



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MOMBASA  
(Coram: Ojwang, J.)

CIVIL SUIT NO. 271 OF 2008

FLAGSHIP HOLDINGS LIMITED.....PLAINTIFF/APPLICANT  
-VERSUS-  
1. MUNICIPAL COUNCIL OF MOMBASA  
2. JOEL TITUS MUSYA t/a MAKURI ...DEFENDANTS/RESPONDENTS  
ENTERPRISES AUCTIONEERS

**RULING**

The plaintiff came before the Court by Chamber Summons dated **6<sup>th</sup> October, 2008**, brought under s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order **XXXIX**, rules 1, 2, 3 and 9 of the Civil Procedure Rules. The application has one substantive prayer, set out as follows:

***“THAT the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves, their servants, agents or employees be restrained from selling by public auction or by private treaty, transferring, leasing, charging, mortgaging, or in any other way or manner disposing of or dealing with all those pieces or parcels of land known as –***

***(a) Mombasa/Block XLVIII/171; and***

***(b) Mombasa/Block XLVIII/172***

***until the hearing and final determination of this suit or until further orders of this Court.”***

As grounds in support of the application it was stated as follows:

***(i) the plaintiff is the registered proprietor of the suit premises;***

***(ii) the suit premises are situated within the Municipality of Mombasa, and the plaintiff is liable to pay annual land rates;***

***(iii) the plaintiff has paid all land rates falling due;***

***(iv) the defendant has persistently included the plaintiff’s name in lists of rates-defaulters published in the daily newspapers;***

***(v) the plaintiff has specified the computation errors in 1<sup>st</sup> defendant’s rates-record, and has brought this to the attention of 1<sup>st</sup> defendant;***

***(vi) the 1<sup>st</sup> defendant has not paid heed to such indication of computing errors;***

***(vii) the 1<sup>st</sup> defendant has never instituted any suit against the plaintiff for recovery of the alleged rates;***

***(viii) the 1<sup>st</sup> defendant has never registered any charge against the plaintiff’s titles to the suit premises to secure unpaid rates;***

***(ix) the 1<sup>st</sup> defendant has never obtained any Court order for the sale of the suit premises;***

***(x) on 30<sup>th</sup> September, 2008 the 1<sup>st</sup> defendant, through 2<sup>nd</sup> defendant, advertised the property No. Mombasa/Block XLVIII/172 for sale on 15<sup>th</sup> October, 2008, on the basis that this is repossessed property;***

***(xi) the 1<sup>st</sup> defendant has no right in law to sell the advertised property;***

***(xii) the 1<sup>st</sup> defendant has no decree against the plaintiff nor an order from the Court issued for the enforcement of a charge against the advertised property;***

- (xiii) *the 1<sup>st</sup> defendant has not followed the procedure set out in s. 17 of the Rating Act (Cap. 267, Laws of Kenya) for the recovery of rates;*
- (xiv) *the intended sale of the advertised property by 1<sup>st</sup> defendant in exercise of any repossession rights, is irregular and unlawful;*
- (xv) *unless restrained by this Court, the defendants will proceed with an illegal sale;*
- (xvi) *the plaintiff has a prima facie case against the defendants;*
- (xvii) *unless the orders sought are granted, the plaintiff stands to suffer irreparable harm not capable of being compensated in damages;*
- (xviii) *the balance of convenience stands in favour of the applicant.*

The application and the stated grounds are supported by detailed deposition in the affidavit of the plaintiff's administration manager, **Joseph Makuthu**, dated **6<sup>th</sup> October, 2010**.

The defendants filed grounds of opposition dated **18<sup>th</sup> November, 2008**, and they thus contend:

- (a) *the plaintiff's application has not demonstrated any legal wrong to have been done by the defendants;*
- (b) *the application does not satisfy the terms of Order XXXIX of the Civil Procedure Rules;*
- (c) *the application "is seriously misconceived, is frivolous, bad in law, and nothing other than an utter abuse of the process of the Court";*
- (d) *"no reason.....[has] been set forth to warrant the Court [exercising] its discretion in favour of the plaintiff";*
- (e) *"the application as a whole is a gross abuse of the process of the Court";*
- (f) *"the application as filed is misconceived, fatally defective, bad in law and ....is for striking out";*
- (g) *"the grounds and issues raised in the plaintiff's application for a temporary injunction are premature and predicated on [a] wrong premise".*

Much later, on **27<sup>th</sup> April, 2010** the 1<sup>st</sup> defendant's Town Clerk swore a replying affidavit, deponing that the plaintiff is in arrears of rates due to 1<sup>st</sup> defendant, to the tune of Kshs. 3, 281,559/24 as at **5<sup>th</sup> March, 2009**. On that basis, it is deposed, 1<sup>st</sup> defendant had acted by virtue of the Rating Act, and instructed 2<sup>nd</sup> defendant, sometime in **September, 2008**, to auction the two suit properties and to recover the outstanding rates. The deponent avers that the 1<sup>st</sup> defendant no longer intends to proceed with the sale; the affidavit bears as an annexure a letter from the City Council of Mombasa to 2<sup>nd</sup> defendant, dated **28<sup>th</sup> November, 2008**; this letter thus reads, in part:

**"RE: NOTIFICATION OF INTENDED PUBLIC AUCTION OF VARIOUS PROPERTIES AS PER THE DAILY NATION NEWSPAPER OF 29<sup>TH</sup> SEPTEMBER, 2008**

**"We refer to the above matter and to our instruction letter to you....."**

**"Pursuant to your aforesaid newspaper advertisement, some of the persons and/or entities who have defaulted in payment of the accrued rates have now started responding well with a good number requesting to be given time to offset the accrued rates to which the Council has agreed....."**

**"In the light of the aforementioned circumstances, kindly cancel and/or call off the intended sale on all the properties referred to hereinabove....."**

The 2<sup>nd</sup> defendant wrote to the deponent on **2<sup>nd</sup> December, 2008** confirming the cancellation of the advertisement for the sale of the properties of rates defaulters.

The deponent acknowledges the advice of his Advocate, **Mr. K. N. Kibara**, that "the issue of the outstanding rates-arrears can be adequately and appropriately canvassed and dealt with by the Rating Court as clearly provided for under the Rating Act....."

For the plaintiff, **Joseph Makuthu**, with leave of the Court, swore a supplementary affidavit on **6<sup>th</sup> May, 2010**; he deponed that "no rates or interest is due by the plaintiff to the 1<sup>st</sup> defendant as alleged"; that the plaintiff still deserved orders of injunction against 1<sup>st</sup> defendant, as it was not known if first defendant would change its mind and arrange "another illegal auction"; that the deponent believes to be true the advice of his Advocate, that "there is no entity known as a 'Rating Court' provided for under the Rating Act"; that this Court has the jurisdiction to hear and determine the issues raised in this suit; that if the 1<sup>st</sup> defendant is no longer intending to sell the properties of those said to be in rates-arrears, then it follows that granting the prayers sought herein will not prejudice the 1<sup>st</sup> defendant.

Learned counsel, **Ms. Azmina Amarshi** began from the position confirmed by the evidence, that the plaintiff is the registered owner of the suit properties, and urged that the threatened sale of these

properties will be contrary to the terms of the Rating Act (Cap. 267, Laws of Kenya). Counsel submitted that the said Act, under s. 17, provides that where any person fails to pay any rate that has fallen due, the rating authority makes a written demand upon that person, failing which proceedings are commenced in the Subordinate Court, seeking payment with interest; and where a decree is made in favour of the rating authority, that authority may apply to the High Court by Originating Summons, and the High Court may then order the sale of the property in question.

Counsel urged that “there is no law allowing 1<sup>st</sup> defendant to simply repossess, advertise and sell such property”; the 1<sup>st</sup> defendant, in the instant case, had no decree or charge registered against the suit properties: and so, 1<sup>st</sup> defendant has no right to advertise the properties for sale.

Counsel relied on exhibits annexed to the supporting affidavit filed with the application, to demonstrate that as at the time of filing suit, all rates due from the plaintiff had already been paid; hence any sale at all, and by whatever procedure it is done, by 1<sup>st</sup> defendant, would be illegal.

Specifically on the position of 2<sup>nd</sup> defendant, learned counsel urged that this defendant had acted in breach of clause 15 of the Auctioneers Rules, 1997, Legal Notice No. 120 (made by virtue of the Auctioneers Act, 1996 (Act No. 5 of 1996), which thus provides:

**“Upon receipt of a Court warrant or letter of instruction the auctioneer shall in the case of immovable property –**

**(a).....**

**(b).....**

**(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him.....**

**(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.....”**

Counsel urged that the grounds of opposition filed by the defendants, had raised “irrelevant issues”, and had taken no position on issues of procedural or substantive law.

Counsel urged that the Town Clerk’s replying affidavit had not strengthened the respondents’ case, particularly because it gave no specific information regarding rates-payment by the plaintiff. Counsel submitted that the deponent’s averment that 1<sup>st</sup> defendant had reversed its decision to sell the suit properties, was an admission that “the advertised sale was unprocedural and unlawful”; and that the deponent’s attribution of the rates-payment dispute to a “Rating Court” which is not provided for by law, only showed impropriety in 1<sup>st</sup> defendant’s handling of the issue, and showed the intent to question this Court’s lawful jurisdiction in the matter.

Counsel submitted that it is the 1<sup>st</sup> defendant, and not the plaintiff, who has an obligation under the Rating Act, to move the Subordinate Court in respect of any rates-claim; but, such a procedure does not oust the unlimited original jurisdiction of the High Court.

Counsel urged that the applicant’s case be held to satisfy the test set out in *Giella v. Cassman Brown* [1973] E.A. 358, for the grant of interlocutory injunctions; and that the applicant had established a *prima facie* case with a probability of success: the case involves land which if lost through a sale, cannot be adequately recompensed in damages. If the sale of the said property took place, counsel urged, the plaintiff would suffer irreparable loss.

Learned counsel urged that even were this Court to determine that the applicant has not made a *prima facie* case, it should be taken that the balance of convenience falls on the side of the applicant, a registered owner who is in possession.

Counsel submitted that a finding in favour of the applicant would occasion no prejudice to 1<sup>st</sup> defendant: for if, ultimately, the case was resolved in favour of 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant would be able to recover its dues, upon complying with the terms of the Rating Act.

Counsel noted that the same sale advertisement which is in issue herein, had sparked another case, *East African Storage Company Limited v. Municipal Council of Mombasa & Another*, Mombasa HCCC No. 266 of 2008 which came up before my learned sister, *Lady Justice Odero*; and it was held:

**“I have carefully considered the submissions of counsel and I have also perused and considered the relevant provisions of the Rating Act.....I am convinced that the applicant has indeed made out a prima facie case. I am further convinced that taking into account the nature of the business**

***undertaken by the applicants on the suit premises, they do stand to suffer irreparable harm if the orders sought are not granted. The balance of convenience tilts in favour of the applicants. I therefore allow [the] application.....”***

Counsel for the respondents submitted that the applicant had “failed to demonstrate that it has a ***prima facie*** case with a probability of success,” and also failed to show “what substantial loss it will suffer if orders of injunction are not granted, which loss cannot be compensated by way of damages”.

Counsel submitted that 1<sup>st</sup> defendant, by causing an advertisement of sale to be made by 2<sup>nd</sup> defendant, was “[exercising]...the mandate under the Rating Act”; but the said advertisement was later cancelled, and so there is no basis for the plaintiff’s application; so, by the application, the Court was being asked to issue an injunction against “that which is not bound to happen”. Counsel called in aid the Court of Appeal’s decision in ***Eric v. J. Makokha & Four others v. Lawrence Sagini & Two Others***, Civil Application No. Nai. 20 of 1994, in which the following passage appears:

***“In this case, even at the date of the filing of the plaint on 13<sup>th</sup> April, 1993 the action which the applicants sought to prevent by an injunction had already taken place. It took place on 6<sup>th</sup> April, 1993. When in, October 1993 the applicants repeated their application for [an] interim injunction to restrain the corporation from [compulsorily] retiring them and evicting them from their residences, the Court’s attention was drawn to how pointless the granting of a temporary injunction would be at that date.”***

Similarly, learned counsel submitted that, “granting the applicant the temporary injunction sought would be pointless”.

Whereas, in the ***Eric Makokha*** case the act sought to be restrained was held to have already taken place, it is not, in my opinion, evident that what the plaintiff wants restrained in this case ***has*** taken place: it emerges from the submissions on both sides that 1<sup>st</sup> defendant’s instruction to 2<sup>nd</sup> defendant to cancel the sale advertisement was purely a ***magnanimous gesture*** by 1<sup>st</sup> defendant. What was the finality of such a gesture? Did the law prohibit 1<sup>st</sup> defendant from going back on the promise? In any case, was there a negotiated, contractual promise by 1<sup>st</sup> defendant? I do not think so; it appears to have been a gratuitous promise on which 1<sup>st</sup> defendant was free to renege any time. But more important, counsel for the applicant did urge, quite meritoriously, in my opinion, that the said gesture by 1<sup>st</sup> defendant could be attributed to a realization that 1<sup>st</sup> defendant did not comply with the terms of ***s.17 of the Rating Act***; just as 2<sup>nd</sup> defendant, too, failed to comply with the terms of ***clause 15 of the Auctioneers Rules, 1997***. On that basis I will draw the conclusion that the cancellation of the proposed sale of the suit premises was ***not secured by any law***, so that the applicant could place reliance upon it.

The applicant was, therefore, well entitled to move this Court seeking injunctive orders; the only question left is whether a case has been made for the grant of a temporary injunction.

There is clear evidence that the properties in question are registered in the name of the applicant, and it is not denied that the applicant is ***in possession***. That fact alone gives a ***status quo*** that the law must protect: the element of ***ownership*** is linked to fundamentals of constitutional rights which it is a core business of this Court to safeguard; and the element of ***possession*** is linked to public order, which is part of the broad framework of legality and of the functioning of the judicial process.

This perception of the ***prima facie*** case is supported by the Court’s assessment (***Odero, J***) in the ***East African Storage Company*** case (***op. cit.***). Not only does the instant case stand in common with the earlier one, arising from the same notice of sale by 2<sup>nd</sup> defendant, but the two should in principle be decided in similar fashion, as a ***consistent line of precedents*** in the High Court will be evidence of judicial consensus on the beacons for fair decision-making.

It is clear to me that the applicant has shown a ***prima facie*** case with a probability of success; and that the applicant would suffer irreparable loss not compensable in damages, if injunctive relief is not granted, and the defendants proceed to sell the suit properties.

I will make orders as follows:

***(1) a temporary injunction is hereby granted, to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves, their servants, agents or employees from selling by public auction or by private treaty, or from transferring, leasing, charging, mortgaging or in any other manner disposing of or dealing with either of the two parcels of land, L.R. No. Mombasa/Block XLVIII/171 and L.R. No. Mombasa/Block XLVIII/172, until the hearing and final determination of the suit or until further orders of this Court;***

**(2) costs in this application shall be borne by the respondents in any event.**

**DATED and DELIVERED at MOMBASA this 5<sup>th</sup> day of November, 2010.**

**J. B. OJWANG**  
**JUDGE**