



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

**Civil Case 462 of 2009**

**PIUS LAWRENCE .....PLAINTIFF**

**VERSUS**

**METALLICA ENGINEERING INDUSTRIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**FIDELITY COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**MUGANDA WASULWA T/a KEYSIAN AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff/applicant instituted this suit against the defendants on the grounds that sometimes in May 2003 the 1<sup>st</sup> defendant sold to the plaintiff all those pieces of land known **LR NO. 209/2352/12 AND 209/2352/13** (herein after referred to as the suit premises) for a consideration of 17 million. After the sale agreement the plaintiff contends that he paid 3 million and on diverse dates paid another sum of Ksh.10,600.000/-. The plaintiff claims that the 1<sup>st</sup> defendant was supposed to redeem the suit premises from the 2<sup>nd</sup> defendant but instead, the 2<sup>nd</sup> defendant appointed a receiver manager who took over the premises from the plaintiff and purported to sell it to a 3<sup>rd</sup> party. The plaintiff claims there was fraud and collusion between the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant and sought for several orders.

Simultaneously with the filing of the plaint, the plaintiff filed a chamber summons dated 26<sup>th</sup> June 2009, which is before me for consideration. The plaintiff is seeking for several orders, but during the hearing of this application counsel for the applicant indicated that he was only pursuing prayer No.2 which seeks for the following orders.

***“The principal Registrar of Titles or whomsoever acting under him e and is hereby inhibited from registering, transferring, or in anyway dealing with the suit premises known as L.R. Number 209/2352/12 and 209/2352/13 pending the hearing of the matter inter parties ”***

This application is premised on the grounds stipulated on the body thereto, and the supporting affidavit sworn by the plaintiff on 29<sup>th</sup> June 2009. According to the plaintiff, he purchased the suit premises from the 1<sup>st</sup> defendant and paid a total of Ksh.13,600.000/= towards the purchase price which amount was utilized to settle the mortgage debt. The 2<sup>nd</sup> defendant instead of redeeming the title appointed a receiver manager who purported to sell the suit properties by public auction through the 3<sup>rd</sup> defendant.

The plaintiff contends that no sale by public auction was carried out but when he tried to register a caveat

restricting any dealings on the suit premises, the registrar of titles advised him to obtain a court order. He was also asked to vacate the suit premises which were purportedly sold to a third party. The plaintiff now contends that there was fraud when the suit properties were sold and the 2<sup>nd</sup> defendant did not properly exercise the statutory power of sale because a valid statutory notice was not issued. The property was not valued before the sale, and the auctioneer did not issue a notice or adhere to the auctioneers rules.

Counsel for the applicant in further argument submitted that the title over the suit premises is registered under the Registration of Titles Act and substantive law is the Indian Transfer of Property Act. According to the provisions of section 52 of the ITPA, when there is a suit over the suit premises, a Court can issue an inhibition order pending the determination of the suit. Despite the fact that the principal registrar is not a party to these proceedings, that does not bar this court from making the necessary orders because the plaintiff's suit raises serious issues of fraud and collusion against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which should be determined, and meanwhile, the property should not be transferred.

This application was opposed by the 2<sup>nd</sup> defendant, who relied on the replying affidavit by **Rana Sengupta** sworn on 9<sup>th</sup> July 2009. According to the 2<sup>nd</sup> defendant, banking facilities were extended to the 1<sup>st</sup> defendant and the suit properties were charged as security. The suit premises were charged by a charge dated 3<sup>rd</sup> September 2004 to secure the repayment of a sum of 36 million. The suit premises which were already charged to the 2<sup>nd</sup> defendant were not available for sale to the plaintiff.

The charge specifically provided that the 1<sup>st</sup> defendant could not sell or agree to sell the charged property or any part thereof, without the prior written consent by the 2<sup>nd</sup> defendant. No such consent was given, by the 2<sup>nd</sup> defendant, thus if there was any sale agreement between the plaintiff and the 1<sup>st</sup> defendant it was null and void. Moreover the plaintiff did not annex any evidence of payment of the purchase price into the 1<sup>st</sup> defendant's mortgage account. Even the copy of the alleged sale agreement purportedly entered into with the 1<sup>st</sup> defendant is not dated nor is it stamped under the Stamp Duty Act. It is an essential requirement under the stamp duty act for a document of sale of land to be relied upon in evidence to be stamped under the Act.

Moreover the plaintiff swore a verifying and supporting affidavit in **HCCC No.559 of 2008** between the **East African Limited vs. Ismail Mawji** and 2<sup>nd</sup> defendant herein, in that suit the plaintiff alleged that his company was a lessee of the suit premises from the 1<sup>st</sup> defendant since 2003 to date. It is interesting that the plaintiff has conveniently omitted to state in that he was a lessee in that suit, and brought a new allegation that he is actually a purchaser of the property.

The plaintiff also claims to have entered into the sale agreement while knowing the property was charged and monies were advanced to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant denies any knowledge of any sale transaction between the plaintiff and the 1<sup>st</sup> defendant over the charged property. The 2<sup>nd</sup> defendant is only aware of the sale carried out in exercise of the statutory power of the sale, after the 1<sup>st</sup> defendant defaulted in the repayment of the loan. The 2<sup>nd</sup> defendant followed all the requirements provided for by the law which includes a statutory notice and auctioneers notification of sale.

Counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff has not established a prima facie case with a probability of success. The 1<sup>st</sup> defendant equity of redemption of the charged property was extinguished upon the successful sale. The property was placed under a receiver manager, the 1<sup>st</sup> defendant lacked capacity to purport to sell the suit premises. The order sought by the plaintiff is against the Registrar of Titles who is not a party to these proceedings. More fundamentally the 3<sup>rd</sup> party who purchased the property and who is going to be affected by an order of inhibition is also not a party to these proceedings. Counsel urged the court to dismiss this case in line with a court of appeal decision in the case of **Habib Zurich Finance (K) Ltd. v Muthoga & Another East African Law Reports [2002] I EA 71 (HCK)**. In that case the court of appeal held as follows:-

***“We agree with the Learned Judge that the 1985 amendment which changed the law in such a way***

***that the equity of redemption is lost on the fall of the hammer at the auction sale could not be applied to the transactions which took place from the middle of December 1983 to the middle of April 1984.”***

Having set out the summary of the rival submissions and also the gist of the application, the issue for determination is whether the plaintiff is entitled to an order of inhibition against the principal registrar of titles inhibiting any transfer or dealings with the suit premises until the final determination of this suit. The plaintiff is relying on an alleged sale agreement between him and the 1<sup>st</sup> defendant who was the registered proprietor of the suit premises.

Apart from the fact that the copy of the sale agreement is not dated or stamped, for this court to rely on it as evidence of sale, the 2<sup>nd</sup> defendant has annexed a copy of the charge which was registered over the suit premises on 15<sup>th</sup> September 2004, going by the provisions in that charge, the 1<sup>st</sup> defendant could not sell the suit premises to the plaintiff without first obtaining the consent by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant denies having given any consent to the 1<sup>st</sup> defendant to sell the suit premises. The plaintiff merely alleges to have paid money to the 2<sup>nd</sup> defendant but he has not annexed any payment receipts of the monies he purports to have paid to redeem the loan with the 2<sup>nd</sup> defendant.

The plaintiff also failed to make material disclosure that he filed another suit **in HCCC No.559 of 2008** where he swore the verifying and supporting affidavit claiming to be a lessee. He has not disclosed the connection between his claim in that suit and the new claim that he purchased the suit property. Taking the totality of the matter, I am not persuaded that the application by the plaintiff has merit or discloses a prima facie case. The plaintiff has not satisfied the threshold of granting an interlocutory order of this nature. He has not joined necessary parties especially the 3<sup>rd</sup> party who purchased the suit premises in an auction and who is likely to be affected by this order. The plaintiff has also not established a prima facie case with a probability of success in that he purported to enter into a sale agreement with the 1<sup>st</sup> defendant while knowing there was a charge in existence. He has not furnished this court with any evidence of payment of the loan owing to the 2<sup>nd</sup> defendant as alleged in his affidavit.

The application lacks merits and is hereby dismissed with costs to the 2<sup>nd</sup> defendant.

**RULING READ AND SINGED AT NAIROBI ON 31<sup>ST</sup> DAY OF JULY 2009.**

**M.K. KOOME**

**JUDGE**