



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 281 of 2009

ZAKARIA MUIGAI GAKIBEPLAINTIFF
VERSUS

JOHN MWENJA NGUMBA1ST DEFENDANT
(sued as the Administrator of the estate of
ANDREW KIMANI NGUMBA)

KENYA COMMERCIAL BANK2ND DEFENDANT
ROYAL BUILDERS LIMITED.....3RD DEFENDANT
THE ATTORNEY GENERAL.....4TH DEFENDANT
(on behalf of the Principal Registrar of Government Lands)

RULING

1. By his Chamber Summons application dated 12/06/2009, and filed in court on the same day, the Plaintiff/Applicant prays for ORDERS:-

1. **THAT** the application herein be certified as urgent and service hereof be dispensed with on the first instances. (sic)
2. **THAT** the Honourable Court be pleased to issue a temporary injunction restraining the third defendant by itself or its servants, agents, employees or any other person claiming under it from evicting or in any other manner interfering with the Plaintiff's quiet possession of the property known as LR No.74/16 North East of Nairobi pending the hearing and determination of this application.
3. **THAT** the Honourable Court be pleased to issue a temporary injunction restraining the third defendant by itself or its servants, agents, employees or any other person claiming under it from evicting the Plaintiff or in any other manner with the Plaintiff's quiet possession of the property known as LR No.74/16 North East of Nairobi pending the hearing and determination of the suit herein.
4. **THAT** the Honourable Court be pleased to issue a temporary injunction against the third defendant restraining it by itself or its servants, agents, employees or any other person claiming under it from selling, disposing of, charging or in any other manner dealing with all that property known as LR No. 74/16 North East of Nairobi pending the hearing and determination of this application.
5. **THAT** the Honourable Court be pleased to issue a temporary injunction against third defendant by itself or its servants, agents, employees, or any other person claiming under it from selling, disposing of, charging or in any other manner dealing with all that property known as LR No. 74/16 North – East of Nairobi pending the hearing and determination of the suit herein.

2. The application is premised on the following ten (10) grounds that is to say:-

- (i) **THAT** the Plaintiff/Applicant has lived on the subject property with his family and has made considerable developments on the subject property apart from cultivating it since 1991.
- (ii) **THAT** the Plaintiff/Applicant bought the subject property from the late Andrew Kimani Ngumba and the 1st Defendant held the subject property in trust for the Plaintiff.

- (iii) **THAT** the subject property was fraudulently sold to the third defendant by the second defendant in collusion with the fourth defendant.
- (iv) **THAT** the 2nd Defendant purported to sell the subject property in exercise of its power of sale which had not and could not accrue without a court order.
- (v) **THAT** the 3rd Defendant ought to have exercised due diligence prior to purchasing the property herein and known or ought to have known that it obtained a defective title.
- (vi) **THAT** the Plaintiff is apprehensive that the 3rd Defendant will evict him from the subject property in spite of the said defendant's defective title.
- (vii) **THAT** the Plaintiff has a prima facie case with a high probability of success against the Defendants.
- (viii) **THAT** the Plaintiff will suffer irreparable harm incapable of compensation by way of damages should the Plaintiff be evicted from the subject property as he has made considerable developments thereon and has lived with his family since 1991.
- (ix) **THAT** in any event, the balance of convenience tilts in favour of the Plaintiff.
- (x) **THAT** it is in the interests of justice and fairness that the application herein be allowed.

3. The Plaintiff/Applicant has also sworn a supporting affidavit dated 12/06/2009 in which he says that he bought the property known as LR No. 74/16 situate North East of Nairobi (the suit property) measuring 26.5 acres from the late Andrew Kimani Ngumba for a consideration of Kshs.4.4 million pursuant to an agreement for sale. That though the agreement for sale was not signed by the parties, the deponent paid Kshs.1.2 million pursuant to the unsigned agreement, and that the 1.2 million was paid to a company by the name Mbangi Investments Inc in which the late Andrew Kimani Ngumba was a director and that Mbangi Investments Inc. acknowledged the said sum of Kshs.1.2 million through a receipt dated 10/06/1991.

4. The deponent also says that he took possession of the suit property on which he built a home for himself and his family and has cultivated the rest of the suit property since taking possession. The deponent also avers that when the late Andrew Ngumba refused to sign the transfer documents in the Plaintiff's favour, the Plaintiff filed HCCC 1850 of 1993 in addition to lodging a caveat on the suit property in order to secure his interests, therein. The deponent also depones to the following matters:-

- (a) that the late Andrew Ngumba refused/failed and/or neglected to execute the necessary transfer and to obtain the requisite land control board consent to effect the transfer;
- (b) that the late Andrew Ngumba's application to remove the caveat lodged on the suit property by the deponent was dismissed by Pall J (as he then was) on 27/09/1993;
- (c) that the deponent's application for extension of time within which the consent of the Land Control Board would be obtained to facilitate the transaction was allowed vide a ruling dated 10/11/1995; giving the deponent 60 days to obtain the consent
- (d) that the late Andrew Ngumba died before final prosecution of HCCC No. 1850 of 1993 but that the 1st Defendant, John Mwenja Ngumba took out Letters of Administration on 11/05/1998 to allow him defend the suit;
- (e) that the suit against Andrew Ngumba abated a year after the late Andrew Ngumba died on 13/05/1997 since no substitution was done within the statutory 12 months' period
- (f) that the late Andrew Ngumba guaranteed a loan of Kshs.1 million processed through loan account No. 314087251018 though the deponent says he has never been supplied with bank statements to date
- (g) that the 2nd Defendant as interested party in HCCC No. 1850 of 1993 was fully aware of the ownership dispute involving the Plaintiff and the late Andrew Kimani Ngumba, yet went ahead to give an unsecured loan to the deponent
- (h) that on or about 25/04/2005, the 2nd Defendant fraudulently purported to exercise its power of sale over the suit premises over undisclosed arrears and sold the suit premises to the 3rd Defendant
- (i) that the 2nd Defendant was unable to have the suit premises valued by **Ms Centenary Valuers and Property Consultants** for reasons that the suit property, though registered in the name of Andrew Kimani Ngumba was physically occupied by a Mr. Muigai.
- (j) that no official search could be done at Lands office because the original file could not be found at the lands registry and further that the page containing relevant information in the main register had been ripped off
- (k) that the 2nd Defendant sold the suit property without authority of the court and in the face of a caveat restricting any dealings in the suit premises
- (l) that the Principal Registrar fraudulently and without notice to the Plaintiff of any objections to the caveat, lifted the

caveat

- (m) *that despite many requests to the Principal Registrar of Lands, no information has been released to the Plaintiff to enable him deal with the subject property and to protect his interests therein*
- (n) *that HCCC Nos 285 of 2005 (John Mwenja –vs- KCB & Hon. Elias Mbau and 584 of 2007 (John Mwenja Ngumba –vs- KCB & Hon. Elias Mbau) which suits had been instituted to protect the Plaintiff's and the late Andrew Kimani Ngumba's interests in the suit property were simultaneously withdrawn on 20/11/2008 for purposes of facilitating the fraudulent transfer of the suit premises.*

5. For the reasons above given, the Plaintiff avers that he has shown that he has a prima facie case with a probability of success and that unless the injunction sought is granted he stands to suffer irreparable harm which is incapable of compensation by way of damages.
6. The Plaintiff has annexed a number of documents to his supporting affidavit among them a ruling in **HCCC No. 1850 of 1993 – Zakaria Muigai Kibe –vs- Andrew Kimani Ngumba** – in which the court held that the Plaintiff's claim that he had a purchaser's interest in the suit premises could not be dismissed out of hand. The application that was the subject of the ruling in that case was one which sought lifting of the caveat registered in Volume N.57 Folio 303/37 by the Plaintiff against the title of LR 74/16 Kasarani Nairobi. The caveat forbade any dealing with the land. Relying on what Madan J (as he then was) said in **Mawji –vs- US International University and Another [1976] KLR 185** at p. 199, the court rightly said that while a caveat remained in force, there was need for some safeguards such as the Plaintiff giving an undertaking in respect of damages which the Defendant might suffer from being unable to deal with the suit premises.
7. The application is opposed. By the 2nd Defendant's Replying Affidavit dated 26/06/2009 and sworn by Beth N. Mugo, the 2nd Defendant's Relationship Manager, Credit Support Unit, the 2nd Defendant says that the Plaintiff has deliberately misled this Honourable Court by his averments in the Supporting Affidavit to the Plaintiff's Chamber Summons. The deponent specifically avers that:-
 - (a) *the creation and registration of the mortgage over the suit premises was sanctioned by the relevant Land Control Board as evidenced by letter of consent to mortgage dated 30/04/1991 in favour of Andrew Kimani Ngumba (deceased)*
 - (b) *upon registration of the mortgage, the Mortgagor, Andrew Kimani Ngumba (deceased) could not transfer the suit premises to a third party (read Plaintiff) without the consent of the 2nd Defendant as mortgagor*
 - (c) *the 2nd Defendant's remedy under the mortgage instrument to sell the mortgaged property was statutorily underpinned in section 69 of the Transfer of Property Act of India, 1883, hence the 2nd Defendant did not need a court order before exercising its power of sale*
 - (d) *the Plaintiff had never disputed his indebtedness to the 2nd Defendant nor has the Plaintiff placed any material before the court to show that he ever requested for monthly statements with respect of his loan account and was never supplied with the same.*
 - (e) *the Plaintiff has conveniently not disclosed the existence of HCCC No. 1531 of 1999 between the Plaintiff and the 2nd Defendant in which the Plaintiff sought to restrain the 2nd Defendant from exercising its statutory mortgagor's power of sale in which suit the Plaintiff confirmed under oath that he owed the 2nd Defendant the sum of Kshs.2,735,844.85, as per paragraph 12 of the Plaintiff's supporting affidavit to the Chamber Summons dated 29/07/1999*
 - (f) *the sale and transfer of the suit premises to the 3rd Defendant as nominee of the Purchaser in a public auction conducted in exercise of the 2nd Defendant's statutory power of sale extinguished the Plaintiff's equity completely and no remedy touching on the suit premises is available to the Plaintiff as mortgagor or any other person claiming under him*
 - (g) *by the ruling dated 26/05/2006 in Milimani HCCC No. 285 of 2005, a case that was filed by the 1st Defendant on behalf of the estate of Andrew Kimani Ngumba (deceased) as mortgagor, the court held that the public auction held on 26/04/2005 was proper and valid*
 - (h) *following the ruling in HCCC 285 of 2005, the 1st Defendant on behalf of the estate of Andrew Kimani Ngumba (deceased) consented to the 2nd Defendant transferring the suit premises to the 3rd Defendant being the nominee of the purchaser at the public auction and also consented to withdrawing all the previous suits filed on behalf of the estate of Andrew Kimani Ngumba challenging the 2nd Defendant's exercise of its statutory power of sale in respect of the suit premises and also executed a deed of indemnity in the 2nd Defendant's favour against all claims and liabilities arising from the transfer of the suit premises to the 3rd Defendant.*
8. It is thus the 2nd Defendant's contention that the Plaintiff's application for injunctive orders has no basis. To buttress this position, the

2nd Defendant relies on the provisions of section 69 of the ITPA and in particular section 69B thereof which provides:-

“69B(1). A mortgagee exercising the mortgagee’s statutory power of sale shall have power to transfer the property sold for such estate and interest therein as may be the subject of the mortgage freed from all estates, interests, rights and encumbrances to which the mortgage has priority but subject to all estates, interests, rights and encumbrances which have priority to the mortgage.

(2) where a transfer is made in exercise of the mortgagee’s statutory power of sale the title of the purchaser shall not be impeachable on the ground –

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given’ or

(c) that the power was otherwise improperly or irregularly exercised and a purchaser is not, either before or on transfer, concerned to see or enquire whether a case has arisen to authorize the sale or due notice has been given or the power is otherwise properly and regularly exercised; but any person damaged by an unauthorized or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

I shall return to the above provisions later in this ruling.

9. The 1st Defendant’s Replying Affidavit is dated 10/07/2009. In this affidavit, the 1st Defendant denies the existence of any legitimate agreement for sale of the suit premises by Andrew Kimani Ngumba (deceased) to the Plaintiff. The deponent also says that HCCC No. 1850 of 1993, between the Plaintiff and the deceased Andrew Kimani Ngumba abated within 12 months of the death of Andrew Kimani Ngumba and more so when the Plaintiff failed to join the 1st Defendant who took out Letters of Administration as a party to that suit within the requisite time.
10. The 1st Defendant also avers that the Plaintiff’s present suit cannot stand for reasons that –
 - (a) it is barred by and bad in law as it is based on the same cause of action as the abated suit HCCC No. 1850 of 1993*
 - (b) it is barred by Limitation of Actions Act (Cap 22) as it has been brought more than twelve (12) years since the alleged occurrence in 1991 of the cause of action*
 - (c) it is forbidden by the provisions of the Law of Contract Act (Cap 23) for want of a written and signed agreement for sale of the suit premises.*
11. The 1st Defendant also avers that the Plaintiff/Applicant having defaulted in payment amounts due to the 2nd Defendant exposed the suit premises to sale by the 2nd Defendant through public auction and that in the circumstances, the Plaintiff/Applicant should not even be given an ear for having let down the estate of the late Andrew Kimani Ngumba. The 1st Defendant also avers that the filing of HCCC Nos. 285 of 2005 and 584 of 2007 were aimed at protecting the estate of the late Andrew Kimani Ngumba against the proposed sale of the suit premises through public auction by the 2nd Defendant herein and that the courts having found that the public auction was valid prima facie, the 1st Defendant had to withdraw the said suits. The 1st Defendant therefore wants the Plaintiff’s application for injunction dismissed.
12. The 3rd Defendant has also opposed the application. The lengthy replying affidavit on behalf of the 3rd Defendant is sworn by Hon. Elias Peter Mbau, who says he is a director of Royal Builders and Investments Ltd. The 3rd Defendant’s main contention against the Plaintiff’s application is that the 3rd Defendant bought the suit premises through its nominee at a properly conducted public auction conducted on 26/04/2005 and thereafter signed the Memorandum of Sale after paying the requisite 25% deposit amounting to Kshs.5,750,000/=. The 3rd Defendant also avers through the Replying Affidavit that there was agreement involving the 1st, 2nd and 3rd Defendant that any amount realized by the 2nd Defendant at the auction over and above the outstanding loan balances of Kshs.5,192,588/= as at 08/02/2005 would be paid to the estate of the late Andrew Kimani Ngumba, and so it was that the 3rd Defendant agreed to pay a total of Kshs.17,500,000/= being the balance of the purchase price of Kshs.23,000,000/= to the estate of Andrew Kimani Ngumba.
13. The deponent of the 3rd Defendant’s replying affidavit says that the 3rd Defendant paid cash of Kshs.2,500,000/= to the 1st Defendant vide Cheque numbers 001543 dated 07/11/2006 for Kshs.1,300,000.00 and 001483 dated 26/10/2006 for Kshs.1,000,000.00 both

of which cheques were drawn on Equity Bank Ltd, Community Corporate Branch. A further Kshs. 200,000 (two Hundred Thousand only) was allegedly paid in cash to John Mwenja Ngumba holder of ID No. 4428037 on the 17/11/2006 by the firm of Chege Ng'ang'a Advocate on behalf of Hon. Elias Mbau; pursuant to a private treaty sale agreement for LR No. 74/16 Nairobi. According to the deponent at paragraph 13 of the Replying Affidavit the 3rd Defendant obtained a loan of Kshs.15,000,000.00 to be secured by the suit premises from Equity Bank Limited after which all the relevant professional undertakings were given by the 3rd Defendant's lawyers. That thereafter, the mortgage over the suit premises, recoveyance dated 15/11/1993 and the conveyance were duly prepared executed and forwarded to Equity Bank's lawyers together with the mortgage from the 3rd Defendant. It is also the 3rd Defendant's contention that it obtained the relevant Land Control Board Consents for the conveyance and mortgage as well as the Nairobi City Council Clearance Certificate after settling the outstanding rates amounting to Kshs.112,200/=. The deponent of the 3rd Defendant's Replying Affidavit also says that after the suit premises were registered in the 3rd Defendant's name, Equity Bank paid to the 1st Defendant the sum of Kshs.15,000,000.00 as per the professional undertaking and thereafter HCCC No. No. 285 of 2005 was withdrawn.

14. On the basis of the facts outlined above by the 3rd Defendant, the 3rd Defendant says that the Plaintiff has no proprietary interest or right in the suit premises and that the purported sale agreement between the Plaintiff and the late Andrew Kimani Ngumba is of no effect because the same is neither dated nor signed. The 3rd Defendant also accuses the Plaintiff of material non-disclosure namely that the Plaintiff has failed to say candidly that the consent order by Aluoch J (as he then was) in HCCC No. 1850 of 1993 gave the 2nd Defendant the right to exercise its statutory power of sale after the Plaintiff failed to honour his loan repayments, for which the suit premises were charged to secure the loan on the Plaintiff's behalf. The 3rd Defendant further accuses the Plaintiff of failing to disclose to the court that he (Plaintiff) filed a previous suit HCCC No. 1531 of 1999 against the 2nd Defendant herein which suit was filed simultaneously with an application for injunction. The application was dismissed. It is the 3rd Defendant's case that any monies (namely Kshs.1,200,000.00/=) allegedly paid to Andrew Kimani Ngumba (deceased) should be recovered from the estate of the said Andrew Kimani Ngumba and not from the 3rd Defendant. The 3rd Defendant argues that the Plaintiff's application has no merit and further that the application has been overtaken by events and is an afterthought.
15. In reply to the various Replying Affidavits, the Plaintiff swore two (2) supplementary affidavits dated 17/07/2009 and filed on 20/07/2009. The first of the two affidavits is further to the Plaintiffs supporting affidavit and in response to the Replying Affidavit sworn on behalf of the 2nd Defendant. The Plaintiff avers that the 2nd Defendant failed to avail bank statements to him, thus forcing him to file **HCCC No. 606 of 2006 – Zakaria Gakibe Muigai –vs- Kenya Commercial Bank Ltd**. The Plaintiff contends that that suit was withdrawn on 14/12/2006 without his consent. The Plaintiff also alleges that the 2nd Defendant sold the suit property at the throw-away price of Kshs.23,000.000/= as at 06/07/2009.
16. The Plaintiffs second supplementary affidavit is in reply to the 3rd Defendant's replying affidavit dated 9/07/2009. The Plaintiff says that the 3rd Defendant acted maliciously when it broke into Plaintiffs' home standing on the suit premises on the pretext that the Plaintiff was the 3rd Defendant's tenant in arrears of rent. The Plaintiff also says that as purchaser the 3rd Defendant knew or ought to have known that the ownership of the suit premises was in dispute and further that since the 3rd Defendant was aware of the illegal removal of the caveat, he ceased to be an innocent purchaser for value.
17. The parties also filed written submissions which were highlighted before me. The 4th Defendant did not file any Replying Affidavit or submissions for reasons that the Chamber Summons application does not seek any orders against the said 4th Defendant. The 4th Defendant was accordingly exempt from attending the court during the hearing of the application inter parties.
18. The Plaintiff's submissions were filed on his behalf by M/s Kyalo & Associates Advocates. The gist of the Plaintiff's submissions is that the suit property was fraudulently sold by the 2nd Defendant to the 3rd Defendant. According to the 1st Defendant the following are the issues for determination by the court:-

(i) *whether indeed the 1st Defendant held the suit property in trust for the Plaintiff;*

(ii) *The effect of fraud on the purported sale of the suit property;*

(iii) Whether or not the Plaintiff has established a prima facie case with a probability of success;

(iv) Whether indeed or not damages are an adequate remedy in the circumstances.

19. In answer to all the above issues, the Plaintiff submits that there are facts before this court to show that the 1st Defendant holds the suit property in trust for the Plaintiff basically on the ground that there is a valid agreement for sale between the Plaintiff and the late Andrew Kimani Ngumba who stood as guarantor for the loan advanced to the Plaintiff by the 2nd Defendant and as secured by the suit premises. The Plaintiff also submits that he made an advance payment of Kshs.1.2 million to Andrew Kimani Ngumba as part payment of the total purchase price of Kshs.4.0 million. The Plaintiff refers to a number of the exhibits he has annexed to the supporting affidavit and in particular to Exhibit ZMG-3 to demonstrate that the Plaintiff has been in occupation of the suit premises. The Plaintiff also argues that section 3 of the Law of Contract Act does not affect the creation or operation of a resulting implied or constructive trust; and therefore that the admitted unsigned and undated Agreement for Sale between the Plaintiff and Andrew Kimani Ngumba should not be held against the Plaintiff.

20. Section 3(1) and (2) of the Law of Contract Act Cap 23 Laws of Kenya reads:-

“3(1) No suit shall be brought whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person therewith by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character conduct credit, ability, trade or dealings of any other person to the intent or purpose that such person may obtain credit, money or goods, unless such representation or assurance is made in writing signed by the party to be charged therewith.”

21. What can be discerned from the above provisions is that no clean can be based upon the Defendants special promise to answer for the default of another unless the agreement upon which such is brought is in writing and signed by the party to be charged. The Plaintiff in this case says that though the Sale Agreement between Andrew Kimani Ngumba and the Plaintiff was not duly executed as provided, that should not matter.

22. The Plaintiff also contends that there was glaring fraud in the transactions leading to the transfer of the suit premises from the 2nd Defendant to the 3rd Defendant and in particular, the fact that the caveat that was registered by the Plaintiff on 27/09/1993 was lifted in very unclear circumstances. In this regard, the Plaintiff relied on two decisions by the Court of Appeal, namely **(i) Russel –vs- Commercial Bank of Africa [1986] KLR 633** and **(ii) Elijah Arap Bii –vs- Samuel M. Gitau & Another [2009] e KLR**. In the **Bii Case**, the court held, inter alia that the issue of fraud “has to be determined in the perspective of the general duties of a mortgagee, the relevant provisions of the RTA and ITPA, the relevant case law and upon consideration of evidence as to whether the sale was tainted with impropriety amounting to fraud.” It is to be noted that the issue at hand before the learned Judges of Appeal in the **Bii case** was one in which the Appellant was questioning summary judgment granted at the interlocutory stage; when there were allegations of fraud in the plaint. That in my view was the basis of their lordships ruling that issues of fraud cannot be determined without hearing both sides at a full trial. The Plaintiff contends therefore that because of the gravity of the allegations of fraud in this matter this Honourable Court should exercise its discretion in favour of the Plaintiff by granting the interlocutory injunction sought pending the hearing and determination of this suit.

23. Regarding issues (ii) and (iii) as framed by the Plaintiff, the Plaintiff contends that the Plaintiff has demonstrated that he has a prima facie case with a probability of success and that payment of damages would not adequately compensate the Plaintiff. The Plaintiff says that the 2nd Defendant sold the suit property at less than the value it had given of Kshs. 38 million as per the Valuation Report by Centenary Valuers and Property Consultants dated 19/04/2005. It is to be noted that in the same Valuation Report, the Recommended Reserve Price was given as Kshs.23,000,000.00 while the forced sale value was given as Kshs.26,000,000.00. Secondly, the Plaintiff argues that since he has been in occupation of the suit premises since 1991, and has put up a multi-million shilling home, the balance of convenience should tilt in the Plaintiffs’ favour. See **Giella –vs- Cassman Brown case** to which the Plaintiff has referred and which case has been considered by the court.

24. The 1st Defendant filed its submissions through the firm of M/s Nyairo & Company Advocates. The 1st Defendant reiterates the averments of the Replying Affidavit dated 10/07/2009 and sworn by John Mwenja Ngumba. The 1st Defendant says that the suit

premises which is currently registered in the name of the 3rd Defendant as nominee of Hon. Elias Mbau was purchased during a public auction mounted on the instructions of the 2nd Defendant in exercise of its statutory power of sale as a result of default in loan repayments by the Plaintiff.

25. The 1st Defendant also contends that there was no duly signed and dated agreement for sale between the Plaintiff and the late Andrew Kimani Ngumba and that the existence of such an agreement was strenuously denied by the late Andrew Kimani Ngumba in the latter's defence filed in this case. The 1st Defendant says that the Plaintiff's suit fails by virtue of provisions of section 3(3) of the Law of Contract Act, as contended by Act No. 2 of 2002.
26. The 1st Defendant also contends that after the death of Andrew Kimani Ngumba on 31/05/1997, the Plaintiff took no action to substitute the said Andrew Kimani Ngumba the Defendant in HCCC 1850 of 1993 as required under Order 23 Rule 4 of the Civil Procedure Rules. The 1st Defendant thus submits that HCCC No. 1850 of 1993 abated 12 months after the death of Andrew Kimani Ngumba on 31/05/1997 and that "*no fresh suit shall be brought on the same cause of action.*" The 1st Defendant also avers that the Plaintiff's suit against him is barred by the provisions of section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya which reads:-

"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person."
27. In brief therefore, the 1st Defendant urges this Honourable Court to find that the Plaintiff's Chamber Summons application dated 12/06/2009 has no merit for reasons that the Plaintiff has not come to court with clean hands since he is the one who was the cause of the dispossession of the 1st Defendant. The 1st Defendant also wants the Plaintiff's application dismissed on grounds of material non-disclosure, namely the Plaintiff's failure to disclose in his plaint that he (Plaintiff) also filed HCCC No. 1531 of 1999 against the 2nd Defendant.
28. The 3rd Defendant's submissions were filed on its behalf by M/s E. Chege Ng'ang'a Advocate of Maina Mururi & Co. Advocates. In the submissions, counsel reiterated the averments of the Replying Affidavit sworn by Hon. Elias Mbau to the effect that the 3rd Defendant bought the suit premises for Kshs.23,000,000.00. Secondly, the 3rd Defendant contends that after paying the full purchase price, the estate of Andrew Kimani Ngumba withdrew all pending cases involving the suit premises and that since the 3rd Defendant is now the registered owner of the suit premises, this court should not act in vain by issuing orders of injunction which cannot be obeyed. The 3rd Defendant says that by the time the Plaintiff filed his application on 12/06/2009, the suit premises had already been transferred to the 3rd Defendant on 18/09/2008 with a mortgage encumbering the property.
29. The 3rd Defendant also submits that the Plaintiff has not approached this Honourable Court with clean hands by reason of alleging that there was a valid agreement of sale between the Plaintiff and the late Andrew Kimani Ngumba when there was no such agreement and further by failing to inform the court that he was a party to the consent order recorded by Aluoch J (as she then was) in HCCC No. 1850 of 1993 (**Zakaria Gakibe –vs- Andrew Ngumba & KCB**). The consent order dated 25/05/1994 cancelled the public sale of the suit premises in terms of the Plaintiff's proposal vide Plaintiff's letter dated 24/05/1994. Order number 3 thereof was to the effect that if the Plaintiff defaulted on any one payment, the interested party in that suit (being the 2nd Defendant in this suit) would be at liberty to exercise its power of sale. The 3rd Defendant also accuses the Plaintiff of deliberately misleading the court by alleging that HCCC Nos. 285 of 2005 and 584 of 2007 were filed to safeguard his (Plaintiff's) interests in the suit property when he was neither a beneficiary nor a purchaser.
30. For the above reasons, the 3rd Defendant contends that the Plaintiff has not met the conditions for the granting of injunctions as set out in the **Giella case**, namely that the Plaintiff does not have a prima facie case with a probability of success; that the Plaintiff has not demonstrated that the loss (if any) he might suffer cannot be adequately compensated by payment of damages and finally that the Plaintiff has not shown why the balance of convenience should tilt in his favour and not in favour of the 3rd Defendant. The 3rd Defendant says that the case of **Prisallar Krobought Grant –vs- Kenya Commercial Bank (C.A. No. 227 of 1995 – unreported)** dictates that the Plaintiff's remedy in this case where a mortgagee has already exercised its statutory power of sale

lies in a claim for damages as provided by section 69B of the Indian Transfer of Property Act.

31. It is also the 3rd Defendant's case that the Plaintiff is guilty of latches and delay since he has not honoured his proposals as recorded in court on 25/05/1994. The 3rd Defendant also says that the Plaintiff is a vexatious litigant who has filed numerous suits and applications solely to vex the Defendants herein and in an attempt to create an atmosphere of complexity and confusion. The 3rd Defendant sees the Plaintiff's present application as yet another attempt to use the court process to derail the transaction between the 2nd and 3rd Defendants when there is no doubt that the 3rd Defendant has an indefeasible title to the suit premises. The 3rd Defendant wants the Plaintiff's application dismissed with costs to the 3rd Defendant as was the case in HCCC No. 285 of 2005. The 3rd Defendant begs this Honourable Court to allow him to benefit from the suit premises for which it is repaying a loan.
32. Before considering the merits of the Plaintiff's application, it is necessary first to take a look at the principles governing the grant of injunctions and secondly to consider when a mortgagee's right to exercise its statutory power of sale is extinguished. I have already referred to the **Giella case** in which the court set out the three principles for the granting of an injunction, namely that:-
 - (a) *an Applicant must show that he has a prima facie case with a probability of success*
 - (b) *an interlocutory injunction will not normally be granted unless the Applicant would suffer an injury which cannot be adequately compensated in damages and*
 - (c) *where the court is in doubt, it should decide the case on a balance of convenience*
33. The Plaintiff in this case argues that he is indeed entitled to the order for injunction on the basis of all the three principles. First he says that the late Andrew Kimani Ngumba having agreed to sell the suit premises to him, the 1st Defendant herein holds the suit premises in trust for the Plaintiff. Secondly, the Plaintiff says that since the caveat he had placed on the suit premises was lifted in unclear circumstances, the issue of fraud becomes central in the whole process leading to the registration of the suit premises in the name of the 3rd Defendant. The Plaintiff also says that the suit premises is such that its loss to the 3rd Defendant cannot be adequately compensated in damages; and therefore that because of the fraud, the court should find that the balance of convenience tilts in favour of the Plaintiff.
34. Apart from the **Giella case**, the Plaintiff also placed reliance on **HCCC No. 3 of 2006 (Unreported) – Karmali & 2 Others –vs- CFC Bank Ltd. & Another**. The court in the said case stated that the fact alone that the sale of the suit property resulting in loss which may not be compensated in damages was not sufficient by itself to warrant the grant of an injunction. The court in that case granted an injunction on the basis of a combination of facts, including the probability of duress; the fact that the facility secured by the suit property did not directly benefit the 2nd Plaintiff.
35. The Plaintiff also relied on **Mbuthia –vs Jimba Credit [1988] KLR 1**. The court in that case considered a number of issues namely (i) when a mortgagor's equity of redemption is deemed to be extinguished and mortgagees due duty to obtain a fair price and to have regard to the mortgagor's interest and (ii) how applications for injunctions in land matters should be considered. The facts in that case were quite similar to the facts in the present case. The Appellant/Mortgagor filed suit seeking nullification of a transaction by which the Respondent/Mortgagee had, in exercising its statutory power of sale sold the Appellant's charged land to the second Respondent. The Appellant contended that the suit property had been sold at a grossly unfair under value and sought an order restricting the transfer of the property to the second Respondent.
36. The Appellant in the **Mbuthia case** also applied for an interim injunction restraining the first Respondent from interfering with his possession of the property which he said was his home and for the status quo to be maintained. The application was dismissed on grounds that there was no evidence of bad faith, that the sale price was not considerably low and finally that the Appellant's entire case was unmeritorious and lacked a possibility of success. It was held, inter alia, that it was the duty of the mortgagee to obtain the best possible price, and further that where the subject matter of the suit was land, it is usual to grant an injunction. The Plaintiff also relied on the **Russel case** (above). Since I have already set out the holding of the court in the said suit, I need not repeat it here.
37. From the above authorities the Plaintiff's principal arguments are that the 1st Plaintiff held the suit premises in trust for the Plaintiff, secondly that the suit property was sold at an undervalue of Kshs.23,000,000.00 as compared to Kshs.38,000,000.00 and thirdly

that there was fraud in the entire transaction.

38. The arguments by the 1st Defendant are that since the purported Sale Agreement between the Plaintiff and Andrew Kimani Ngumba (deceased) was neither signed nor dated, there was no agreement binding the estate of Andrew Kimani Ngumba to the Plaintiff. Further the 1st Defendant says that the Plaintiff never made efforts to enjoin the 1st Defendant to the suits that he (Plaintiff) had with Andrew Kimani Ngumba nor did the Plaintiff seek to be enjoined in the suits filed by the 1st Defendant. Finally, the 1st Defendant contends that Plaintiff defaulted on the mortgage repayments despite the consent order of 25/05/1994 and that in any event, the Plaintiff is guilty of undue delay in bringing both this application and the suit. The 1st Defendant relied on the statutory provisions of the Limitation of Actions Act Cap 22, the Law of Contract Act, (Cap 23 as amended by Act No. 2 of 2002) to support his contention that the Plaintiff's suit is time barred and bad in law.

39. Section 3(3) of the Law of Contract Act as amended by Act No. 2 of 2002 provides:-

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) the contract upon which the suit is founded –

i. is in writing

ii. is signed by all the parties thereto;

and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such a party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

40. The 1st Defendant also relied on the provisions of Order 23 Rule 4 of the Civil Procedure Rules to support his contention that HCCC No. 1850 of 1993 abated by effluxion of time after the death of Andrew Kimani Ngumba on 31/05/1997.

41. The 2nd Defendant's case is that the Plaintiff having defaulted on the mortgage repayments, the 2nd Defendant was entitled to exercise its statutory power of sale. The 2nd Defendant contends that the Plaintiff has not placed any evidence before the court to show that he complied with the consent order of 25/05/1994 recorded by Aluoch J (as she then was) in the presence of the Plaintiff and his counsel.

42. The 3rd Defendant's contention that its title is unimpeachable is supported by the **Giella case** (above) and also by **Grant –vs- Kenya Commercial Finance Company Ltd.** (supra). In the case, the suit property had already been transferred to the 2nd and 3rd Respondents. The court, in its wisdom found, and I fully agree with the learned Judges of Appeal, that in the particular circumstances of the case, granting an injunction would serve no useful purpose as what was sought to be restrained had already happened. The court also found that the provisions of section 69B of the ITPA (supra) provided a complete answer to the Applicant's claim, and that the only remedy of the Applicant would be a claim for damages if the Applicant could prove that there was an improper or irregular exercise of the statutory power of sale.

43. The Plaintiff in the instant case also wants the court to believe that there was no sale between the 2nd and 3rd Defendants. However, the facts before me show that the Hon. Elias Mbau personally attended the public auction and paid the requisite 25% deposit. The 3rd Defendant argues that the Plaintiff has not shown any evidence of impropriety on the part of the 3rd Defendant in the purchase of the suit premises. The court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage – see **Bharmal Kanji Shah & another – vs- Shah Depor Devji [1965] EA 91; Halisbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highway Development Ltd. –vs- Central Bank of Kenya & 2 Others – Civil Application No. Nai 140 of 1995 (unreported) per Kwach, JA.**

44. The 3rd Defendant also relied on **Mrao Limited –vs- First Amercian Bank of Kenya Limited & Others [2003] KLR 125.** The court reiterated the principles for the granting of injunctions as set out in the **Giella case** and also expounded on what a prima facie case means, namely that a prima facie case is one “*which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or*

rebuttal from the latter.” In the present suit the 3rd Defendant contends that the Plaintiff has not met the threshold of a prima facie case set out in the **Mrao Limited case**. The court in the **Mrao Limited case** referred to **Ramanlal T Bhatt –vs- R [1957] EA 332** where the Court of Appeal for East Africa gave a definition of what in criminal practice, amounts to a prima facie case in the following words:-

*“A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true, as **Wilson J**, said that the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”*

45. The question that needs determination by the court in this case is whether the Plaintiff has presented such material to the court as would enable this court to conclude that there exists a right on the part of the Plaintiff which right has been infringed by all or any of the Defendants herein.
46. The 3rd Defendant also relied on **Muganda –vs- Housing Finance Company of Kenya – HCCC No. 1436 of 1999 (unreported)** and **Kihara –vs- Barclays Bank of Kenya Limited [2001] 2 EA 420**. One of the issues that came up for determination in the **Muganda case** was what could be said to amount to an under sale. The court held and I agree with that holding that:-

“--- what really counts in determining whether or not a sale was an undersale is not the subjective valuation of either the Plaintiff or the Defendant but what the market value of the property as determined by a free and robust public auction would be.”

47. I have now carefully considered the opposing views in this matter and the law and have taken the following view of the Plaintiff’s case as against each of the Defendants herein. As against all the Defendants I am of the view that the Plaintiff has not made out a prima facie case with a probability of success, nor has he demonstrated that the loss he is likely to suffer cannot be adequately made good by payment of damages.
48. As far as the 1st Defendant is concerned, I am satisfied that there is no evidence placed before the court to show that the 1st Defendant held the suit premises in trust for the Plaintiff. The Plaintiff was not a beneficiary to the estate of the deceased Andrew Kimani Ngumba and even after the deceased died, the Plaintiff took no action to substitute the deceased with the administrator of the deceased’s estate in HCCC 1850 of 1993. Having failed to do so I accept the 1st Defendant’s argument that HCCC No. 1850 of 1993 abated under the provisions of Order 23 rule 4 of the Civil Procedure Rules upon expiry of twelve (12) months from the deceased’s death on 31/05/1997.
49. I have also accepted as a fact that there was no valid agreement for sale between the Plaintiff and the deceased in respect of the suit premises. The Plaintiff himself admits as much and I see no reason why I should find that section 3(3) of the Law of Contract Act (as amended by Act No. 2 of 2002) is not applicable in this case. In a nutshell, I find and hold that the Plaintiff’s allegations against the 1st Defendant are grounded on a hollow surface and cannot therefore stand. In any event, the court has already found in HCCC No. 285 of 2005 that the public auction by the 2nd Defendant was valid prima facie and that the 1st Defendant was under no obligation whatsoever to consult the Plaintiff on any decision taken by the said 1st Defendant in respect of HCCC Nos. 285 of 2005 and 584 of 2007, including the withdrawal of the said suits.
50. As regards the Plaintiff’s case against the 2nd Defendant, there is no doubt that on the 25/05/1994, the Plaintiff was a party to a consent order which gave power and authority to the 2nd Defendant to exercise its statutory power of sale over the suit premises if the Plaintiff failed to meet any of the terms over the proposal he made vide his letter dated 24/05/1994 without further reference to the court or any of the parties. The Plaintiff defaulted on that proposal and the 2nd Defendant proceeded to exercise its statutory power of sale. The Plaintiff has alleged that there was fraud on the part of the 1st and 2nd Defendants in having the suit premises sold by public auction, because, the Plaintiff argues, the caveat he placed on the suit premises on 27/09/1993 was lifted in unclear circumstances. I have looked at the Plaintiff’s particulars of fraud against each of the four (4) Defendants. As against the 1st Defendant the Plaintiff alleges inter alia, that the 1st Defendant was fraudulent in withdrawing all the suits that had been filed by the 1st Defendant against the 2nd and 3rd Defendants in relation to the suit property and that he also received proceeds of sale which

were over and above the recovery amount from the 2nd Defendant.

51. The true position on these allegations is that there was no point in the 1st Defendant keeping the said suits alive when the court had found that the public auction was valid. Further, the court found and I fully agree with those findings, that the Plaintiff himself had no proprietary interest or right in the suit premises and that having defaulted on the loan repayments, any amount of the sale proceeds over and above the recovery amount rightfully belonged to the 1st Defendant.
52. Among the allegations of fraud against the 2nd Defendant is that the 2nd Defendant sold the suit property while knowing or having knowledge that the statutory power of sale could and did not accrue without a court order. I have already referred to the consent order of 25/05/1994 by which the Plaintiff agreed that if he did not comply with any of the proposals he had made to the 2nd Defendant vide his (Plaintiff's) letter dated 24/05/1994, then the 2nd Defendant would proceed to exercise its statutory power of sale. There was thus already a court order and the 2nd Defendant did not need to obtain another court order before proceeding with the sale. It is also clear that the Plaintiff had no purchaser's interest in the suit premises because there was no valid sale agreement between the Plaintiff and the late Andrew Kimani Ngumba under which the Plaintiff could claim a purchaser's interest. The Plaintiff also made unsubstantiated claims of collusion between the 2nd Defendant and the Principal Registrar of Titles in lifting the caveat. The court rejects such unsubstantiated claims.
53. As concerns the 3rd Defendant the Plaintiff alleges that the 3rd Defendant was fraudulent in failing, refusing or neglecting to exercise due diligence in ascertaining the title and in failing to take cognizance of irregularities and improprieties between the 2nd Defendant and the Principal Registrar. I have already said that the Plaintiff's allegations of impropriety against the Principal Registrar are unsubstantiated and in any event, the provisions of section 69B of the ITPA place no such burden upon the 3rd Defendant.
54. It flows from the above that the Plaintiff's application against the 3rd Defendant must fail on two fronts. In the first place, there would be no purpose in granting an order of injunction against the 3rd Defendant because what the injunction seeks to stop has already taken place. I agree with the lordships of appeal in the **Grant case** that there is no need for the court to issue orders in vain. If the Plaintiff has any claim at all, and if he is able to prove any impropriety in the transaction leading to the registration of the suit premises in the name of the 3rd Defendant, then his claim lies in damages and not in an injunction. Secondly, the Plaintiff's application against the 3rd Defendant must fail because of the provisions of section 69B(2) of the ITPA which protect the 3rd Defendant's title against claims of impeachment on grounds that (a) no case had arisen to authorize the sale, or (b) that no due notice was given or (c) that the power of sale was otherwise improperly or irregularly exercised. The 3rd Defendant in this case was not required to be concerned to see or enquire into any of the matters raised by the Plaintiff against the said 3rd Defendant.
55. In conclusion and for the reasons given above, I find that the 1st Defendant did not hold the suit property in trust for the Plaintiff. I also find that any purported fraud did not have any annulling effect on the sale of the suit property to the 3rd Defendant. I also find that the Plaintiff has not met the threshold of the three conditions for the granting of an injunction and that if the Plaintiff has any claim in respect of the exercise of the 2nd Defendant's statutory power of sale, then such a claim lies only in damages against the said 2nd Defendant. I am also satisfied that the Plaintiff has not come to court with clean hands and he is guilty of laches and undue delay.
56. The upshot of what I have said above is that the Plaintiff's Chamber Summons application dated 12/06/2009 lacks merit. The same is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of April, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Kyalo (present) for the Plaintiff/Applicant

M/s Nyairo & Co. (absent) for the 1st Defendant

Mr. Masinde (present) for 2nd Defendant

Mr. Chege (absent) for 3rd Defendant

Mr. Kamau (absent) for 4th Defendant

Weche - court clerk