



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

**Civil Case 39 of 2005**

**JAMES KHIRANGA SHILALA:.....PLAINTIFF**

**VERSUS**

**1. COOPERATIVE BANK OF KENYA LTD:.....1<sup>ST</sup> DEFENDANT**

**2. DANCAN KINYANJUI WANJUU**

**T/A DOLPHIN AUCTIONEERS:.....2<sup>ND</sup> DEFENDANT**

**3. WAKARIMA INVESTMENTS CO. LTD:.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

By a plaint dated the 4<sup>th</sup> day of May, 2005 and filed in court on even date the plaintiff sued the Applicant herein as the third Defendant amongst two other Defendants. The said third Defendant was the purchaser for value at an auction conducted by the second Defendant as instructed by the first Defendant.

In that plaint the plaintiff alleges that there was no auction at which the first Defendant realized the security given to it by the plaintiff being land parcel number Kakamega/Kongoni/246 and that in any event the statutory Notice required to be given before sale was not so given. The plaintiff goes further to allege fraud and illegality against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the realization of the security and that the property was sold for a value far less than the market value. There is an allegation in the plaint that the second Defendant had no capacity to conduct a public auction in Eldoret as that was not in his area of jurisdiction., There is also in the plaint an allegation of fraudulent collusion between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the manner of the sale which the plaintiff describes as underhand and between insiders. The plaint then prays for injunctions to prevent the defendants from evicting the plaintiff from the suit property and not to transfer the same. The duration for such injunctions was not indicated in the plaint. There is a prayer for damages for fraudulent sale and/or transfer not directed at any party in particular. That is the background against which the application under consideration is to be determined.

The third Defendant has by way of a chamber summons dated 27<sup>th</sup> March 2007 and aided by Order VI Rule 13(d) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Rules (Act?) and other enabling provisions of the Law brought an application that the suit be struck out and/or be dismissed with costs. It is based on the grounds that the action has lapsed and/or has been overtaken by events. That the interim temporary injunctive orders have lapsed and the suit property has since been transferred to the third Defendant and the suit therefore serves no purpose. The further pendency of the suit will be an abuse of the court is the final ground upon which the application is based. There is filed an Affidavit in support of the application in which one Mary Wakarima Jackson described as a director of the third Defendant depones to matters relative to how she attended an auction at which she bought the said property.

Learned counsel for the third Defendant submitted that the cause of action against the third Defendant has lapsed or has been overtaken by events and that the plaint does not disclose a cause of action against the third Defendant. He further submitted that the fraud alleged in the plaint does not involve the 3<sup>rd</sup> Defendant and that the plaintiff's remedy lies with the 1<sup>st</sup> Defendant by way of a claim for damages.

The Plaintiff appearing in person opposed the Application and repeated what is in the plaint that there was fraud in the sale of the suit property. He stated that the 3<sup>rd</sup> Defendant was fraudulent in buying the property as he was an insider and there was no auction.

It is now time for the court's consideration of this matter. It has been said time and again that the court is not to concern itself with the process of the sale once the sale has taken place. An innocent purchaser for value is to be left alone to enjoy his purchase. But the above must be the case, in my considered view, where factors which may vitiate the sale are not present and there is absence of fraud. In this particular case until the same is heard and determined on evidence the presence and/or absence of fraud as alleged in the plaint will not be established. At this stage there is an allegation of fraud even as against the third Defendant. That will await trial of the suit. And importantly also the suit is set down for hearing on the 15<sup>th</sup> October, 2008 which is a day away today. The plaintiff himself wishes that the suit proceeds against the third defendant as well as against the other two defendants. He is assumed to know the consequences of so proceeding. In the end the court finds that there is no merit in dismissing the suit as against the third Defendant and dismisses the application with costs.

**DATED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF OCTOBER, 2008**

**P.M. MWILU**

**JUDGE**

**IN THE PRESENCE OF:-**

James Khiranga Shilala - the plaintiff

**And in the absence of:**

Tom Mutei Advocate for the 3<sup>rd</sup> Defendant.