



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 494 of 2008**

**BENJOH AMALGAMATED LIMITED.....1<sup>ST</sup> PLAINTIFF**

**MUIRI COFFEE ESTATE LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**BIDII KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

Note this suit was filed by the two Plaintiffs but later the 2<sup>nd</sup> Plaintiff discontinued the suit against the two Defendants. Therefore the suit continues with 1<sup>st</sup> Plaintiff against the two Defendants.

The Applicant seeks orders to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from taking possession of the land L.R. No. 10075 Thika District until hearing and determination or until further orders of the Court. And that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to produce accounts of 1<sup>st</sup> Plaintiffs Account No. 315043651017 forthwith. The grounds are set out being that the purported sale of plot No. L.R 10075 is under police investigation on ground of fraud yet the 2<sup>nd</sup> Defendant has since issued a notice to take possession of the said plot and subject of the Account No. 315043651017 is still pending for hearing and determination in *Misc. Civil Case No. 784/2007* and also at the time of purported sale there were current Court orders restraining the first Defendant from selling, disposing or dealing in any manner with disputed property.

That damages will not be adequate remedy to compensate the plaintiff for loss of property. Further, that the property ought to have been re-advertised for sale after expiration of 90 days.

The supporting affidavit shows that the said property was sold in a public auction held on 19.09.2007 and that title was registered in favour of the second Defendant and they were intending to take over possession of the property. Annexure "C2" is a court order issued on 26.09.2007 (Justice Lesiit) *HCC 122/07* restraining the sale of the property pending hearing of the matter inter-partes on 11.10.2007. And that the account No. 315043661017 aforesaid was under police investigation as shown in annexure C3. The purported sale was irregular and did not conform with the provisions of Auctions Act, title has to be discharged and a caveat has to be removed and no good-title could be passed and if the second Defendant

was to take possession civil commotion would occur.

In reply, the second Defendant has caused an affidavit to be sworn by Rahul Dilesh Bid who swears that this matter is res judicata. The matters raised having been heard determined in suit No. 122/2007 (Judgment exhibited) and therefore there is no case for injunction demonstrated.

That order made on 28.08.2008 is null and void and invalid. The restraining orders made herein on 26.09.2007 in *suit No. 122/2007* and that suit was struck out pursuant to the judgment of Warsame J. on 17.06.2008.

The 2<sup>nd</sup> Defendant says it purchased the land L.R. 10075 Thika at the price of Kshs. 70 million at an auction which was regular, lawful and they obtained good title.

The first Defendant has also caused a Replying Affidavit to be filed, sworn by Chris Theuri an employee of the Bank. The First Defendant raised the points that the suit is Resjudicata and that the principles in the case of *Giella –vs- Cassiman Brown* are not fulfilled and no prima facie case has been demonstrated. And also that this suit is scandalous, frivolous, vexatious and incompetent and an abuse of court process.

The first Defendant has also enumerated the several suits heard and determined between the Plaintiffs and the first Defendant being HCC No. 1219 of 1992 at Nairobi, HCC No. 285 of 1993, 1520 of 1996, 1611 of 1996, HCC 24 of 1997 at Nyeri, Civil Appeal No 276 of 1997, HCC 1576 of 1999, Civil Appeal 239 of 2004, Civil Suit 337 of 2006, HCC No. 243 of 2006, Petition No. 352 of 2007 and 122 of 2007. All these suits have been heard and determined. All matters arising are now res judicata.

In support of their opposition, the first Defendant has filed a list of 16 authorities. In support of the submissions that this suit is Resjudicata, the Judges in the case of Mburu Kinyua –Vs- Gachiri Tuti (No.1) quoting a passage from *Hernderson –vs- Henderson, 1843*, said:

*“Where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to having forwarded their whole case (and will not except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward..... the plea of Resjudicata applies except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation”*

In the case of *Pop-In (Kenya) Ltd & 3 others –VS- Habib Bank A.G. Zurich*. It was held by court of Appeal (Holding1) on the same lines as in the case of *Mburu Kinyua –vs\_ Gachiri Tuti*.

I have perused all the authorities on this submission and I have come to the conclusion that the matters already determined in this dispute has become Resjudicata in view of previous suits and the ruling of Justice Warsame in suit no. 122/07 aforesaid decided. All matters relating to the exercise of the power of sale by first Defendant are now Resjudicata.

Regarding the availability of order for injunction after sale has been completed the authorities are to the effect that a Mortgagor’s equity of redemption is extinguished after a mortgagee has exercised his powers of sale.

As it is the property is now registered in the name of 2<sup>nd</sup> Defendant who ought to enjoy all the rights and benefits of proprietorship as conferred by Law.

There is no evidence that the purchaser obtained the title by fraud and he has demonstrated that the public auction was conducted lawfully and regularly and it (2<sup>nd</sup> Defendant) did comply with all the rules of the auction concerning a purchaser in a public Auction.

In that case if the Plaintiff has any claim there is remedy in damages but only against the person exercising power of sale and that is the first Defendant. However, due to the suits abovementioned this issue is now Resjudicata.

The plaintiff seeks to restrain the 2<sup>nd</sup> Defendant from taking possession of the property L.R. 10075. It would be unlawful to restrain a proprietor of land from entering into possession of his land and the court will not issue such an injunction. The court does not find any reason to issue orders to Kenya Police in this matter no grounds are demonstrated to warrant such an order.

Regarding the issue of accounts this issue has herein been raised before. However the applicant is entitled to final account, in view of the final sale and transfer of the mortgaged property this should bring this litigation to a close.

I therefore order the first Defendant to deliver to the Applicant final statement of account within the next 21 days.

In view of the above, I do not give orders sought in the application dated 28.08.2008 except that prayer (iii) thereof.

The application is dismissed with costs in the cause.

DATED this 3<sup>rd</sup> day of November 2008.

JOYCE N. KHAMINWA

JUDGE