



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

Civil Case 352 of 2005

FRANCIS MURIITHI GITUKU..... PLAINTIFF

VERSUS

STEPHEN I. MUSA..... 1ST DEFENDANT

BARCLAYS BANK OF KENYA.....2ND DEFENDANT

EMMANUEL G. NGANGA T/A SHEFLO AUCTIONEERS.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR NYANDARUA DISTRICT.....4TH DEFENDANT

RULING

The plaintiff, Francis Muriithi Gituku seeks by Chamber Summons dated 22.3.2007 the following main order:-

That the 1st defendant be restrained by an injunction from alienating, selling, transferring, charging and/or offering the suit premises known as Nyahururu/Ol-Joro-Orok Salient/20 for security and or other transaction until the hearing and determination of this suit.

The application is brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. Some 16 grounds are set out on the face of the application. The primary ones are as follows:-

- 1) That the suit piece of land was illegally and unlawfully sold and transferred to the 1st defendant by the 3rd defendant under the directions of the 2nd defendant bank.
- 2) That the 2nd defendant did not issue the requisite mandatory Notice of Sale.
- 3) That the 1st defendant issued the 2nd defendant with a deposit cheque for KShs.2.5 million on 19.12.2003 whereas the auction had been advertised for sale on 19.2.2004.
- 4) That the suit property was sold by Private Treaty contrary to the provisions of the Law.
- 5) That the 4th defendant acted illegally and unlawfully by accepting the price of KShs.3.5 million which was a throw away price.

6) That the suit property was sold and transferred by the 3rd defendant to the 1st defendant through conspiracy and fraud.

There is an affidavit by the plaintiff in support of the application and filed therewith. There are 2 further affidavits sworn by the plaintiff filed on 14.6.2007 in response to the replying affidavits of the 1st and 3rd defendants.

In the amended plaint filed on 15.2.2007, several orders are sought including a declaration that the sale and transfer of the suit property is illegal, damages, eviction and injunction restraining the 1st defendant from encroaching, trespassing, disposing, wasting away or alienating the suit property. The defendants entered appearance and filed defences.

I have perused all the pleadings. I have also read the affidavits sworn in support of and in opposition to the application. Counsel submitted at length and relied upon many authorities. A substantial portion of counsel's submissions were on matters that are best left for the judge who will hear the case. I have considered the submissions in so far as they are relevant to the application.

It is now settled that an applicant will not obtain an interim prohibitory injunction unless he can show, firstly, that he has a prima facie case with a probability for success at the trial. Secondly, the applicant must show that he will suffer irreparable loss or damage that cannot be compensated by an award of damages. Thirdly, if the court is in doubt the application is to be decided on the balance of convenience. Those principles were set in the precedent setting case of **Giella – vs – Cassman Brown – [1973] EA 358.**

In his amended plaint the plaintiff has inter alia pleaded fraud and/or other irregularities. Detailed particulars of the same are given. Among them are allegations of misrepresentation, want of the mandatory Statutory Notice of Sale, sale at an undervalue, failure to obtain the mandatory Land Control Board consent, sale by private treaty etc.

The defendants have denied all those allegations. The allegations are repeated in the plaintiff's affidavits sworn in support of the application and in equal measure denied in the replying affidavits. All contentions are weighty matters that cannot be adjudicated upon at this stage upon the affidavits.

On a consideration of the allegations of the plaintiff, it cannot be said that they are not without basis. For instance there is the allegation that long before the alleged auction sale the 1st defendant had purportedly made payment of 2.5 million towards the purchase price of the suit property. That allegation is so grave that if the plaintiff will establish the same at the trial the sale will be seen to be tainted. Another allegation that is weighty is in relation to the value for the suit property and the price at which it was sold. As it has been held before sale of such a property below half its true value would itself suggest fraud.

In the premises, I am inclined to grant the temporary prohibitory injunction sought as it is also my view that the injury the plaintiff will suffer unless the injunction is granted may not be adequately compensated by an award of damages.

On the limb of balance of convenience, it is my view that the same tilts in favour of granting the injunction. The 1st defendant is already registered as the proprietor. If no order is given to protect the suit property, the 1st defendant may transfer the same elsewhere which would render these proceedings nugatory even if the plaintiff were to eventually succeed.

In the premises, I will allow the application as prayed. The interim injunction is granted on the condition that the plaintiff files by 1.00 p.m. on 7.12.2007 an appropriate undertaking as to damages. Such undertaking to be on oath. Costs to be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Machira for the plaintiff, Mungai holding brief for Mutuli for the 1st and 3rd defendant and Havi for Ogunde for the 2nd defendant.

F. AZANGALALA

JUDGE

30/11/07