



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE NO. 863 OF 2009

EDOM INVESTMENTS

LTD.....PLAINTIFF

VERSUS

**BANK OF BARODA (K) LTD.....1ST
DEFENDANT**

**INTIME TRAVEL & TOURS LTD.....2ND
DEFENDANT**

**THE COMMISSIONER OF LANDS.....3RD
DEFENDANT**

RULING

The salient facts of this matter are not in dispute. They are that the Plaintiff was the registered owner of the suit property known as LR No. 21697 (IR No 70188) measuring 5 acres off Waiyaki Way, next to Vet Labs Golf club, Nairobi. In 2002, the 2nd Defendant borrowed from the 1st Defendant Kshs 6,000,000/-. The Plaintiff guaranteed the payment of the loan and gave the suit premises as security. A charge was then registered against the property. The 2nd Defendant defaulted in payment of the loan and the 1st Defendant exercised its statutory power of sale in the year 2009.

Following that sale, the Plaintiff filed a plaint on 25th November, 2009. Filed simultaneously with the plaint was an application by Chamber Summons dated 25th November, 2009 and taken out under **Section 63 of the Civil Procedure Act**, the inherent jurisdiction of the court, **Order XXXIX Rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules**, and all enabling provisions of the law. By that application, the plaintiff prays for orders that –

1) Due to the urgency of this matter, the court be pleased to certify this application as urgent and to hear it ex parte in the first instance.

2) A temporary injunction be issued to restrain the 1st Defendant, its servant and or agents from selling by public auction or otherwise the Plaintiff's parcel of land known as LR. No. 21697 (IR No. 70188) situated in Nairobi within Nairobi area measuring 5 acres or in any other way attempting to dispose of, alienate or otherwise deal with the said parcel of land in exercise of its statutory power of sale pending the inter partes hearing of this application.

3) A temporary injunction be issued to restrain the transfer of the property known as LR No 21697 (IR No. 70188) until this application is heard inter partes.

4) A temporary injunction be issued to restrain the 1st Defendant, its servants and or agents from exercising its statutory power of sale or otherwise disposing by public auction or otherwise of the Plaintiff's parcel of land known as LR No 21679 (IR No. 70188) situated in Nairobi within Nairobi area until this case is heard and determined.

5) A temporary injunction be issued against the 3rd Defendant to restrain it from transferring the Plaintiff's property known as LR. No. 21697 (IR No 70188) until this case is heard and determined.

6) The costs of this application be provided for.

The application is supported by the annexed affidavit of **GIDEON MUGO MAKANGA**, Director of the Plaintiff Company, sworn on 25th November, 2009, and is based on the following grounds –

a) The 1st Defendant claims it has sold the Plaintiff's property known as LR No. 21697 (IR 70188) situated off Waiyaki way measuring 5 acres. If the sale has taken place then, that is illegal as the Plaintiff hasn't been given any notice of the sale and the sale took place secretly.

b) The sale is flawed, illegal, null and void as the right to exercise the statutory power of sale has not accrued.

c) The 1st Defendant did not serve the Plaintiff with the notice prescribed by section 69A (1) of the Transfer of Property Act and no attempt has been made to do so.

d) The 1st Defendant has not disclosed information on when the sale took place and who bought the property. The much it says is that it sold the property in April or May 2009. The property has, however, not been transferred to anybody and is still registered in the Plaintiff's name.

e) The Plaintiff would suffer irreparable loss which cannot be compensated by way of damages if the said parcel of land is sold.

Opposing the application, the 1st Defendant's Advances Manager, **DUNCAN LEMISO**, filed a replying affidavit sworn on 23rd December, 2009. In that affidavit, he confirmed that the suit property was sold by a public auction after due compliance with all the requisite pre-sale procedures. The property was knocked down at a bid of Kshs 12,020,000.00 where upon the chargor's equity of redemption was extinguished. The deponent avers that if the Plaintiff is aggrieved by the sale of the suit property, its

remedy lies in damages as the property has already been sold to a third party; that it has not made out a prima facie case with a probability of success, nor shown what irreparable loss it would suffer if the injunction sought is not issued; and that the balance of convenience tilts in favour of the 1st Defendant who was entitled to exercise its statutory power of sale.

To that replying affidavit, **EVANS NDAMBIRI MAKANGA**, a Director of the Plaintiff Company, filed a supplementary affidavit sworn on 12th February, 2010, in which he deposes that the 1st Defendant sent a statutory notice to one **EVANS NDAMBIRI KAMANGA** whereas his true name is **EVANS NDAMBIRI MAKANGA** and therefore he was not served with the statutory notice, nor did any such notice reach the Plaintiff. He also contended that the property was sold at an under value, and advertised in a paper which is hardly read by any one, and that the sale was conducted secretly, all of which incidence were fraudulent.

With leave of the court, the parties filed written submissions which they each adopted and relied on. After considering the pleadings and those submissions, I find that the main issues calling for determination relate to the sale of the suit property. These are whether the Plaintiff was served with the statutory notice as provided by **Section 69 (1) (A)** of the **Transfer of Property Act**; whether the power of sale was exercised prematurely; whether the sale was conducted secretly; and whether the property was sold fraudulently at undervalue.

Regarding the statutory notice, the 1st Defendant exhibited a copy of a letter entitled Statutory Notice. The Plaintiffs state that they did not receive that letter. But the Defendants have annexed to their Replying Affidavit a list of registered postal packets. Registration parcel No. 0047020 was addressed to Edom Investment Ltd of P O Box 73673, Nairobi. This was the same address as that given in the charge document dated 3rd November, 2002, in respect of the suit property. It would be very strange, to say the least, if the Plaintiff did not receive that letter.

As if to give credence to the allegation that the Plaintiff did not receive the letter, **EVANS NDAMBIRI MAKANGA** states in his supplementary affidavit as follows –

***“3. That at page 38 of the exhibit, it is indicated that the 1st Defendant sent a statutory notice to one Evans Ndambiri Kamanga. I wish to clarify that is not my name. My name is Evans Ndambiri Makanga, not Evans Ndambiri Kamanga (see attached copy of my identity card Marked “K”) I therefore did not receive the said notice thought it was reportedly sent by registered post. It can therefore not be said I was served with a statutory notice.*”**

4. That I was the Plaintiff Executive Director (sic) in 2003 and the statutory notice allegedly sent to the plaintiff did not reach the Plaintiff, otherwise I would have taken appropriate action to stop the intended sale.”

Mr Makanga’s excuse for not having received his statutory notice was that his name was written as “**Kamanga**” instead of “**Makanga**”. However he does not allege that the Company’s name was also misspelt. If he did not receive his letter because his name was allegedly misspelt, how come that the Company did not also receive its letter, yet its name was not misspelt? Secondly, the list of the names on page 38 of the replying affidavit to which the registered parcels were sent along with that of the Plaintiff Company does not disclose the nature of the document which was enclosed. Only the 1st Defendant says that the letter posted to the Plaintiff was the statutory notice. But they do not say that the letter addressed to Makanga was also a statutory notice. How then, did Mr Makanga know that the said letter, which he did not receive, was the statutory notice? On a balance of probability, I find that both Mr Makanga and the Company received their letters, and that the letter to the Plaintiff was the statutory notice. In the unlikely event that Mr. Makanga did not receive his letter, the Company certainly received the letter. I accordingly, hold that the 1st Defendant duly complied with the requirements of **Section 69 (1) (A)** of the **Transfer of Property Act**, and therefore the power of sale was not exercised prematurely.

The second main issue is whether the sale was conducted secretly. This issue is closely interwoven with the conduct of the auction sale. In the first instance, the advertisement for the sale was carried in “*The Times*” Newspaper which, according to Mr Makanga, “**is hardly read by anyone.**” While I don’t share Mr. Makanga’s sentiments that it is hardly read by anyone, I think that this court can take judicial notice of the fact that the said newspaper does not have as wide a circulation as some other Dailies in the Country. By advertising the auction in the Times, a big number of would-be bidders was clearly eliminated from participation. Secondly, the print carrying the first advertisement at page 25 of the issue of Kenya Times of Thursday, April 30 2009, is in such tiny print that not only was it unattractive, but it was also blurred and almost illegible. This court had literally to use a magnifying class to decipher the contents especially of the conditions of sale. And this was done among some other three auction advertisements on the same page which were very clear. Why wasn’t the one by Keysian Auctioneers as clear as those by Fantasy Auctioneers, Lolwe Auctioneers and Kinyua & co Auctioneers which feature on the same page?

Although the second advertisement at page 25 of the Kenya Times issue of Thursday May 14, 2009, is clearer than that of April 30th, the print is comparatively smaller and unclear when compared with the other advertisements surrounding it. One wonders whether this was accidental or whether it was done deliberately to dissuade or deter would-be bidders from reading Keysian Auctioneers advertisements. The final aspect of the sale of the suit property relates to the Auction itself. Only two bidders attended the sale on 15th May, 2009 and placed their bids. The property was then knocked down to the higher bidder at Kshs 12,020,000.00. The Defendant contends that this was fraudulent.

There is evidence on record about different valuations of the suit property. It is common ground that it is about 5 acres. In 1998, its open market value was assessed at Kshs 14,820,000/- by Mohamed A. Samji, a Consultant Surveyor & Valuer. In the same valuation report, Mr Samji further assessed the “*distressed*” or “*forced*” sale value at Kshs 12,300,000/-. Surprisingly, when the plot was finally sold at the auction on 15th May, 2009, it did not fetch even what would have been the stressed or forced value more than 10 years before.

On 13th October, 2008, the same plot was valued by Njihia Njoroge & Company, Valuers, Surveyors, Estate and Managing Agents. They valued the property at Kshs 13,000,000/- and, in their opinion, if this property were offered for sale by public auction, the forced sale value could be stated as Kshs 10,000,000/-. Is it possible that a plot in Nairobi, which had a forced value of more than Kshs 12,000,000/- in 1998, would have depreciated so much that its forced sale value would be Kshs 10, 000, 000/- ten years later? On my part I would not find that to be credible. In the ordinary course of things, it is in the nature of real property to appreciate and for a five acre property in Nairobi to be sold at Kshs 12 million in 2009 leaves a lot to be desired.

After the property had been sold in May, 2009, it was valued again by Kenstate Valuers in November, 2009 by at Kshs 75,000,000/-. Against that background, the price at which the property was sold was very low. Coupled with the fact that the auction sale was advertised in a paper which does not command as large a circulation as some other papers, and for that matter in such a small print as to discourage the reading thereof, and seeing that the auction was attended by only two bidders and the property sold at a price which was well below its distressed or forced sale in 1998, I find that the sale was, *prima facie*, at fraudulent undervalue. In **MBUTHIA v JIMBA FINANCE CORPORATION & ANOR** [1986-1989] EA, 340, Apoloo J.A., at page 353 quoted a passage from “*Fisher and Lightwood on Mortgages*” where it was said –

“A sale made at fraudulent undervalue will be set aside. But the court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be itself evidence of fraud.”

I find this quotation to be applicable to this case, as the sale price was so low as to be anything but bona fide, and the Plaintiffs have established a *prima facie* sale at fraudulent undervalue. In the circumstances, they are entitled to some of the orders sought.

I accordingly grant them a temporary injunction in terms of prayer 5 of the application by chamber summons dated 25.11.2009 as prayed, pending the hearing and determination of this case.

Costs will be in the cause.

The Plaintiffs to file and serve an undertaking as to damages within 5 days from the date hereof.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of December 2010

L. NJAGI

JUDGE