



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 234 of 2010**

HASSAN MOHAMMED ABDI.....1<sup>ST</sup> PLAINTIFF

FARAH MOHAMMED ABD.....2<sup>ND</sup> PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK.....1<sup>ST</sup> DEFENDANT

KHEIRA OMAR MAALIM.....2<sup>ND</sup> DEFENDANT

**RULING**

1. A Chamber Summons application was filed with the plaint on 16<sup>th</sup> April, 2010 seeking for *inter alia*, an order of injunction to restrain the 1<sup>st</sup> Defendant from selling by public auction or private treaty or in any way dealing with the property known as LR. No. 13768/68/152 and LR No. 13768/153, Avenue Park Nairobi and L.R. No. 9742/4 (LR. No. 57225) Karen Nairobi until the hearing and determination of the suit. The application is supported by the grounds stated on the body thereto and the matters deposed to in the supporting affidavit of Hassan Mohammed Abdi.

2. Briefly stated, it is the Plaintiff’s case that the 1<sup>st</sup> Plaintiff is the registered proprietor of the suit premises. The 1<sup>st</sup> Defendant purportedly advertised the suit properties for sale on 12<sup>th</sup> April, 2010 and the sale is to take place on 27<sup>th</sup> April, 2010. The Plaintiffs contend that they were never served with the statutory notice as provided for under the charge and as per the law. Secondly and more fundamentally, there were other suits between the plaintiffs and the 1<sup>st</sup> defendant which were compromised culminating with a consent order/ decree dated 18<sup>th</sup> June 2008. By that consent, the parties settled the suits according to the terms contained in that consent decree. That consent order, also settled the various suits as follows:

**A) Milimani Civil Number 557 of 2005 Hassan Mohammed Abdi v Giro Commercial Bank & 2 others;**

**B) Milimani Civil Suit Number 564 of 2005 Hassan Mohammed Abdi v Giro Commercial bank & 2 others;**

**C) Milimani Civil Suit Number 563 of 2005 Farah Mohamed Abdi v Giro Commercial Bank & 2 others;**

**D) Milimani HCCC 304 of 2006 Kheria Omar Maalim v Giro Commercial Bank Limited and Another;**

3. The plaintiffs' suit principally challenges the validity of consent orders and the decree that settled all those suits. It is alleged there was a mistake and misapprehension of facts when the consents were entered into. There were various essential considerations and items which were not taken into consideration. For instance the parties agreed to sell a certain property and offset part of the debt as provided for under clause (f). The balance which was left outstanding was covered by additional securities which were offered by the plaintiffs as stated under paragraph 14 of the supporting affidavit.

4. The consent lacks time frame within which the balance ought to have been paid. It also did not provide the modalities of payment and the extent to which the additional securities secured the outstanding loan. Moreover there was no default clause thus the applicants are entitled to challenge the consent order by the filing a separate suit. Finally, the auctioneers who issued the notification of sale and advertised the property for sale have not conducted a valuation of the property. For those reasons counsel for the Plaintiffs submitted that they have demonstrated a prima facie case with a probability of success.

5. This application was opposed by the Respondent; the 1<sup>st</sup> Defendant relied on the replying affidavit of **Tirus Murigi** sworn on 21<sup>st</sup> April, 2010. Counsel for the respondent submitted that according to the consent order, it is specifically provided that the 1<sup>st</sup> Defendant had the right to realize the securities being the suit premises either by private treaty or public auction. The 1<sup>st</sup> Defendant has had the liberty to realize the securities if the plaintiffs failed to abide by the terms of the consent. Counsel further submitted that the consent decree is not ambiguous, when the plaintiffs failed to adhere to the terms of the consent decrees; the 1<sup>st</sup> defendant sent them a letter dated 16<sup>th</sup> September, 2008 informing the plaintiffs that they had failed to abide by the provisions of clause 1(g) that is to provide additional titles.

6. In November 2009, the 1<sup>st</sup> Plaintiff wrote a letter to the 1<sup>st</sup> Defendant seeking for indulgence because he had found a buyer for one of the properties. By the same letter the plaintiff also authorized the 1<sup>st</sup> Defendant to sell the suit property by January 2010 if he will not have succeeded in finding a buyer of one of the suit property. On 26<sup>th</sup> January 2010, a formal demand was issued to the Plaintiffs requiring them to settle the decretal sum and in default the 1<sup>st</sup> defendant would proceed to take step to realize the securities held to enforce the decree. The Plaintiffs failed to honor the consent decree and the notification of sale was served by the M/s Garam Investment on 25<sup>th</sup> February 2010.

7. The Auctioneer issued the certificate under Section 15(c) of the Auctioneers Rules. Counsel submitted that the 1<sup>st</sup> Defendant was not obliged to issue a statutory notice. The 1<sup>st</sup> defendant was at liberty to realize the security as the statutory notices had been issued and the 1<sup>st</sup> Defendant only delayed the realization of the statutory power of sale after the consent decrees. Thus the plaintiffs have not demonstrated a prima facie case with a probability of success to warrant this court granting an order of injunction. Moreover, there are no grounds advanced to warrant the setting aside of the consent orders which can only be set aside on grounds of fraud, mistake or misrepresentation.

8. The principle element to determine in this application as in all applications for injunctions is whether the applicants have established a prima facie with a probability of success. Secondly, irreparable harm which will not be compensated for in damages would arise, and if the court is in doubt, the matter should be determined on a balance of probability. The Court of Appeal has explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case 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.”***

9. In the same case the Court appeal cited with approval the circumstances in which a mortgagee may be restrained from exercising its statutory power of sale as set out in Halsbury's Laws of England, Vol 32 (4<sup>th</sup> edition) paragraph 725 as follows:-

*"725 When mortgagee may be restrained from exercising power of sale."*

*"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claims excessive." (Emphasis added)*

10. This application raises two issues, firstly whether the consent decree is ambiguous so as to amount to misrepresentation. The second issue is in regard to the allegations of irregularities regarding the failure by the 1<sup>st</sup> Defendant to issue a statutory notice and the Auctioneers failure to conduct a valuation. The Court of Appeal in the case of; Flora Wasike vs. Wamboko (1988) KLR reiterated the same principles in the decision in J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. And cited with approval the similar principles as enunciated in an English case of Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

*"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."*

11. The consent decrees complained about were entered into and signed on behalf of the Plaintiffs by their lawyers. It is not denied that the lawyers who represented the Plaintiffs had the authority to enter into the consent judgment. Although this is perhaps a matter for the trial court, on the face of the consent decree, I do not see any ambiguity that can be said to amount to fraud, mistake or misrepresentation. The consent decrees clearly stated what each party was supposed to do. The Plaintiffs have not demonstrated or presented any evidence to show that they complied and performed their obligations as per the consent decrees especially the provision of additional securities. The consent decrees granted the 1<sup>st</sup> Defendant the discretion and powers to proceed and realize the properties by sale through private treaty or public auction.

12. The 1<sup>st</sup> Defendant opted to sell the properties by public auction and notification of sale was issued as per the auctioneers rules. I am not persuaded that the 1<sup>st</sup> Defendant needed to go outside the provisions of the consent decrees to realize the suit properties as statutory notices were issued to the plaintiffs before they filed those suits which were compromised. Accordingly I find the Plaintiff's application does not meet the threshold of granting an interim order of injunction. The application is dismissed with costs to the 1<sup>st</sup> Defendant.

-  
RULING READ AND SIGNED ON 26<sup>TH</sup> APRIL 2010 AT NAIROBI.

M. K. KOOME  
JUDGE

-