



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 86 OF 2010

SAMSON NGUGI

KHINGWA.....PLAINTIFF

VERSUS

**NATIONAL INDUSTRIAL CREDIT BANK LTD & 2
OTHERS.....DEFENDANT**

RULING

1. The plaintiff charged his property known as Kikuyu/Kikuyu Block 1/48 and Block 1/55 to the 1st defendant . The 1st defendant in execution of the powers under the charge sold the plaintiffs property on 9th February, 2010 to the 2nd defendant at a public auction held by the 3rd defendant. The plaintiff claims the sale to the 2nd defendant is null and void as there was no public auction that was conducted. The property is charged under the Provisions of the Registered Land Act Cap 300 which prescribe a sale of a charged property by public auction and not by way of a private treaty.
2. It is alleged the charge created could not have given rights to the 1st defendant to sell the plaintiff's property. This application is supported by the supporting affidavit sworn by John Kamau Ngige on 15th February, 2010 he claims that he attended the auction on 9th February, 2010 at the offices of the 3rd defendant. He was told to wait outside and later on, Mr. Joseph Gikonyo the proprietor of the Garam Investments confirmed that they had carried out the auction. Counsel also relied on the supplementary affidavit sworn by the plaintiff and three other persons who claim to have attended the auction and contend that no public auction was held by the 3rd defendant on the 9th February, 2010.
3. Counsel for the applicant urged the court to grant an order to stay, lift and or set aside the purported sale of the plaintiffs property. Secondly, the court was asked issue an order restraining any transfer of the suit premises to the 2nd defendant until the application is heard and determined. In further arguments, it was submitted that as at the time the 1st defendant purported to exercise the statutory power of sale, the right of sale and not accrued. This is because the charge was defective which is a triable issue. That issue was not determined even in a previous suit which was decided by Kimaru J. Moreover, it was submitted, the matter that was determined by Kimaru J was an interlocutory application which was seeking to stop the sale the applicant is now seeking to stop the transfer. Moreover the previous suit was withdrawn and the present case raises fundamental issues which should proceed for trial.
4. This application was opposed counsel for the 1st and 3rd defendants relied on the replying affidavit by Lilian Songoh sworn on 17th March, 2010 and Joseph Gikonye sworn on the same day as well as Kany

Kimondo sworn on 18th March, 2010. It is contended that the issues raised by the plaintiff in this application are *resjudicata* and fully covered by the provisions of Section 7 explanation No. 4 of the Civil Procedure Act. The plaintiff filed Milimani HCC No. 287 of 2009, which challenged the validity, execution and all the shortcomings of the charge on the suit premises. Counsel urged the court to strike the plaintiff's suit. The affidavit by Kany Kimondo explained how the plaintiff appeared in their officers before signing the charge and the provisions of Section 70, 74, 79, 83 and 84 of the Registered Land Act were read and explained to the plaintiff before he signed the charge.

5. It was further submitted that the 1st defendant was entitled to exercise the statutory power of sale after the plaintiff filed another suit seeking orders of injunction. That application was dismissed and the plaintiff should not be allowed to litigate in installments. The affidavit by the auctioneer gave a detailed account of every steps that he took before and during the auction. He annexed copies of the bids recorded at the auction. He therefore complied with the provisions of the Auctioneers act. The plaintiff was also faulted for not coming to court with clean hands. He was given a chance to repay the loan after justice Kimaru's ruling but he never came up with any offer.

6. The application was also opposed by the 2nd defendant reliance was placed on the replying affidavit sworn by Raju Dhanani sworn on 18th March, 2010. It is contended that the 2nd defendant is a bonafide purchaser at a public auction, he had no notice of defect of title. He participated on an auction held on 9th February, 2010 alongside other bidders he was declared the purchaser thus he should not be prejudiced by being denied the registration of the property. Moreover, after the auction, the plaintiff remedy is a claim for damages.

7. The plaintiff's application seeks for an order to set aside the sale and to restrain any transfer of the suit premises. These are both mandatory and temporary orders of injunction. The principles upon which such orders can be granted are well settled; as regards the prayer for a mandatory order, the principles to guide the court are set out in a long line of authorities by the Court of Appeal especially the case of **Kenya Breweries Ltd & another Vs Washington Okeyo C A Civil Appeal No. 322 (Nairobi)** (Unreported) at page 3 their Lordship quoted with approval the Text Vol. 24 of Haslbury Laws of England 4th Edition paragraph 948 which reads as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple summary one which can be easily remedied, or if the defendant attempted to steal a March on the plaintiff....A mandatory injunction will be granted on an interlocutory application. Also in Locobail International Finance Lt. V Agroespport and others {1986} 1 ALL ER 901 at page. 901 it was stated:-

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court though that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard then was required for a prohibitory injunction.....”

8. Back to the issue on whether the plaintiff can be granted a mandatory order of injunction, let alone an interim order of injunction. It is common ground that the plaintiff filed Milimani HCC No. 287 of 2009 against the 2nd defendant a similar application was determined by a ruling of Kimaru J delivered on 4th November, 2009. The plaintiff was seeking for an order to restrain the 1st defendant from selling the same suit premises which were charged to the 1st defendant. The court found there was no basis for denying the

1st defendants their statutory right of sale and the application was dismissed. Before that suit, the plaintiff had filed another suit being Nairobi HCC No. 592 of 2008 which suit was compromised by a consent dated 14th October, 2008.

9. Are the prayers sought by the plaintiff *resjudicata* under the provisions of section 7 of the Civil Procedure Act. The plaintiff argued that the present application is challenging the sale by public auction which was not an issue before Kimaru J. The plaintiff is relying on a host of affidavits sworn by persons who claim to have been witnesses at the public auction. However, from the averments, it is clear a public auction was held pursuant to an advertisement but the point of departure according to the applicant is that there were no bids by the 2nd defendant. According to the 2nd and 3rd defendant, the auction was properly conducted whereby the 2nd defendant was declared the highest bidder and he paid the purchase price. It is trite law that a purchaser is not concerned to make an enquiry whether a case has arisen to authorize the sale or whether due notice was given but any party affected by an irregular exercise of the power of sale has a remedy in damages against the person exercising the power.

10. The 2nd defendant is a purchaser there is no privity of contract between the plaintiff and the 2nd defendant. The plaintiff's remedy lies in damages if he can prove there was no sale by public auction. The plaintiff's case does not meet the threshold set out for granting the mandatory and interim orders of injunction. The application is dismissed with costs to the respondent.

Ruling signed and submitted for delivery on the 9th day of November 2010

MARTHA KOOME

JUDGE

Delivered and countersigned on 12th day of November 2010.

P KIHARA KARIUKI

JUDGE