

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 17 of 2007

JERVASIO G. NGATIA.....APPLICANT

Versus

EQUITY BANK OF KENYA.....1ST RESPONDENT

GITAU NGANGA T/A SHEFLO AUCTIONEERS.....2ND RESPONDENT

PHILIPH KIMANI GATUMA.....3RD RESPONDENT

RULING

The Appellant herein was unsuccessful in obtaining an injunction from the lower court to stop the transfer of his land which allegedly had been sold by auction by the 1st Defendant. Being dissatisfied with that dismissal the Appellant has filed a Memorandum of Appeal against that ruling. Before the hearing of the appeal the Appellant has presented before Court a Notice of Motion dated 28th March 2007. The application is brought under *Order XLI Rule 4* of The Civil Procedure Rules. The prayer that that application seeks is that there be stay of transfer of land parcel No. OTHAYA/KIANDEMI/780. In the affidavit in support of that application the Appellant deponed that if the land is transferred, such transfer will render his appeal nugatory.

That application was opposed by an affidavit sworn by the 2nd Respondent. The 2nd Respondent in the replying affidavit stated that he is a bona fide purchaser for value. That he has paid Kshs.1,650,000/= towards the purchase price. He annexed to his application a copy of the Newspaper advertisement of the auction and the memorandum of sale issued to him after the auction. The Respondent further deponed that the Appellant could be compensated by way of damages if the Court did find that there were irregularities in the sale. The Respondent then gave a detailed explanation of the frustrations that he has encountered in obtaining the consent to transfer which frustration was perpetrated by the Appellant. By the supplementary affidavit the Appellant began by stating that the 2nd Respondent had failed to defend the application for injunction at the lower court and that it was the first time he was claiming to be a bona fide purchaser for value. In that respect he annexed the affidavit in reply filed on behalf of the 1st Respondent. I have had occasion to look at that affidavit in reply filed in the lower court. It is pertinent to note that the memorandum of sale was annexed to that affidavit to show that the property was sold to the 2nd Respondent. The Appellant further stated that he had been advised by his advocate that if there were no bids at the auction such a sale would not be recognized in law. It is note-worthy that in the present application the Respondent has not stated that he was not present at the auction. It is only through his annexures where he annexed the affidavit he swore in the lower court that one finds that he deponed that he was present on 22nd September 2006 outside the Post Office but there were no bidders to the auction. The Appellant does not state which post office he was at when he claimed that the sale did not take place. Looking at the Newspaper advertisement for the auction, it is stated that the property was due for auction on 22nd September 2006 at 11.00 a.m. opposite Othaya Post Office. One will note that the Appellant stated that he was outside the Post Office not opposite the Post Office. In submissions in opposition to the application the Respondent's advocate quoted from several decided cases where the court in ruling for injunction application found that *Section 69* of the **ITPA** provides that when sale has been concluded the only avenue available to an applicant is to seek for damages.

As I begin to consider this ruling I must state that those cases are not of assistance to the Respondent

because of the provisions of *Section 164* of the Registered Lands Act. That section provides as follows:

“Upon the first registration of any land under this Act, the Transfer of Property Act, 1882, of India shall cease to apply to that land, except in relation to any dealing entered into before the date of first registration.”

Undoubtedly the suit property **OTHAYA/KIANDEMI/780** is registered under Registered Land Act. Looking at the Appellant’s application although the prayer in that application states that the Appellant is seeking stay of transfer what the Appellant does seem to be seeking from this Court is an injunction to stop transfer. If that be the case the Appellant needed to have satisfied the principles of injunction. These are the principles enunciated in the case of **GEILLA VS CASSMAN BROWN & CO. LTD. [1973] E.A. 358**

They are as follows:

“An applicant must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; when the court is in doubt, it will decide the application on the balance of convenience.”

The Appellant would need to show that he has a *prima facie* appeal with probability of success. It is important to note that the Appellant does not deny being indebted to the 1st Respondent. Further he knew that the sale was going to take place on the 22nd September 2006. He even wrote a letter to the 1st Respondent in respect of that sale dated 21st September 2006. As stated before the Appellant’s application both in the lower court and in this court is on the basis that there were no bids to the sale of his property. As stated before the Appellant in his affidavit said that he was standing outside the Post Office and did not see any bids to the sale of his property. He does not explain why he was outside the Post Office where as the sale was due to take place opposite the Post Office. Further the right of redemption of the Appellant was extinguished the moment the bid was made by the 2nd Respondent. (See S. 72 RLA). In considering the arguments raised by the Appellant, I find that the Appellant has not shown a *prima facie* case with a probability of success. The next principle I need to consider is whether the Appellant will suffer an irreparable loss if the injunction is not granted. The Appellant by his affidavit at the lower court sworn on 20th November 2006, stated that when the sale took place he was in the process of looking for potential buyers of his land to be able to repay the debt of the 1st Respondent. That being the case it does mean that the Appellant will not suffer irreparable loss if injunction is not granted for if indeed the Appellant does succeed in his appeal the court can order damages to be paid to him. It ought to be noted that the Appellant did give value to his property. He stated that it is valued at Kshs.3million. The appellant therefore cannot be heard to argue that he will suffer irreparable loss since he was willing to sell his property and he knows the value of his land. I therefore also find that the Appellant has not satisfied the second principle.

In considering this matter as a whole I find that I am not in doubt in respect of those principles of injunction and therefore I do not have to consider where the balance of convenience lies. Accordingly the Appellant’s application by way of Notice of Motion dated 28th March 2007 is dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 27th day of July 2007.

MARY KASANGO

JUDGE