



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

Civil Suit 181 of 2004

JANE WAMBUI MACHARIA.....PLAINTIFF

-VERSUS-

GIRO COMMERCIAL BANK LIMITED.....1ST DEFENDANT

ANTHONY MAINA MUHORO.....2ND DEFENDANT

STANLEY MUNUHE KAMAU.....3RD DEFENDANT

RULING

The plaintiff filed suit against the defendants seeking several orders of the court. She sought an order of the court to declare the sale of **Nairobi/Block 137/75 (Lavington)** and **Nairobi/Block 133/209 (Komarock)** (*hereinafter referred to as the suit properties*) by the 1st defendant to the 2nd and 3rd defendants respectively, was in violation of the 1st defendant's duty of care to the plaintiff. She further sought an order of the court to declare the said sale of the suit properties as null and void. She prayed for an order of permanent injunction to restrain the 2nd and 3rd defendants from dealing with the suit properties in a manner adverse to the proprietary interests of the plaintiff. Contemporaneous with filing suit, the plaintiff filed an application seeking orders of injunction under the provisions of **Order XXXIX Rules 1 & 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** to restrain the defendants by themselves or their agents from alienating, subdividing, charging or in any other way dealing with the suit properties pending the hearing and determination of the suit. She further sought an order of injunction to restrain the 2nd and 3rd defendants from evicting the plaintiff or her tenants from the suit properties.

The grounds in support of the application are on the face of the application. The plaintiff contends that the 1st defendant breached the mandatory requirement as to statutory notice to the plaintiff before it purported to sell the suit properties to the 2nd and 3rd defendants. She contends that the statutory notice served was invalid since the amount due in each loan was not stated. It was her contention that the failure by the 1st defendant to issue a valid statutory notice meant that the right for the 1st defendant to exercise its statutory power of sale had not accrued, and further, if any sale proceeded subsequent to the said invalid notice, then the same was rendered null and void. The plaintiff complained that the 1st defendant denied her an opportunity to redeem her properties when she offered, either to pay certain sums in part payment of the amount owed or alternatively to sell the suit properties by private treaty so that she could offset the debt. She took issue with the manner in which the auction was conducted. She contends that the auctioneer acted in breach of the law when he sold the suit properties to persons who were not the highest bidders. The application is supported by the annexed affidavit of Jane Wambui Macharia, the

plaintiff.

The application is opposed. The 1st defendant filed grounds in opposition to the application. Modali Sastry, the general manager of the 1st defendant swore a lengthy replying affidavit in opposition to the application. In essence, the 1st defendant contends that it issued the requisite statutory notices to the plaintiff after the plaintiff had defaulted in repaying the loan that was advanced to her. The 1st defendant further stated that it followed the procedure set down by the law when it advertised and later sold the suit properties pursuant to its statutory power of sale as contained in the instrument of charge. The 1st defendant further stated that the plaintiff made several proposals to pay the loan, which proposals, although considered by the 1st defendant, were not honoured by the plaintiff. The plaintiff stated that the sale of the suit properties to the 2nd and 3rd defendants was therefore above board and could not be impeached by the court. The 1st defendant denied that it had sold the suit properties in a price which was undervalued. On his part, the 3rd defendant, Stanley Munuhe Kamau swore a replying affidavit in opposition to the application. He deponed that he had legally purchased one of the suit properties in a public auction and later sold the same to a third party. The defendants urged the court to dismiss the plaintiff's application with costs.

At the hearing of the application, Miss Mwangi for the plaintiff reiterated the contents of the application and the affidavit sworn in support thereof. She submitted that the statutory notice issued to the plaintiff by the 1st defendant was not proper since the two properties were separately charged by the plaintiff to the 1st defendant. She maintained that since there were two separate charges in respect of the two properties, the 1st defendant was required to issue two statutory notices instead of one. She took issue with the 1st defendant's decision to consolidate the two loans unilaterally without consulting the plaintiff. In her view, the failure by the 1st defendant to issue a valid statutory notice meant that the 1st defendant's statutory power of sale had not accrued at the time the 1st defendant purportedly sold the said suit properties. She submitted that the 1st defendant denied the plaintiff her legal right to redeem the suit properties. It was contended that the plaintiff had made proposals to settle the loan, which proposals the 1st defendant had accepted, but contrary to the agreement, still went ahead and sold the suit properties. Miss Mwangi urged the court to consider this act by the 1st defendant as constituting a clog in the plaintiff's equity of redemption. She complained that the public auction was conducted in an irregular and illegal manner because the suit properties were not sold to the highest bidders. She maintained that according to the list of bidders who were present during the public auction, the suit properties were sold to persons who had offered lower bids thus resulting in the sale of the properties at a value that did not reflect the true value of the suit properties. She conceded that the 2nd and 3rd defendants were already registered as the owners of the suit properties. She however urged the court to preserve the properties from further transfer pending the hearing and determination of the suit. She submitted that the plaintiff had established a prima facie case and therefore is entitled to the order of injunction sought.

Mr. Murugara for the 1st defendant opposed the application. He relied on the grounds of opposition and the replying affidavit filed on behalf of the 1st defendant. He submitted that the 1st defendant had issued valid statutory notices before the suit properties were sold in a public auction. He conceded that one notice was issued in respect of the two properties although the amount owing was stated. He explained that the 1st defendant had invoked a clause in the charge which entitled it to consolidate the two loan accounts that were maintained by the plaintiff prior to issuing the statutory notices. He reiterated that the plaintiff made several proposals to repay the loan but failed to keep her promises. Mr. Murugara was of the view that the plaintiff's application was overtaken by events since the suit properties were already transferred to the 2nd and 3rd defendants, and further, the plaintiff was no longer in possession of the suit properties. He denied the suggestion by the plaintiff that the 1st defendant had clogged her equity of redemption. He submitted that the 1st defendant was required to tender payment of the loan so that the 1st defendant could refrain from exercising its statutory power of sale. He maintained that, since the suit properties had changed hands, the only remedy available to the plaintiff was an award of damages. He was of the view that the plaintiff had failed to establish a prima facie case to entitle this court grant her

application for injunction. He submitted that the balance of convenience tilted in favour of the 2nd and 3rd defendants who were already registered as the owners of the suit properties and were in possession of the same. Mr. Murugara referred the court to several decided cases in support of his submission. He urged the court to dismiss the application with costs.

Mr. Githinji for the 3rd defendant also opposed the application. He submitted that the 3rd defendant purchased one of the suit properties in a public auction; paid the bid price; had the property transferred to him and later sold the same to a third party. He submitted that by the time the 3rd defendant was served with the application for injunction he had already disposed the suit property to a third party. He urged the court to dismiss the application with costs.

I have carefully considered the rival arguments made by the parties in this application. I have also read the pleadings filed by the parties in this suit in support of their respective positions in this application. The issues for determination by this court is whether the plaintiff established a case to enable this court grant her the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

Certain facts are not in dispute in this application. It is not disputed that the plaintiff was advanced two different loans by the 1st defendant. To secure the said sums advanced, the plaintiff charged two properties to the 1st defendant. The two properties are **Nairobi/Block 137/75 (Lavington)** and **Nairobi/Block 133/209 (Komarock)**. The instruments of charge were duly registered as encumbrances on the said properties. The plaintiff defaulted in repaying the loan advanced. The 1st defendant sought to realize the pledged securities. It invoked a clause in the charge instrument which allowed it to consolidate the two loans that had been separately advanced to the plaintiff. The plaintiff admits that she was served with a notice prior to the 1st defendant exercising its statutory power of sale. The plaintiff however disputes that the said notice sent to her by registered post was a valid statutory notice within the meaning of **Section 65(2)** and **Section 74** of the **Registered Land Act**. She claims that the said notice, while giving her the requisite three months notice, failed to specify the amount that she was required to pay in order to redeem her properties.

I saw a copy of the statutory notice which was annexed to Modali Sastry’s replying affidavit dated 17th October, 2002. It is clear that the said notice specified the properties of the plaintiff that were to be sold if the plaintiff failed to settle the sum of KShs.3,705,199.16 which was then owing and which continued then to attract an interest at the rate of 24% p.a. It therefore incorrect for the plaintiff to claim that she had been served with an invalid statutory notice. I am satisfied that the 1st defendant duly served the plaintiff with the requisite statutory notice before exercising its statutory power of sale as chargee.

As regard the other complaint raised by the plaintiff that the 1st defendant had clogged her equity of redemption when the 1st defendant failed to accede to her request that she be allowed to pay certain monies so as to forestall the sale of the suit properties by public auction, I have evaluated correspondences that were exchanged between the plaintiff and the 1st defendant prior to the said exercise by the 1st defendant of its statutory power of sale, and it is evident that the plaintiff was accommodated at several instances by the 1st defendant. A sale was postponed at one time when the plaintiff made certain proposals. The plaintiff however gave proposals which she did not honour. It appeared that the plaintiff laboured under misconception that if she was able to obtain intervention by various government agencies, including the Ministry of Finance, the Ministry of Lands and the Ministry of Justice and Constitutional

Affairs, the 1st defendant would somehow refrain from exercising its statutory power of sale as chargee. It was therefore incorrect for the plaintiff to state that the 1st defendant clogged her equity of redemption by failing to give her opportunity to settle the amount owed so that she could discharge the said charged properties.

The plaintiff further challenged the manner in which the suit properties were sold by the 1st defendant in exercise of its statutory power of sale. It was the plaintiff's case that the 1st defendant had deliberately sold the suit properties at a price that was far below the actual value of the said properties. She took issue with the fact that the 1st defendant had sold the suit properties to persons who were not the highest bidders. I have perused the list of bidders which was annexed to the replying affidavit sworn on behalf of the 1st defendant. It is true that some bidders bid amounts which were higher than the actual amount the successful bidders offered. However, I noted that the persons who quoted higher figures did not pay the requisite deposit of 10% of the bid price as provided in the conditions of sale which was supplied to prospective bidders prior to the said sale by public auction.

The 1st defendant took precaution to obtain the best possible price for the suit properties in the circumstances. They instructed a Registered Valuer to value the suit properties for the purposes of disposing them by public auction. The values given for the two properties if they were sold in a public auction were exceeded by the two successful bidders. It was not the duty of the 1st defendant to obtain the market value of the said properties. What the 1st defendant was required to establish in the circumstances of this case was that it conducted the said sale of the suit properties in good faith. (See **Section 77 (1) of the Registered Land Act**). As was held by Ringera J (as he was then) in **Margaret Anyango vs. National Bank of Kenya Limited Nairobi HCCC No.2533 of 1992** (unreported) at page 12 of his Ruling:

“... I am being urged to infer fraud from the fact that the price which the suit premises fetched at the auction is less than what the chargor's valuation would give it. I can only observe that an auction price is not ordinarily the same as the market price. People go to an auction to make a bargain. It would be naïve to expect people to go to an auction to buy property at the price the seller's valuation indicates. In the present case, the auction was publicly conducted after three advertisements in the press. And there was competitive bidding by five persons.”

In this case, I am satisfied that the 1st defendant obtained the best possible price in the circumstances. I therefore hold that the plaintiff failed to establish that the 1st defendant acted in bad faith when it sold the suit properties in exercise of its statutory power of sale.

Finally, the plaintiff argued that this court should grant injunction to prevent the suit properties from being transferred to other parties by the 2nd and 3rd defendants pending the hearing and determination of the suit. As stated earlier, it was conceded that the suit properties had already been transferred to 2nd and 3rd defendants. In fact, the 3rd defendant, at the time the plaintiff filed this suit, had already sold the property to a third party. It is clear that the plaintiff's suit falls within the category of suits contemplated under **Section 77 (3) of the Registered Land Act**. The plaintiff can only seek to be paid damages and not reverse the transfer of the suit properties to the 2nd and 3rd defendants which were, *prima facie*, lawfully sold to the said defendants.

Taking into account all the circumstances and the facts of this case, I hold that the plaintiff failed to establish a *prima facie* case to enable this court exercise its discretion in her favour. The suit properties are no longer registered in her name. She is no longer in possession of the suit properties. It is trite that an order of injunction can only be issued to preserve the status quo existing at the time the order is sought. At this stage of the proceedings, the plaintiff can only be compensated by an award of damages if she establishes that there were irregularities in the manner in which the 1st defendant exercised its statutory power of sale by chargee pursuant to the instrument of charge. The balance of convenience tilts in favour of the 2nd and 3rd defendants, who, *prima facie*, were purchasers for value without notice of any

irregularities that could have occurred prior to the public auction in which they purchased the suit properties.

The application for injunction lacks merit and is hereby dismissed with costs.

DATED at **NAIROBI** this **22nd** day of **MAY, 2008**.

L. KIMARU

JUDGE