



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 262 of 2008**

**MOHAMUD MOHAMED EMAN.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**DICKSON MATEI T/A**

**MARCHET AUCTIONEERS (K) LTD....2<sup>ND</sup> DEFENDANT**

**STEVEN TARUS.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application is brought under **Order 39 Rule 1 and 2**. The orders sought are:-

1. Pending the hearing and determination of this application and this suit the defendants and each of them either themselves or through their advocates, servants or agents be restrained by way of temporary injunction from alienating interfering with plaintiff's parcel of land known as Kajiado/Dalaletuktuk/576.
2. That all further registrations or change of registration of the ownership, leasing subleasing allotment user, occupation or possession or in any kind of right title and interest in Kajiado/Dalaletuktuk/576 be prohibited until further orders of this court.
3. Costs.

The grounds upon which the application is based are numbered (a) to (j) are stated in the application. The application is also supported by three affidavits one sworn on 16/5/2008 by Mohamud Mohamed Iman and the second is sworn on 16/12/2008 and the third on 3/2/2009.

The plaintiff/applicant states that no demand for payment under Section 65 of the Registered Land Act has ever been made and served on the plaintiff/applicant. No statutory notice pursuant to Section 74 of Registered Land Act has ever been served on the plaintiff. The transaction the subject matter of the suit is tainted with fraud, illegality, misrepresentation and breach of statutory provisions as particularized in the plaint and that 1<sup>st</sup> and 2<sup>nd</sup> defendants did not obtain a current valuation of the suit property as required by law prior to purported auction. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants purported to auction the suit property to the sum of 9 million where as the same is currently valued at Kshs.22,500,000/=. The plaintiff has offered to pay the 1<sup>st</sup> defendant the entire amount on his loan account and the 1<sup>st</sup> defendant has refused and persists in refusing the said payment thus clogging and fettering the plaintiff's right of redemption. That the plaintiff has all along informed the 1<sup>st</sup> defendant that he holds the title to the property in trust for

himself and the other members of his family and thus the need to redeem the property to avoid the other members of the family suffering. The 1<sup>st</sup> defendant had represented to the plaintiff that if he would obtain the entire outstanding amount then he would redeem his property and now the 1<sup>st</sup> defendant has declined to receive the entire amount.

Finally, the plaintiff and his members of his family for whom he holds in trust stand to suffer irreparable loss and damage if the orders sought herein are not granted.

The supporting affidavit of the plaintiff shows that the 1<sup>st</sup> defendant agreed to give him financial accommodation way back in 1998 in the sum of Kshs.7 million. The security of which was a charge entered into between the plaintiff and the 1<sup>st</sup> defendant as security.

It was a term of the charge that the plaintiff would pay a sum not exceeding 7 million on the date the plaintiff shall receive a written demand. The plaintiff states that he never received such a demand from the 1<sup>st</sup> defendant. Such demand as required under Section 65 of Registered Land Act. Further the plaintiff swears that he came to know that his property had been sold to the 3<sup>rd</sup> defendant. A Mr. Umda who is an employee of the 1<sup>st</sup> defendant informed the plaintiff that if he could get Kshs.9 million he could redeem the property and he promised to talk to the buyer that if the money was paid (Kshs.9 million) together with costs the property would be returned to him, the plaintiff. The plaintiff protested that his property worth Kshs.22 million would be sold for Kshs.9 million. He has come to know that his property was sold for only Kshs.9 million.

In reply the 1<sup>st</sup> defendant has caused an affidavit to be sworn by Jacob Umda who is described as a Relationship Manager in the Credit Support Unit. He swears that in consideration of the 1<sup>st</sup> defendant advancing to Air-Faraj Ltd. such a loan or facility has been requested by the borrower from time to time. The plaintiff/applicant executed and granted to the 1<sup>st</sup> defendant a legal charge dated 29/1/1998 the applicant's property Kajiado/Dalaletuktuk/576. The applicant agreed to pay the 1<sup>st</sup> defendant such sum of money not exceeding Kshs.7 million together with all the accruing and due and owing to the 1<sup>st</sup> defendant. Subsequently the borrower defaulted and the account rose to Kshs.12, 799,581/= .

The 1<sup>st</sup> defendant served the applicant with a statutory notice through a letter dated 21/5/2003. That letter is exhibited and the notice states that:-

*“unless we receive in our chambers the aforestated amount further interest will accrue together with our debt collection fee within three months from the date of service of this notice. Our instructions are at the end of that period to authorize auctioneers to sell your above property”.*

That letter is copied to the 1<sup>st</sup> defendant and by registered post to Air –Faraj Ltd. and to the District Commissioner of Kajiado District. The plaintiff states that the letter were not sent to the correct address.

After dispatching statutory notice the 1<sup>st</sup> defendant instructed a firm of auctioneers to sell the suit property by public auction and the said auctioneers served the requisite 45 days notice together with the notification of sale upon the applicant. The reserve price was Kshs.8 million. However the sale did not take place on 18/12/2007 because the bids offers received were below the reserved price. Public auction was rescheduled to take place on 8/4/2008 and it was advertised in the Daily Nation of 26/3/2008. On 8/4/2008 the auction was successful and the property was sold to the 3<sup>rd</sup> defendant to the sum of Kshs.9 million. 25% mandatory deposit was paid. The procedure after sale by auction were followed. It is sworn that the plaintiff/applicant lost his equity of redemption on 8/4/2008 and the present application is misconceived and bad in law. The plaintiff has not made full disclosure and it is clear he is guilty of inordinate delay.

A supporting affidavit sworn by Jacob Umda on 26/1/2009 confirms that there was default and the statutory notice was served by first defendant on the plaintiff and although the plaintiff has admitted the debt he has been unable to pay and that a valuation was served out on 4/6/1999 putting value at

Kshs.8,250,000/= forced sale and reserve price of Kshs.7,800,000/=.

Then there is another valuation dated 4/10/2007 by the same valuer which recommended reserve price of Kshs.8 million. Page 6 of that report is omitted. There is no order of recommended price. The evidence of valuation is not clear. There is omitted page 6 and the date conserved on by the documents is of 1999. The recent valuation 14/5/2008 shows that the value is Kshs.22,500,000/=. On the other hand, it does appear that the terms of the charge were never read to the plaintiff. His supporting affidavit indicates that he does not understand that he was only a guarantor and there was a borrower AIR AL FARAJ LTD. He appears to think that he is principle debtor and he was waiting to receive document for Kshs.7 million so that he can pay. The document of charge is not clear and the court does not see the signature of the applicant.

It is my view that this is a case which is to be heard timely so that evidence may be disclosed and the court can do justice to all parties.

Upon considering the material before the court, it is clear parties have not disclosed all facts of this case as to statutory notice and whether the plaintiff was explained the effect of transaction before he was requested to sign. I find his case might succeed and damages are not adequate remedy. I therefore allow application and grant orders as prayed in terms of prayer 3, 4, and 5.

Costs to the plaintiff/applicant.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> October, 2009.

**JOYCE N. KHAMINWA**

**JUDGE**