



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Case 499 of 2009**

**LAVENDER  
OMBIMA**

**(SUING AS THE  
LEGAL  
REPRESENTATIVE  
OF THE**

**ESTATE OF NELSON  
MUCHILWA  
OMBIMA  
.....  
PLAINTIFF**

**VERSUS**

**MEIER  
INTERNATIONAL  
LIMITED**

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

**SAMSON MASABA  
MUNIKA T/S**

**MUNIKA &  
COMPANY  
ADVOCATES**

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

**DEVELOPMENT  
BANK OF KENYA  
LIMITED  
..... 3<sup>RD</sup>  
DEFENDANT**

**ROBERT  
KINYANJUI KAMAU**  
.....  
..... **4<sup>TH</sup>**  
**DEFENDANT**

**RULING**

The plaintiff suing as the legal representative of the estate of Nelson Muchlwa Ombima filed the chamber summons on 14<sup>th</sup> July 2009 seeking for injunctive orders against the 3<sup>rd</sup> and 4<sup>th</sup> defendants from selling transferring or disposing in any way LR NO. 330/79 pending the hearing and determination of this suit. This application is supported by the grounds stated on the body thereto and the matters deposed to in the supporting affidavit of the applicant.

Briefly stated, it is the applicant's case that she married the late Nelson Ombima in 1965. Her husband passed away on 24<sup>th</sup> December 1998, she obtained the limited grant of letters of administration ad litem in respect of her husband's estate and filed Nairobi HCCC No.258 of 2004 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. She also sought temporary orders of injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendants from evicting the tenants or alienating the suit premises. The 2<sup>nd</sup> defendant in his replying affidavit explained how the suit premises formerly part of LR NO. 330/670 was transferred in the name of the 1<sup>st</sup> defendant in whom the 2<sup>nd</sup> defendant was also a director. The suit premises was threatened to be sold due to nonpayment of City Council rates that is when the 2<sup>nd</sup> defendant advised the deceased to have the property transferred to the 1<sup>st</sup> defendant and a conveyance transferring the property to the 1<sup>st</sup> defendant was completed, the 1<sup>st</sup> defendant remained a trustee of the deceased. In the cause of dealings between the 2<sup>nd</sup> defendant and the applicant's late husband, there was a dispute over fees that are when the 2<sup>nd</sup> defendant proposed to purchase the property and charged it to the 3<sup>rd</sup> defendant to secure a debt of 6 million.

The plaintiff contend that there was no valuable consideration and the suit premises remained held in trust as the consent of the family was also not sought before the property was used to borrow money from the 3<sup>rd</sup> defendant. That is why an injunction was issued in **HCCC NO. 258 OF 2004**, that interim order of injunction was extended by consent and it was registered at the Lands Office. The sale by the 3<sup>rd</sup> defendant is challenged because even if the 1<sup>st</sup> and 2<sup>nd</sup> defendants were issued with a statutory notice, they were incapacitated by the orders of injunction to deal with the statutory notice and since the order was registered in the lands office, it constituted a notice to all the parties.

Further it was urged that the plaintiff who is the beneficial owner of the property was not notified. The property was also not sold according to the auctioneers rules that require there a reserve price and 25% be paid on the fall of the hammer. It was also alleged by the plaintiff that there is a tenant running a school on the suit premises who has offered to purchase the property for 45 million. This means the property was under sold for over 10 million. The applicant should be allowed to sell the property to pay the 4<sup>th</sup> defendant by refunding 34 million which is adequate to sort out the debt. Counsel urged the court to find that there was clear collusion in this matter. The financial institution took undue advantage of the applicant who relies on the rent of the suit premises for her whole upkeep.

Regarding the contention that the property belongs to a company counsel for the applicant argued that the company held the property in trust and the plaintiff has sued the 1<sup>st</sup> defendant for breach of trust. The plaintiff has also invoked the doctrine of equity to trace the property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. Counsel urged the court to find that the plaintiff has established a prima facie case with a probability of success and if the interim orders is not granted she will suffer irreparable loss while the 4<sup>th</sup> defendants loss is the rent accruing from the premises.

This application was opposed by both counsels for the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Both relied on the

replying affidavits sworn by their respective clients on 20<sup>th</sup> July 2009 and 6<sup>th</sup> August 2009. According to the defendants, the plaintiff has not established a prima facie case with a probability of success. The plaintiff has not demonstrated that she has determinable interest in the subject matter. The property the subject matter in this case was charged to 3<sup>rd</sup> defendant. There was default and notices were issued to the 2<sup>nd</sup> defendant who acknowledged receipt and made proposals for repayment which also did not materialize. The notification of sale was issued and the property was sold for Ksh.34, 500,000/- which was a reasonable offer in the circumstances. Further the suit premises belong to a company which is distinct from its share holders and directors as well as the estate of the late Nelson Muchlwa. The allegations that the property was sold at a gross under value was denied because the plaintiff did not even offer any evidence to support the allegations. After the property was sold the account of the 2<sup>nd</sup> defendant was credited and they withdrew the balance of Ksh.17,500,000/-. The plaintiff was also aware of the sale and no explanation has been offered why they did not seek an injunction before the sale the 4<sup>th</sup> defendant.

The 3<sup>rd</sup> defendants pursuant to the powers vested vide the mortgage, which was registered before the order of the court in HCCC NO. 258 OF 2004, was entitled to exercise its statutory power of sale after issuing the necessary notices which were duly complied with. On the part of the 4<sup>th</sup> defendant it was emphasized that the plaintiff was not a share holder or director of the 1<sup>st</sup> defendant therefore she lacks locus standi in law to present a case for the 1<sup>st</sup> defendant. Counsel made reference to the case of **Omondi & Another vs. The National Bank of Kenya Limited and two others (2001) KLR page 579**. Which emphasized that under the company law a company is a distinct personality from its share holders and directors even where the directors happen to be the sole share holders. The plaintiff therefore in that case was found to lack legal competence to institute a suit in their own capacity as directors of the company. Several other decisions were cited where the plaintiff filed a suit and the court held that they lack locus standi. Moreover the provisions of section 69 B 2 of the Transfer of the Property Act which stipulate as follows:-

***“Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground:-***

- (a) that no case had arisen to authorize the sale; or***
- (b) that the power was otherwise improperly or irregularly exercised,***
- (c) that the power was otherwise improperly or irregularly exercised***

***and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person dignified by an un authorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”***

The records show that there was an agreement for sale, there was a conveyance. The plaintiffs main complaint was that the property was sold at an under value which cannot be a ground for granting an injunction because it is not supported by an independent valuation. The 3<sup>rd</sup> defendant has averred in the replying affidavit that the property was sold at the best price at the auction. Moreover failure to sell the property at the reserve price cannot be a ground for injunction. It can only be remedied by damages. Lastly, it was argued that the defendants can always meet an award of damages if the plaintiffs succeeds in her claim that the property was sold at a throw away price. The 4<sup>th</sup> defendant was an innocent

purchaser for value who should not be restrained from using the property.

The above is the summary of the salient issues raised in the rival submissions and the pleadings. The principle issue for determination is whether the applicant has established a prima facie case with a probability of success. The Court of Appeal has explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the Court of Appeal held that:

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

The plaintiff's application was challenged on the grounds that she lacks locus standi to make a claim on behalf of the 1<sup>st</sup> defendant which is a company with its own distinct personality. The plaintiff claims to be a widow of the late Nelson Ombima who passed away in 1998. It is alleged that the 2<sup>nd</sup> defendant fraudulently charged the suit premises to the 3<sup>rd</sup> defendant when he indeed was holding the suit premises in trust of the late Nelson Ombima. That contention is not supported by any document to show that the transfer to the 1<sup>st</sup> defendant where the 2<sup>nd</sup> defendant is a director held the property in trust.

It is instructive that the order which was made in **Nairobi HCCC NO. 258 OF 2004** was against the 1<sup>st</sup> and 2<sup>nd</sup> defendants while the mortgage on the suit premises was registered in November 2002 in favor of the 3<sup>rd</sup> defendant. An instrument of conveyance that the late Wilson Ombima transferred the property to the 1<sup>st</sup> defendant, the consideration of 10,600,000/- is indicated as the purchase price. It is not stated in that instrument that the 1<sup>st</sup> or the 2<sup>nd</sup> defendant where to hold the property in trust of the plaintiff or her late husband. The plaintiff is obviously not a director of the 1<sup>st</sup> defendant. She can therefore rightly be said to be a stranger to the affairs of the 1<sup>st</sup> defendant.

The other allegation is that the property was sold at a throw away price. However, there is no material produced by the plaintiff to show the market value of the property. In any event that would entitle the plaintiff to a claim for damages if she was able to prove the allegation but not the cancellation of title. As the matter stand, the property was sold to the 4<sup>th</sup> defendant and transferred on 11<sup>th</sup> June 2009, he is the registered proprietor. It is my humble opinion that the plaintiff came to court too late, if indeed there was trust between her late husband and the 1<sup>st</sup> and 2<sup>nd</sup> defendants, it is not indicated in the documents and coming more than 12 years after original conveyance from her late husband to the 1<sup>st</sup> defendant is too late.

In the circumstances, the plaintiff has not established a prima facie case with a probability of success. Firstly, she lacks locus standi. The property was properly charged to the 3<sup>rd</sup> defendant by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants 2 years before a suit was filed against them. The 3<sup>rd</sup> defendant was not restrained by any order of the court from exercising their statutory power of sale. Proper notices were issued notifying the 1<sup>st</sup> and 2<sup>nd</sup> defendants of the default. Accordingly, I find no justifiable reasons why the 3<sup>rd</sup> and 4<sup>th</sup> defendants should be restrained from dealing with the property.

This application does not meet the threshold of granting interlocutory order of injunction as set out in the oft' cited case of **Giella vs. Cassman Brown Limited**. Taking all the matters in totality, I find the application lacks merit, it is hereby dismissed with costs to the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

RULING READ AND SINGED ON 13<sup>TH</sup> NOVEMBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**