



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 221 of 2009

**1. PHALLICE MUTIO MUTUA
2. MARGARET NZULA MUTA**

**(SUING AS THE ADMINISTRATORS OF THE ESTATE OF
BENJAMIN MUTUA MUSILA.....PLAINTIFF/APPLICANTS
VERSUS**

**1. THE COOPERATIVE BANK OF KENYA
2. CHRIS MUSAU
3. DENNIS KYALO.....DEFENDANTS/RESPONDENTS**

RULING

1. The Application dated 21.7.2009 seeks orders that the Defendants be restrained under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules from “**charging, sub-leasing, letting, occupying, effecting any transfer, further transferring, committing any acts of waste or effecting the registration, and/or change of registration of the ownership of the property pending the hearing and determination of the suit.**”
2. I have read the Supporting Affidavit of Phallice Mutio Mutua sworn on 21.7.2009, the Replying Affidavit of Regina Anyika sworn on 26.8.2009 on behalf of the 1st Defendant. I have seen no response or on behalf of the 2nd and 3rd Defendants and only the advocates for the Plaintiffs and 1st Defendant filed submissions and authorities. In any event, I note as follows;
3. The Plaintiffs/Applicants are the administrators of the estate of one Benjamin Mutua Musila (*deceased*). Together with one Samuel Muiya, the deceased was registered as proprietor of title no. L.R. Machakos Town/Block 1/93 and apparently the same was charged to secure a loan facility extended by the 1st Defendant.
4. The Applicants claim that they were unaware of the charge and they were surprised when the 1st Defendant advertised the land for sale and the advertisement was placed in the “**Daily Nation**” newspaper of 6.7.2009. That although the deceased died on 29.5.2001 none of his administrators was served with any statutory notice of sale of the property and that the auction of 13.7.2009 was null and void for want of notice.
5. The 1st Defendant’s argument on the other hand is that one Samuel Muiya Mayunza obtained a loan facility from it and charged the suit property to secure the loan. Upon default in effecting repayment, the 1st Defendant advertised the land for sale and then sold it off in a public auction on 13.7.2009. That although the Bank sent notices to both Mutua (*the deceased*) and Samuel Mayunza, it had no notice that Mutua had died. In any event, once Mutua had died, Mayunza became sole proprietor of the suit property and a notice to him was sufficient.
6. It is also the 1st Defendant’s case that in Machakos HCCC 76/2007- Samuel Muiya Mayunza & 4 others, this court declined to issue injunctive reliefs in favour of Mayunza and one of the properties in issue in that cause is the suit property herein. That being the case, this suit is res-judicator and the orders sought cannot be issued.
7. I have taken into account the well written submissions by advocates for the Plaintiffs/Applicants and the 1st Defendant/Respondent and my opinion is as follows;
8. Firstly, I have read the Plaint dated 21.7.2009 and the only thing said about the 2nd and 3rd Defendants is that they purportedly bought the suit property at a public auction on 13.7.2009 and nothing is said of them in the Chambers Summons before me. I therefore do not see what wrong they have committed and I will quickly dismiss the Application as against them in spite of the fact that they have not responded to it.
9. Secondly, and as regards the 1st Defendant, I have read my Ruling in Machakos HCCC 76/2007 and I note that I declined to issue any orders against the 1st Defendant once properties listed therein were threatened with sale. One of the properties in issue in that suit was L.R. Machakos/Block 1/93, the same property in issue here. The issues raised in that suit are however completely different because in the present suit, what is in issue is whether the administrators of the estate of Mutua aforesaid were aware of the loan and whether they were served with the notification of sale.
10. In the other case, there were more than one issue in contest and the interest of Mutua and/or his estate’s administrators was not one of those issues. My decision may or may not therefore be directly applicable in the present suit.
11. Thirdly, and in spite of what I have said above, the Application before me cannot succeed for one fundamental reason. The property

in issue was sold off at a public auction in exercise of statutory power of sale which has arisen. The property is registered as a leasehold interest under the Registered Land Act, Cap 300 and section 77(3) of that Act Provides as follows;

“A transfer by a chargee 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.”

12. I accept the above as the law on the subject and it has been said time and time again that once the statutory power of sale is exercised, whether notice was served or not and whether any other irregularity has occurred, the remedy lies in damages. If that be the case, an injunction cannot be the remedy because in Giella vs Cassman Brown [1973] E.A. 358 it was settled that where damages are payable in recompense, no injunction can issue.
13. Fourthly, I have seen the charge document dated 5.3.1997. It was duly signed by Benjamin Mutua Musila as joint proprietor of the suit property. It cannot be said that he never charged the property as contended by the Applicants.
14. Lastly, I have seen no evidence before me that the Plaintiffs have established a prima facie case with a probability of success and I have said that damages in any event are an adequate remedy.
15. The Application before me is incompetent and is dismissed with costs to the 1st Defendant only.
16. Orders accordingly.

ISAAC LENAOLA
JUDGE

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

H.P.G. WAWERU
JUDGE