



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**Civil Case 187 of 2007**

**FORTUNATUS WANJOHI NDEGWA.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

This Chamber Summons has been brought by the plaintiff under Order XXXIX Rules 1, 2, 3, 4, 5 and 9, Order XIX of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of Law. It seeks the following principal order:

**“That a temporary injunction be issued restraining the defendant whether by itself, officers, Directors, Servants and/or its agents M/s Guram Investments or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with Title No.Ngong/Ngong/12687 Ongata Rongai Kajiado in any manner whatsoever pending the hearing and determination of this application.”**

The application is supported by an affidavit sworn on 11.4.2007 by the plaintiff who also swore a further affidavit on 19/4/07. The application is based on the following primary grounds:-

- 1) That the plaintiff has made substantial payments if not the entire payments to the defendant towards the settlement of facility due and owing to the defendant.
- 2) That the amount claimed by the defendant relates to illegal interests, commissions, Bank charges and penalty charges which have already been settled by the plaintiff and which sums the plaintiff has requested the defendant to account but to no avail.
- 3) That the plaintiff stands to suffer irreparable loss and damage that is incapable of being compensated by damages should the illegal unlawful and unprocedural sale of its property be allowed to proceed.
- 4) That the defendant is in breach of the terms of the charge document and as such the plaintiff has been discharged from the obligations thereunder.
- 5) That should the intended sale scheduled for the 12.4.2007 be allowed to proceed as planned, then the plaintiff’s application herein will be rendered nugatory and futile.
- 6) That the defendant has been charging unconscionable bank charges commissions and unlawful

penalty fees on the plaintiff's accounts in violation of the Law.

The application is opposed and there is a replying affidavit sworn by one Damaris Gitonga the defendant's Manager in charge of Secretarial Services.

The plaintiff appeared *ex parte* before Hon. Okwengu J on 12.4.2007 but did not convince the Learned Judge that an interim order of injunction could issue. It is significant that that day was the appointed day for the sale of the suit property and the Learned Judge was of the view that the plaintiff had not acted with diligence and dispatch and that it was too late to grant the orders sought by the plaintiff. The Learned Judge however certified the application as urgent and fixed the same for hearing *inter partes* on 19.4.2007. Come that day, counsel for the defendant sought an adjournment to enable him respond to the application. He also informed the court that the sale of the suit property had proceeded on 12/4/2007. In the event, the said replying affidavit was duly filed. It was deponed in paragraph 22 (c) of that affidavit as follows:

**“22(c) That subsequently, statutory power of sale arose and all the necessary notices were issued but the plaintiff still did not liquidate the outstanding sum compelling the defendant to sell the property by public auction on 12.4.2007 to one Julius Koome M'mbwira.”**

In the further affidavit sworn by the plaintiff on 19.4.2007, it is deponed in paragraphs 4 and 7 as follows:

**“4. That the auction scheduled for the 26.3.2007 at 11 a.m. proceeded where the defendant's agents Garam Investments sold the suit property at an under value.**

**7. That the purported purchaser has visited the suit property and has threatened to evict me and make alterations to the suit property by the end of April, 2007.”**

From the above affidavit evidence, it is clear that the suit property has been sold. The defendant has disclosed the purchaser. The plaintiff has not sought to amend his plaint and application to join the purchaser. Yet he recognizes his interest in the suit property. No complaint has been made against the purchaser. He is not even aware of these proceedings. In my view no orders can be made touching on the suit property in the absence of notice to the purchaser. Such orders would offend against the well known legal maxim that no man should be condemned unheard. The orders would offend against rules of Natural Justice which the courts have jealously guarded over the years.

In any event, the plaintiff has not sought any orders pending the hearing of the suit.

In my view and in the light of what I have stated above, the plaintiff has not established the 1<sup>st</sup> condition for the grant of an interlocutory injunction which is that for a court to exercise its discretion in relation to temporary injunction the applicant must show a *prima facie* case with a probability of success at the trial. He has not even moved the court for such an order pending trial.

I need not therefore consider the other conditions for the grant of a temporary injunction. The application must fail. It is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>st</sup> DAY OF MAY 2007.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

Okelo holding brief for Amadi for the applicant and Ojiambo for the respondent.

**F. AZANGALALA**

**JUDGE**

**31/5/07**