



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

**Civil Case 558 of 2009**

**SAMUEL NDUMBA MUTHURI ..... 1<sup>ST</sup> PLAINTIFF**

**M'MWITHIMBU M'MUNYUA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT**

**CORPORATION ..... 1<sup>ST</sup>  
DEFENDANT**

**ZABERIO GITONGA ..... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

By a suit filed on 3<sup>rd</sup> August 2009, and amended on 19<sup>th</sup> August 2009 the plaintiffs sought for among others orders restraining the 1<sup>st</sup> defendant from transferring or dealing with L.R. Nyaki/thura/3916, 3917,3918 and 3919 to the 2<sup>nd</sup> defendant pending the hearing and determination of the suit. The plaintiffs filed an amended chamber summons dated 19<sup>th</sup> August 2009 seeking for interim orders of injunction until the suit is heard and determined.

The application is supported by affidavit of **Samuel Ndumba Muthuri** the 1<sup>st</sup> plaintiff. It is alleged that in 1998 he borrowed a sum of Ksh.100,000/- from the 1<sup>st</sup> defendant using title No.Nyaki/Thura/3916 – 3919 belonging to the 2<sup>nd</sup> plaintiff as security for the loan. The plaintiffs claims that he has paid a sum Ksh.162,000/- towards the loan but the 1<sup>st</sup> defendant continued charging illegal interests and penalties in the account thereby making it impossible for him to redeem the loan the plaintiff depose that he has fully paid the loan were it not for the illegal charges of interests and penalties. He claims that on 30<sup>th</sup> July 2009 he visited the offices of the 1<sup>st</sup> defendant with a view of discussing the status of the account and he was surprised to be informed that his property was sold to the 2<sup>nd</sup> defendant. He claims the sale was fraudulent. Moreover the 2<sup>nd</sup> plaintiff resides on the suit land with his family where he derives a livelihood. He therefore sought for injunctive relief pending the hearing.

Counsel for the plaintiff filed written submissions and urged the court to consider that the plaintiff has established a prima facie case with a probability of success because the plaintiff claims to have paid the money. The 1<sup>st</sup> defendant did not act in good faith when carrying out the sale over a property worth over

1 million shillings which was sold for only 350,000/-. Counsel made reference to the case of Housing Finance Company Ltd v Palm Homes Ltd & Others (2002) KLR and urged the court to follow the decision by Khamoni J. Who found that lack of diligence in insuring the sale of property in an auction for under value entitled the plaintiff to an order of injunction?

This application was opposed by the respondent. They relied on the replying affidavit by **Zaberio Gitonga** sworn on 29<sup>th</sup> August 2009 and 12<sup>th</sup> August 2009. The 1<sup>st</sup> respondent also swore an affidavit on 13<sup>th</sup> August 2009 and filed written submissions. According to the 1<sup>st</sup> respondent this suit ought to have been filed before the Chief Magistrates Court because the suit premises was sold for Ksh.350,000/- and the outstanding loan was Ksh.600,000/- which is within the jurisdiction of the Magistrates court, according to the provisions of section 6 of the Civil Procedure Act.

Moreover there is a suit being **CMCC 99 OF 1999** between the 1<sup>st</sup> defendant and the plaintiffs which was filed in Meru where the subject matter of this suit is situated. The plaintiff was faulted for approaching this court in bad faith and for failing to disclose material information especially while alleging he had repaid the loan. The 1<sup>st</sup> respondent annexed documents to show that the plaintiff persistently defaulted in loan repayment and the 1<sup>st</sup> defendant took the legal steps to recover the loan. Statutory notices were issued which the 1<sup>st</sup> plaintiff acknowledged and wrote to the 1<sup>st</sup> defendant making proposals of how he intended to pay the loan.

The plaintiffs went further to involve prominent government officials such as former Minister for Environmental and Natural Resources Hon. David Mwiraria who wrote to the 1<sup>st</sup> defendant on 13<sup>th</sup> August 2007 seeking for the plaintiff to be indulged. The plaintiffs also sought intervention from the office of the President and a letter was written by Permanent Secretary requesting the plaintiff to be given time to repay the loan. Despite the plaintiffs being given time, they did not settle the loan account and the property was sold in an auction in May 2008 to the 2<sup>nd</sup> defendant. The property was duly transferred to the 2<sup>nd</sup> defendant thus the plaintiffs lost their right of redemption.

The fact that the 1<sup>st</sup> defendant had filed **CMCC NO.99 OF 1999** that did not stop the 1<sup>st</sup> defendant from exercising his statutory power of sale as contained in the charge. The plaintiff having withheld that information especially the fact that he was aware of the steps the 1<sup>st</sup> defendant was taking to realize the security held, disentitles the plaintiffs to an equitable remedy.

Counsel for the 2<sup>nd</sup> defendant also opposed this application on the grounds that the 2<sup>nd</sup> defendant purchased the suit premises over one year ago, the property was subdivided and sold to other parties. The 2<sup>nd</sup> defendant purchased the property for value without notice. The court cannot therefore disentitle him from his legal entitlement. The plaintiffs slept on their rights, they lost the right of redemption, and thus the only remedy left available to the plaintiffs is in damages if any. The 3<sup>rd</sup> parties who purchased the suit premises from the 2<sup>nd</sup> defendant are not parties to this suit. Counsel urged the court to dismiss the application which has not met the threshold of the conditions set out for granting an order of injunction.

Having set out the summary and the rival submissions the issue for determination, is whether the plaintiffs are entitled to an order of interim order of injunction pending the determination of the suit. The principles upon which such orders can be granted are well settled in the often cited case of **Giela vs. cassman Brown & Co. Limited 1973 EA.**

Firstly the plaintiff has to establish a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise, and if in doubt the court will determine the matter on a balance of convenience. Applying those principles to the present case, the 1<sup>st</sup> plaintiff alleged that he repaid the loan. He also contends that he was overcharged interests and other penalties. Further he claims he was not aware that the property had been sold in an auction. The 1<sup>st</sup> plaintiff however did not annex any document to show he had over paid the loan. What is clear from the records is that the plaintiffs were both aware that the property they had used as security to secure the loan

was in danger of being sold because of non payment of the loan.

The plaintiffs wrote several letters as can be seen in the replying affidavit by **Grace Mudola Magunga** the company secretary of the 1<sup>st</sup> defendant. The plaintiffs wrote letters to the 1<sup>st</sup> defendants seeking for indulgence and to be allowed to settle the outstanding account by installments and even to sell a portion of the suit premises. Letters were also written by Government officials at the request of the plaintiff. The 1<sup>st</sup> defendant has annexed copies of the notices which were issued pursuant to the Provisions of Registered Land Act and the Auctioneers Rules. Moreover the suit premises were sold in May 2008 to 3<sup>rd</sup> parties who are not parties to this suit. The plaintiffs lost the opportunity to redeem the property.

For the foregoing reasons, I am not satisfied that the plaintiffs have established a prima facie case with a probability of success. In the case of *Mlao Ltd v First American Bank of Kenya Ltd. and 2 others 2003 KLR page 125* The Court of Appeal has defined what is a prima facie case and also cited with approval a text set out in *Halsbury Laws of England Volt 32 (4<sup>th</sup> Ed)*.

***“Para 725 When mortgagee may be restrained from exercising power of sale.***

***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage, the claim is excessive”***

In the circumstances the plaintiffs have not satisfied the applicable conditions to enable this court exercise its discretion for an equitable relief. The plaintiffs withheld material information regarding their inability to pay and their failure to meet their obligations after they were given an opportunity to do so. The property was sold more than a year ago to other parties who are not parties in this suit. The plaintiffs remedy if any lies in damages.

While noting there is another suit being Meru CMCC NO. 99 OF 1999 between the 1<sup>st</sup> defendant and the plaintiffs, it will be in the interest of justice for this suit to be consolidated with that suit and this file be sent to the Chief Magistrates Court in Meru for hearing and determination. The plaintiff’s application dated and amended on 19<sup>th</sup> August 2009 is hereby dismissed with costs.

RULING READ AND SIGNED ON 29<sup>TH</sup> OF OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**