



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMERCIAL & TAX DIVISION
CIVIL CASE NO.247 OF 2011

METRA INVESTMENTS LIMITED PLAINTIFF

VERSUS

**STANDARD CHARTERED
BANK KENYA LIMTIED**

1ST DEFENDANT

DIXON ESHIALWA OBATI

2ND DEFENDANT

**THE PRINCIPAL REGISTRAR
OF TITLES 3RD**

DEFENDANT

R U L I N G

This application is brought by a Notice of Motion dated 23rd June, 2011, and taken out under **Section 3A of the Civil Procedure Act; Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the law. The Applicant thereby seeks the following orders from the Court –

1. ... (spent)
2. ... (spent)
3. *That the Honourable Court be pleased to issue a temporary injunction restraining the 2nd Defendant by himself or his servants, agents, employees or any other person claiming under it from alienating, selling, disposing of or charging or in any other manner dealing with all that property known as L.R. No.209/12918/5 situate in Kileleshwa Nairobi, pending the hearing and determination of the suit.*
4. *That an order be made under Section 52 of the Indian Transfer of Property (Amended) Act 1959 that during the pendency of this suit, all further registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or any kind of right, title or interest in all that property known as L.R. No.209/12918/5 Kileleshwa Nairobi with any land registry, government department, and all other registering authority be prohibited.*
5. *That costs of this application be provided for.*

The application is supported by the annexed affidavit of Rahab Mukiyama, a Director of the Plaintiff Company, and is premised on the following grounds –

- (a) *That the 1st Defendant in fraudulent exercise of its statutory power of sale grossly undervalued and sold, by public auction, the suit property that was registered in the name of the Plaintiff to the 2nd Defendant.*
- (b) *That a Transfer of the suit property has been effected and consequently registered in favour of the 2nd Defendant on 23rd June, 2010.*
- (c) *That the Plaintiff has been in possession of the suit property and only came to learn of the Transfer of the suit property by the 1st Defendant on 14th January, 2011.*
- (d) *That immediately upon learning of the transfer the Plaintiff made numerous requests to the 1st Defendant to produce a valuation report carried out on the instructions of the 1st Defendant, showing an appraisal of the suit property prior to the auction sale but none has been forthcoming.*
- (e) *That the circumstances surrounding the sale smacks of impropriety on the part of the 1st Defendant.*
- (f) *That the 2nd Defendant has benefited from the fraudulent conduct of the 1st defendant and is now threatening to evict the Plaintiff and its tenants from the suit property.*
- (g) *That the Plaintiff has a prima facie case with a high degree of success against the Defendants.*
- (h) *That the Plaintiff will suffer irreparable harm incapable of compensation by way of damages should the Plaintiff be evicted from the suit property by the 2nd Defendant as it has made considerable developments thereon and has tenants residing on the suit property.*
- (i) *That in any event, the balance of convenience tilts in favour of the Plaintiff.*
- (j) *That in the interests of justice and fairness that the application herein be allowed.*

Opposing the application, the 1st Defendant filed the following grounds of opposition –

- (i) *That 1st Defendant's Statutory Power of Sale had crystallized in law.*
- (ii) *That Plaintiff has acknowledged the debt and default.*
- (iii) *That Plaintiff has failed to make full material disclosure that:*
 - (a) *The suit property had previously been offered for public auction on three occasions without a successful sale.*
 - (b) *Public auctions have been suspended at the behest of the Plaintiff by the 1st Defendant prior to the sale of 20th November, 2009.*
 - (iv) *The 1st Defendant exercised its power of sale in good faith.*
 - (v) *The present application is an abuse of the court process.*

On his part, the 2nd Defendant filed a replying affidavit in which he explained how he acquired the suit property, which was by way of purchase at a public auction.

During the oral hearing of the application, Ms. Njoki Gachihi appeared for the Applicant, Mr. Chege for the 1st Respondent and Mrs. Oyatta for the 2nd Respondent. After considering the pleadings and the respective submissions of Counsel, I find that the main issue for determination in this matter is whether the Applicant is entitled to an order of injunction restraining the 2nd Respondent from alienating, selling, disposing of, charging or in any other manner dealing with the suit property. Whether it can

obtain such an injunction or not depends on whether it has satisfied the conditions laid down for the grant of interlocutory injunctions in the celebrated case of **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] EA 358**. In that case, addressing its mind to such injunctions, the Court of Appeal rendered itself thus –

“The conditions for the grant of an interlocutory injunction are now ... well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will nor normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Regarding the first condition, the facts of this case are fairly clear. They are that the Applicant borrowed some monies from the 1st Respondent against the security of the suit property. The Applicant frankly concedes that it fell into arrears with the repayment of the monies due to the 1st Respondent, whereupon the latter issued a Statutory Notice for the realization of the security. It was then that the property was advertised for sale by public auction at which the 2nd Respondent offered Kshs.6.5 million which turned out to be the highest bid, thereby attracting the fall of the hammer. The 2nd Respondent thereupon became the purchaser of the suit property and he was duly registered as the owner thereof on 23rd June, 2010.

Between the Applicant and the 2nd Respondent, it cannot be gainsaid that the 2nd Respondent is the lawful proprietor of the suit property, having obtained a clean title at the auction sale in respect thereof. The sanctity of this title is fortified in **Section 23 (1) of the Registration of Titles Act (Cap.281) Laws of Kenya** which is in the following terms –

“23 (1). The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

These are strong words. The Certificate of Title issued by the Registrar to the 2nd Respondent is not subject to challenge by the Plaintiff or anyone else except on the ground of fraud or misrepresentation to which he is proved to be a party. On the facts of this case the Applicant has not at any one moment levelled any allegation of fraud or impropriety against the 2nd Respondent. In the plaint all the allegations of fraud are levelled against the 1st Respondent. In the event, it is futile to cast any aspersions against the 2nd Respondent at this point in time. It is too late for anyone to do so, and the Applicant itself cannot seek an injunction as it does not have any more proprietary right in the suit property. Its interest was extinguished upon the fall of the hammer at the auction. In contrast, the 2nd Respondent is an innocent purchaser for value without notice for which reason for the purposes of this matter, he qualifies to be referred to affectionately as equity’s darling. For the above reasons, I find that the Applicant has not shown a *prima facie* case with a probability of success which would entitle it to an interlocutory injunction.

With regard to the second condition, it is equally clear that the Applicant will not suffer any irreparable injury which would not adequately be compensated by an award of damages. Suffice it to refer to the prayers sought in the plaint wherein prayers (iv) and (v) read thus –

“Reasons wherefor the Plaintiff prays for judgment against the Defendant for orders –

- (i)... (spent)***
- (ii) ... (spent)***
- (iii) ... (spent)***

- (iv) ***That a permanent injunction do issue to restrain the 2nd Defendant from dealing with the suit property in a manner adverse to the proprietary interests of the Plaintiff.***
- (v) ***In the alternative to (i), (ii) (iii) and (iv) above, Kshs.18,500,000/=, being the difference between the forced sale value and the auction sale price be paid to the Plaintiff by the 1st Defendant.”***

Quiet clearly, the Applicant would be happy to be paid the above sum of money in settlement of this matter. It has therefore failed to satisfy the second condition laid down in **GIELLA’S CASE**.

As I am not in any doubt, I need not consider the balance of convenience but if I had to do so, I would find that the balance of convenience tilts in favour of the 2nd Respondent who was an innocent purchaser for value at a public auction, and who is now the registered proprietor of the suit property. In the circumstances, I find that this application has no merit and it is hereby dismissed with costs to the 1st and 2nd Respondents. The interim orders issued herein are hereby set aside.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 6th day of October, 2011.

**L. NJAGI
JUDGE**