



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 309 of 2009

DAVID WAMBUA KIUMATI.....PLAINTIFF/APPLICANT

VERSUS

1. NATIONAL BANK OF KENYA

2. BENJAMIN KISOI SILA

3. JAPHETH KEKIE MWANIADEFENDANTS/RESPONDENTS

RULING

1. The Application dated 13.10.2009 seeks orders that the 3rd Defendant be restrained by himself, his servants and/or agents from disposing, leasing, developing, sub-dividing, sub-diving, selling, or in any other way interfering with land parcel no.Kyangwithya/Misewani/1017 until this suit is heard and finalized.
2. From the Plaint filed on 14.10.2009 and dated 13.10.2009, it is apparent that the land in issue was transferred to the 3rd Defendant when the 1st Defendant sold the land at a public auction conducted by the 2nd Defendant on its behalf. The suit primarily challenges the sale and if that is then the remedy in any event is not an injunction but damages. Section 77(3) of the Registered Land Act, Cap 300 provides as follows;

“s. 77.(1)

(2)....

(3) A transfer by a charge in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.”

3. That is the law as I understand it and it is indeed surprising that the Plaintiff claims no damages in the Plaint. I

have been pointed to a passage in Ockotch vs East African Building Society[1996] LLR 468 (CAK) where the Court of Appeal reproduced section 69 of the Transfer of Property Act which is in near similar language as section 77(3) above and went on to express surprise whether damages would be payable seven years after the action. That may not be the case in the instant action but I am certain that whatever his grievance about the sale of the land, the remedy for the Plaintiff/Applicant lies in damages only.

4. Having so held, it follows that I do not see a prima facie case with a probability of success and the loss suffered, if at all, can be met in damages. The principles in Giella vs Cassman Brown Ltd [1973] E.A. 358 not having been met, I will quickly dismiss the Application before me with costs to the 3rd Defendant only.
5. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this 12th day of **March 2010**.

H.P.G. WAWERU

JUDGE