



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

**Civil Case 348 of 2007**

**ANNE NDUNGE BITOK.....PLAINTIFF**

**VERSUS**

**AGRICULTURE FINANCE CORPORATION LTD ..... 1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENT (A FIRM).....2<sup>ND</sup> DEFENDANT**

**OLOOLUA HOLDINGS LIMITED.....  
.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Application dated 06.07.2007.**

Order XXXIX Rule 2, 2A and 3 Civil Code Section 3A Civil Procedure Act.

Orders sought, restraining order against the Defendants or any of them from causing registration of conveyance of LR. No. 12715/103 or taking occupation of the said land or in any other manner interfering with Applicants ownership and possession thereof and in the alternative mandatory injunction the sale on 21.03.2006 in purported exercise of the first Defendant Statutory power of sale be cancelled.

The application is based on grounds stated that the mortgage under which the purported exercise of power of sale is a nullity under Section 59 of Transfer of Property Act. Auctioneers Rules was not complied with. No valuation was done to establish the market value. The advertisement of the auction was published hardly a day before the auction. It is stated that the third Defendant intends to register a conveyance and to take possession of the premises unless stopped by the court. And that the Plaintiffs case has good chance of success.

At the time the application came up for hearing, Counsel for applicant submitted that as it appeared from the pleadings that the conveyance had already been registered. She was arguing only on alternative prayer No. 4, that the sale be cancelled.

The supporting affidavit shows that the charge under section 20 A.F.C. Act which was governed by section 59 of Transfer of Property Act, it was illegal for the first Defendant to exercise powers of sale in the circumstances.

The application is opposed by first and second Defendants who were represented by Mr. Koech with replying affidavit sworn by Rashid Ngaira, he submitted the suit was *res judicata* indicated and named

two suits in Machakos Court. Mr. Kamau for 3<sup>rd</sup> Defendant also opposed the application saying there were 2 other cases in Machakos. He relied on affidavit of Livingstone Njogu Gitau. Counsel submitted that the applicant obtained orders on ex parte basis and did nothing about the case.

In reply counsel for Applicant said that the issues of validity of the charge were not raised. She said that on Machakos cases one order lapsed after expiration of 14 days and the other was dismissed for want of prosecution. Therefore these two suits and applications were never heard and determined. It is clear then that present suit is not resjudicata. Authorities Ms Mulwa cited are AFC Act Cap 323 Section 20 of which provides that written notification delivered shall for all purposes be deemed to be a mortgage of land comprised herein executed by borrower to secure the loan. She cited also; HCC No. 371 of 2003 Eccon Construction & Engineering Ltd. –vs- Giro Commercial Bank Ltd & Another.

In that case it was contended that the mortgage was invalid because of being obtained by fraud and coercion and there were some irregularities in its execution. After a long analysis of the case law and the facts the court eventually found that the charge was invalid and that the Applicant had shown a prima facie case orders were granted.

The replying affidavit of first Defendants emphasizes that the applicant is guilty of non disclosure of previous suits and that her conduct in filing suit after another against the first Defendant is an abuse of Court process.

The 3<sup>rd</sup> Defendant caused an affidavit to be sworn by Livingstone Njogu Gitau in which it was sworn that the property subject of this suit was purchased by it at a public auction on 21.03.2006. The transaction was proper and legal. The land was registered in favour of 3<sup>rd</sup> Defendant on 05.06.23007. In the circumstances, the Applicant has no case against the 3<sup>rd</sup> Defendant.

I have perused the material laid before the court and am satisfied that the applicant has not acted diligently in pursuant of her rights and although the previous suits were not heard and determined it is clear she has had proper notice and as the property has changed hands, she is not entitled to mandatory injunction as she prays.

This application is dismissed with no order as to costs.

**DATED** this 10<sup>th</sup> day of November 2008.

**JOYCE N. KHAMINWA**

**JUDGE**