



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS**

**Civil Suit 251 of 2007**

**BANELAND ENTERPRISES..... PLAINTIFF**

**VERSUS**

**NIC BANK LIMITED..... 1<sup>ST</sup> DEFENDANT**

**SIGMA FEEDS LIMITED.....2<sup>ND</sup>**

**DEFENDANT**

**RULING**

This is an application by the plaintiff made under the provisions of **Sections 80 and 63(e)** of the **Civil Procedure Act** and **Order XLIV Rules 1, 2 and 3(2)** of the **Civil Procedure Rules** essentially seeking to review, vary or set aside the ruling of Okwengu J delivered on 3<sup>rd</sup> July 2008. The grounds in support of the motion are stated on the face of the application. The plaintiff argues that it has discovered new and important evidence which was not within its knowledge at the time the application was argued before the said court and therefore could not be presented to the court at the material time. It was the plaintiff's case that a director of the 2<sup>nd</sup> defendant, Kirtesh Shah, in an affidavit sworn in response to the initial application for injunction made by the plaintiff, had deliberately and falsely misrepresented and thereby misled the court that it had actually paid in full the purchase consideration for the suit property. The plaintiff states that, upon investigation after the delivery of the ruling by the said court, it had discovered that, apart from 25% deposit of the purchase consideration paid on 12<sup>th</sup> April 2007, the 2<sup>nd</sup> defendant had not paid the remaining balance of the purchase consideration.

The plaintiff states that the 2<sup>nd</sup> defendant issued a cheque for the remaining balance of KShs.5,775,000/= on 8<sup>th</sup> July 2008, which cheque was unpaid upon presentation to the bank. The plaintiff reiterated that the 2<sup>nd</sup> defendant was, in the circumstances, not an innocent purchaser for value without notice. The plaintiff was of the view that because of the said misrepresentation made by the 2<sup>nd</sup> defendant, the court reached an erroneous determination that the 2<sup>nd</sup> defendant had fully paid purchase consideration which was obviously not the case. The plaintiff argues that since the sale was impeached by the fact that it was irregularly conducted (*i.e. the 2<sup>nd</sup> defendant failed to pay the entire purchase consideration within the stipulated period*), then the plaintiff's equity of redemption had in the premises, not been extinguished.

The plaintiff states that since it had established that the 1<sup>st</sup> defendant exercised its statutory power of sale in bad faith, the order of the court dismissing the plaintiff's application for injunction which sought to restrain the defendants from adversely dealing with the suit property i.e. L.R. No. Ngong/Ngong/19956 should be reviewed, and appropriate order be issued allowing the plaintiff's application to restrain the defendants from dealing with the said suit property pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Kioi John Gitau, a director of the plaintiff

company.

The application is opposed. The 2<sup>nd</sup> defendant's director Kirtesh Shah swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the facts put forward in support of the application for review were not maintainable in law since the 2<sup>nd</sup> defendant, contrary to the assertion made by the plaintiff, had fully paid the purchase consideration in respect of the suit property. He deponed that the 2<sup>nd</sup> defendant had paid the 25% deposit of the purchase consideration at the fall of the hammer in the public auction, and thereafter was declared the purchaser of the suit property. He deponed that the plaintiff had filed the application to review the ruling of Okwengu J in abuse of the due process of the court in that the plaintiff had already exercised its option to appeal against the said decision to the Court of Appeal by filing a notice of appeal. He swore that, in the circumstances, the plaintiff could not make an application to review the said ruling of the court. He deponed that the 2<sup>nd</sup> defendant was already registered as the owner of the suit property and therefore the plaintiff's equity of redemption had been extinguished. He reiterated that the 2<sup>nd</sup> defendant was an innocent purchaser for value without notice of any irregularity during the sale and therefore its title could not be impeached. He reiterated that there was no discovery of any new and important matter of evidence which could persuade this court to review its decision.

The 1<sup>st</sup> defendant opposed the application. It filed grounds in opposition to the application. The 1<sup>st</sup> defendant stated that the court lacked jurisdiction to entertain an application for review where there was a pending appeal challenging the decree or order sought to be reviewed. The 1<sup>st</sup> defendant stated that there was no new or important matter which the plaintiff's directors had discovered which was not within their knowledge as at the time the court issued the initial interim orders to the time the application for injunction was dismissed. The 1<sup>st</sup> defendant reiterated that under the provisions of the **Registered Land Act**, upon the fall of the hammer during a public auction, when a chargee is exercising its statutory power of sale, the plaintiff's equity of redemption in respect of the suit property was extinguished. The 1<sup>st</sup> defendant stated that, upon the 2<sup>nd</sup> defendant paying the required 25% deposit of the purchase consideration, a legally binding agreement was entered between the auctioneer and the 2<sup>nd</sup> defendant. It was the 1<sup>st</sup> defendant's case that since the 2<sup>nd</sup> defendant has already been issued with the title in respect of the suit property, the ownership of the same can only be challenged in the manner provided under provided under the **Registered Land Act**. The 1<sup>st</sup> defendant stated that the plaintiff's application was incompetent because it had been caught by laches.

At the hearing of the application, I heard the oral submissions made by Mrs. Chepkwony on behalf of the plaintiff, Miss Karanja for the 1<sup>st</sup> defendant and by Mr. Mandala for 2<sup>nd</sup> defendant. I have carefully considered the said rival arguments. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff has made an appropriate case for this court to review, vary or set aside the ruling of Okwengu J which was delivered on 3<sup>rd</sup> July 2008, dismissing the plaintiff's application for injunction. It is the plaintiff's case that the defendants, and particularly the 2<sup>nd</sup> defendant, deliberately and falsely misrepresented to the court that it had fully paid the purchase consideration for the suit property. It was the plaintiff's view that due to the said misrepresentation, the court was misled into reaching the finding that the suit property was legally sold by the 1<sup>st</sup> defendant in a public auction to the 2<sup>nd</sup> defendant in exercise of its statutory power of sale. It was the plaintiff's case that the correct state of affairs as it existed at the time was that the 2<sup>nd</sup> defendant did not pay the balance of the purchase consideration at the time that it led the court to believe that it had done. It was on the basis of these allegations, which the plaintiff claimed it discovered after the court had rendered its ruling, that the plaintiff now seeks to review, vary or set aside the order of the court dismissing its application for injunction. The defendants are, as expected, of a contrary view. They are of the opinion that the learned judge considered all relevant facts of the case and correctly reached the determination that the plaintiff's application for injunction ought to be dismissed with costs as it was without merit.

Before this court addresses the issues of merit raised by the parties herein, it is imperative that it

renders its decision to a procedural aspect of the application raised by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant argued that the application for review by the plaintiff was incompetent in that it was filed after the said plaintiff had filed a notice of appeal signifying its intention to appeal against the said ruling that it now seeks to have reviewed. It is trite that the filing of a notice of appeal by a party who is aggrieved by a decision this court does not imply that such a party has lodged an appeal to the Court of Appeal. In civil cases, when a party files a notice of appeal under **Rule 74(1)** of the **Court of Appeal Rules**, it does not mean that such a party has lodged an appeal to the Court of Appeal. A notice of appeal only signifies that such a party has intention to appeal against the said decision rendered by this court. An appeal to the Court of Appeal is deemed to have been lodged when a party lodges in an appropriate registry, the record of appeal as provided under **Rule 81(1)** of the **Court of Appeal Rules**. In **African Airlines International Ltd – vs- Eastern and Southern Africa Trade and Development Bank [2003] 1EA1** at page 3, the Court of Appeal held that:

*“We would finally add that Mr. Kang’ethe contended that because the applicant preferred a review, it thereby lost its right of appeal. There is no merit in such a contention. The legal position is, we think, well settled. It was succinctly stated in Sarkar’s Law of Civil Procedure (8 Ed.) Vol. 2 at 1592 as follows (omitting the citation of the case law);*

***‘Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with’***”

For this court to favourably consider an application seeking to review a decision of this court on the grounds that the applicant had made discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of an applicant at the time the original application was argued under **Order XLIV Rule 1** of the **Civil Procedure Rules**, it must be satisfied that such new and important matter or evidence is of such a nature that it would lead any court of law applying its mind to the facts and the law applicable to the case can reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered. The applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant.

In the present application, this court has been called upon to decide whether if the fact that the 2<sup>nd</sup> defendant had not fully paid the purchase consideration had been disclosed to the court that heard the original application for injunction, it would have reached a different decision other than the one that it did. I have carefully perused the ruling that is sought to be impeached by the plaintiff. It was clear to this court that the said court reached the decision after it had discounted the plaintiff’s complaint that it had not been served with the requisite statutory notice and further discounting the plaintiff’s claim that the sale of the suit property in the public auction was tainted by fraud. The court further found that the 2<sup>nd</sup> defendant was a purchaser for value of the suit property without notice since it had purchased the same in a public auction.

It is clear from the foregoing, that the fact that the 2<sup>nd</sup> defendant paid the balance of the purchase consideration at a date other than the one which it stated in its earlier pleadings that it had paid the said balance, would not, in my considered view, have materially influenced the decision of the said court to reach a decision other than the one which it reached. When a chargee exercises its statutory power of sale under the instrument of charge in a sale by public auction, the charged property, in law, is deemed to have been sold at the fall of the hammer. There are plethora of decisions by both the Court of Appeal and the High Court which affirm the legal position that the equity of redemption of a chargor is extinguished upon it being established that the chargee sold the charged property at in a public auction after the fall of the hammer. (See **Patrick Kanyagia vs. Damaris Wangechi & Others CA Civil Appeal No. 150 of 1993 (Nairobi) (unreported)**).

In the present application, it was common ground that the suit property was sold in a public auction which was held on 12<sup>th</sup> April 2007. The 2<sup>nd</sup> defendant was declared the purchaser of the suit property after it paid the 25% deposit of the purchase consideration. In my considered view, the issue whether the 2<sup>nd</sup> defendant paid the 75% balance of the purchase consideration within the stipulated period that was advertised, is not an issue that can, in the circumstances of this case, result in the impeachment of the 1<sup>st</sup> defendant's exercise of its statutory power of sale. In the present case, the suit property ceased to be owned by the plaintiff at the fall of the hammer, when the 2<sup>nd</sup> defendant was declared the purchaser of the suit property upon paying the required deposit of 25% of the purchase consideration. Evidence was placed before this court that the suit property is already registered in the name of the 2<sup>nd</sup> defendant. I think the plaintiff should seriously consider the advice given to it by the court that dismissed the application for injunction that it should file a suit for damages if it feels sufficiently aggrieved by the conduct of the 1<sup>st</sup> defendant in the exercise of its statutory power of sale as chargee.

The upshot of the above reasons is that the plaintiff has failed to establish a case to enable this court favourably consider its application to review the decision of this court delivered on 3<sup>rd</sup> July 2008 in which the plaintiff's application for injunction was dismissed with costs. There is no new matter or evidence that is of sufficient importance that would warrant this court to reach a determination that the court that heard the earlier application would have reached a different decision had the new matter or evidence been placed before it. I find no merit with the plaintiff's application dated 14<sup>th</sup> August 2008 and proceed to dismiss it with costs.

**DATED at NAIROBI this 29<sup>TH</sup> day of APRIL, 2009.**

**L. KIMARU**

**JUDGE**