properties, and restraining them from transferring, selling or disposing of the suit property, pending the hearing and determination of the suit;***
- (ii) ***THAT this Court be pleased to grant the plaintiffs/applicants leave to amend their plaint.***

The application is founded on several grounds, and on the supporting affidavit sworn by 1st plaintiff on **2nd October, 2005**. These grounds are (in summary) as follows:

- (i) ***one of the defendants "has irregularly and unlawfully transferred the suit land to itself using a fraudulent 'auction sale'"***
- (ii) ***the auctioneer had no licence at the time of the auction;***
- (iii) ***no transparent bids were received by the "auctioneer";***
- (iv) ***the purported auction took place during a moratorium period given by a director of 1st defendant;***
- (v) ***the purported sale offends the provisions of the East Africa Building Society Rules, and the Auctioneers Rules;***
- (vi) ***no valid statutory notice was served prior to the sale;***
- (vii) ***the plaintiffs have at all times been willing and able to redeem their property, but "the***

defendant has fettered and/or clogged their equity of redemption by charging [extortionate], exorbitant, oppressive, illegal and non-contractual interest rates and penalties on the plaintiffs' account";

(viii) the first defendant's account included a demand of penalties which are more than two-years old, which are statute-barred under the Limitation of Actions Act;

(ix) 1st defendant has fraudulently increased its rates, and levied penalties contrary to s.44 of the Banking Act.

The 2nd defendant swore a long affidavit in reply, on **24th October, 2005**; but to-date, the main suit, which would resolve the complex case turning on allegations of fraud, has not yet been heard and determined. It is not surprising that after such a long period of pendency, the plaintiffs are seeking leave to amend their pleadings.

From the very beginning, it is clear that the real issues in this cause cannot be canvassed in the interlocutory application herein, even though counsel have made sustained submissions on the application. I will analyze, in a summarized manner, the submissions made on each side.

Learned counsel for the plaintiffs urges that 1st defendant, by a letter of **24th January, 1997** offered to advance the plaintiffs (as members of 1st defendant) a loan of Kshs.5 million, repayable over a period of 15 years. This offer was accepted and incorporated in a charge of **10th February, 1997**, duly executed and registered against the suit land, L.R. No. Mombasa/Block XVII/587. The loan advance was scheduled to have been fully repaid by 2010. Counsel submitted from the affidavit-evidence, that the plaintiffs diligently made repayments and were able to clear as much as 95% of the principal monies – but it is at this stage that the misunderstandings broke out. In 2001 1st defendant attempted to exercise its statutory power of sale, for the purpose of recovering Kshs.12,667,890; but the plaintiff averted this, by instituting Mombasa HCCC No. 547 of 2001 and securing temporary reprieve. Then on **14th October, 2003** the plaintiffs received a fresh statutory notice from **G.A. Dato & Co.** (auctioneers) demanding Kshs.20,142,924/31 on behalf of 1st defendant; this was accompanied by the threat to auction the suit premises on **7th January, 2004**. The plaintiffs' pursuit of an amicable settlement occasioned a director of 1st defendant advising in writing that 1st defendant would take no action during the **December, 2003** festive season, until early in the year 2004 when...an amicable settlement [would be sought]." Counsel submitted that 1st defendant had attempted an unsuccessful auction on **7th January, 2004** and then conducted a sale by private treaty, resulting a purported **transfer** of the suit property to 1st defendant – though the plaintiffs remain **in possession**. Subsequently (by Gazette Notice of **3rd November, 2006**) 1st defendant "purported to transfer all its assets to AKIBA BANK LIMITED which thereafter changed its name to EAST AFRICAN BUILDING SOCIETY BANK LIMITED." Then in 2009, 1st defendant transferred its assets and liabilities to ECO-BANK (K) LTD.

On the foregoing changes to the designation, and the assets portfolio of 1st defendant, the plaintiffs' position is thus stated: ***"The plaintiffs as members to the original society aver that the subsequent sale of business and/or change of name from 1st defendant to 3rd defendant to fourth defendant without their consent as members of the society is illegal and null and void..."*** Such changes, the plaintiffs contend, have frustrated the borrowing contract.

It is on the foregoing grounds that the plaintiffs have sought interim solutions by their amended Chamber Summons of **16th February, 2010**; they seek a temporary injunction restraining the defendants from interfering with their quiet possession of the suit premises, and from re-transferring the same to a third party.

Counsel submitted that the instant application was not affected by any limitation based on *res judicata*:

"HCCC No. 547/2001 was instituted pursuant to the statutory notice issued by 1st defendant on 18th

February, 2001. **The present suit [HCCC No. 11 of 2004] was instituted pursuant to the statutory notice issued on 14th October, 2003...The issues that were determined, or that were to be determined in the second statutory notice demanding Kshs.20,142,924/= could not have been determined in HCCC No. 547/2001. It therefore follows that the parties herein were not precluded from instituting a fresh suit or application for injunction as long as the fresh application was grounded on new facts which could not have been relied on for determination in the earlier application.**"

Counsel relied on a decision of the High Court (**Ringera, J** as he then was),

Kanorero River Farm Ltd. & 3 Others v. National Bank of Kenya Ltd [2002] 2 KLR 207 (at p.208):

"The parties in this suit were not precluded from instituting another application for an injunction as long as the fresh application was grounded on new facts which could not have been relied on in the earlier application."

Besides, counsel submitted, HCCC No. 547 of 2001 had been withdrawn on **5th October, 2005** before the institution of the amended plaint now on record.

Counsel next contested the validity of the public auction of **7th January, 2004** as not having been conducted by a licensed auctioneer, **Azadali H. Dato**; "it is only on the **26th February, 2004** that the Auctioneers Licensing Board acknowledged receipt of the applicant's letter and demanded further documentation. The licence itself was dated **6th April, 2004**". Counsel urged that by the time **Mr. Dato** conducted the public auction of **7th January, 2004** he did not possess a valid licence authorizing him to conduct auctioneering business; and that the auction as conducted was null and void: **Yunis Rubi Abdul v. Housing Finance Company of Kenya Ltd & Two Others**, Nairobi MCCCC No. 12 of 2002 (**Osiemo, J**).

Counsel submitted that the suit property could not, in any event, have passed to 3rd defendant at the alleged public auction: as neither 2nd defendant nor any other defendant did bid at the auction. Rule 17(4) of the Auctioneers Rules (1997) provides that the highest bidder shall be the purchaser, subject to compliance with the conditions of sale. Counsel submitted that **"it is settled law that a public auction can only go to the highest bidder and not otherwise,"** relying on the High Court's (**Azangalala, J**) decision in **Dawood Khan M. Khan v. EABS Bank Limited**, Nairobi MCCCC No. 352 of 2006.

Learned counsel submitted that the defendants' statutory power of sale was not, in this instance, to be upheld, as it was being exercised oppressively. Counsel relied on the Court of Appeal decision in **Godfrey Ngumo Nyaga v. Housing Finance Company of Kenya Limited**, Civil Appeal No. 134 of 1987 in which it was held:

"...the respondent company was entitled to exercise its right to claim possession and to sell the property under section 74 of the Registered Land Act. In the event, the Judge's question 'where is the money' was not wrong. It may have sounded harsh, but it was a call for repayment which it was the duty of the appellant to make. Where a party has a statutory right of action, the Court will not usually prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively."

Counsel urged that, in the instant case, the defendant's statutory power of sale was being exercised oppressively, insofar as the reserve price was **"manipulated by undervaluation of the suit premises to quote prices that were the existing market prices in the year 2001 for a 2005 auction."**

Counsel invoked s.77 of the Registered Land Act (Cap.300, Laws of Kenya), which required the chargee in exercising the power of sale, to act in good faith and have regard for the interests of the chargor. He urged that **"the defendants herein acted without good faith and in total disregard of the interest of the plaintiffs,"** by **"failing to endeavour to get the best price to enable the plaintiff [to] benefit from any surplus after payment of the charged money."** Counsel submitted: **"The defendants**

quickly closed the door on the plaintiff's equity of redemption by declaring a paper purchase of the suit premises at Kshs.19 million contrary to the interest of the [chargor]...

Learned counsel defended the several amendments made to the original plaint, on the basis that these had been necessitated by changing facts and circumstances over time.

Counsel urged that the plaintiffs have established the principles for the grant of injunctive relief, as set out in ***Giella v. Cassman Brown*** [1973] EA 358; and that an award of damages, in the event of the suit succeeding, would not provide an adequate remedy to the plaintiffs.

Learned counsel for the defendants submitted that, owing to successive amendments to the plaint, the entire substratum of the claim has changed: and so, the plaintiffs no longer have a case with reasonable probability of success.

Counsel submitted that it emerged from the evidence, that the plaintiffs had enjoyed the benefit of the loan advanced to them, but they are now claiming that the same is not recoverable on the ground that the charge document is defective.

Counsel submitted that the issue as to the auctioneer's practising certificate was not germane to the merits of the case.

Counsel submitted that a number of the points on which the plaintiffs rest their case, were already determined by ***Mr. Justice Maraga*** on ***4th June, 2004***. The following are passages in the said ruling:

(i) ***"In this case the fact that the plaintiffs' application seeking to stop the first defendant from selling the [suit] property had earlier on been dismissed, was a material fact and should have been brought to the attention of the Court."***

(ii) ***"I cannot see anything wrong in the first defendant bidding and purchasing the charged property. The sale is not challenged. The allegations of fraud and impropriety on the part of the first defendant are general and bare."***

(iii) ***"In this case the power of sale has already [been] exercised and there is no allegation of irregularity in the sale. In my view a prima facie case for the grant of injunction has not been made out."***

(iv) ***"Once a property is charged it becomes a commodity for sale upon default being made in the loan repayment. Default was made in this case and the property was sold."***

(v) ***"The first defendant is a reputable banking institution. It has not been suggested that it will not be in a position to pay damages. If at the end of the day the plaintiffs succeed in this case they can in my view be adequately compensated by an award of damages."***

(vi) ***"In the circumstances the plaintiffs' application fails and it is hereby dismissed with costs."***

Learned counsel urged that ***"this Court cannot sit on appeal on Maraga, J's Ruling as requested in paragraph 22 of the amended plaint."***

Counsel submitted that the amended plaint by itself showed no case of merit: for all the legal formalities relating to transfer of business had been complied with, and the successors-in-title were entitled to the realization of the collaterals of debtors-in-default.

Counsel submitted that the suit property had become the defendant's, by registration, and the equity of redemption has been extinguished; the 1st defendant now receives rent on the suit property, *qua* landlord and not *qua* chargee; the effect being that the injunction application has been overtaken by events.

I have given due consideration to the several authorities invoked by the plaintiffs to support their claim: ***Kanorero River Farm Ltd & 3 Others v. National Bank of Kenya Ltd***. [2002] 2 KLR 207; ***Yunis Rubi Abdul v. Housing Finance Company of Kenya Ltd & Two Others***, Nairobi MCCCC No. 12 of

2002; **Dawood Khan M. Khan v. EABS Bank Ltd**, Nairobi MCCCC No. 352 of 2006; **Godfrey Ngumo Nyaga v. Housing Finance Company of Kenya Limited**, Civ. Appeal No. 134 of 1987. While all these cases have clear merits, this is restricted to the context of facts applicable therein; but their principles are not attuned to the facts of the instant matter, so far as such facts can be identified at this interlocutory stage; and the singular weakness of the plaintiffs' case at this stage is that it rests on no ascertainable facts, nor does it pay regard to reliable Rulings rendered over the years by the High Court. As such rulings have not been contested, in their bases of fact, this Court must take the fact-determinations therein to be valid. I have already set out relevant determinations in the Ruling by **Maraga, J**, on **4th June, 2004**; and it emerges that there was a valid charge-document, executed by the plaintiffs and 1st defendant; monies were advanced to the plaintiffs, on the basis of the charge; such loan monies were not repaid as agreed; the suit property was auctioned, after the prescribed procedures had been complied with; the property was duly transferred into the name of 1st defendant; in the management of the suit property, there are returns in the form of rents, which accrue to the registered proprietor.

From the foregoing facts, the rights of merit in this case have crystallized in favour of **1st defendant**. It follows that there is no *prima facie* case in the plaintiffs' suit and, in any case, if they were to succeed in their suit, just as **Maraga, J**. did observe, their claim would be compensable in **damages**.

So, on the basis of the well-known principles in **Giella v. Cassman Brown**, I hold that there is no case for the award of injunctive relief, in favour of the applicants.

The plaintiffs' amended Chamber Summons of **16th February, 2010** is, hereby, dismissed, with costs to the defendants. Leave, however, is granted for amendment of the plaint; and in this regard, the draft amended plaint annexed to the plaintiffs' application shall be deemed to have been properly filed and served.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 29th day of September, 2011.

**H.M. OKWENGU
JUDGE**