



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL CASE 476 OF 2006**  
**JOHN KISIGWA LUSESO**  
**PHILLORA W. L. KISIGWA .....PLAINTIFFS**  
**VERSUS**  
**KENYA COMMERCIAL BANK LTD.**  
**BASELINE AUCTIONEERS**  
**GEORGE NYAKUNDI ONKOBA .....DEFENDANTS**

**R U L I N G**

In the amended Chamber Summons lodged on 31.8.06, the plaintiffs sought injunctive reliefs pending the hearing and determination of the application and the following orders pending determination of the suit:-

3. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants be restrained from advertising for sale, disposing of, selling by public auction or otherwise howsoever completing by conveyance or transfer of any sale concluded or leasing, letting otherwise howsoever interfering with the ownership of title No. L.R. 209/8275/50 Nairobi pending the hearing and determination of this suit.

4. That an order be made under Section 52 of ITPA that during the pendency of this suit all further registration or change of registration in the ownership, leasing, subleasing, allotment, user occupation or possession or in any kind of right title or interest in L.R. No.209/8275/50 Nairobi be prohibited.

The main grounds for the application are as follows:-

- (a) That the 1<sup>st</sup> defendant has not served a proper Statutory Notice.
- (b) That the provisions of Rules 11, 15 and 16 of the Auctioneers Rules 1997 have not been complied with.
- (c) That the alleged sale is irregular, incurable, defective and illegal.
- (d) That the 1<sup>st</sup> defendant secretly and fraudulently transferred the suit property to the 3<sup>rd</sup>

defendant.

- (e) That the plaintiffs stand to suffer grave and irreparable loss and damage.
- (f) That the 1<sup>st</sup> defendant altered the terms and conditions of the guarantee unilaterally thereby discharging the plaintiffs from the guarantee.
- (g) That the 1<sup>st</sup> defendant has been charging exorbitant, oppressive, illegal and non-contractual interest rates and other charges and penalties on the principal debtor's account.
- (h) That the 1<sup>st</sup> defendant has acted capriciously, fraudulently, recklessly, oppressively and maliciously and in bad faith.

The application is supported by an affidavit of John Kisigwa Luseso

the 1<sup>st</sup> plaintiff. The affidavit is an elaboration of the above grounds. The 1<sup>st</sup> plaintiff also swore a further affidavit in which he admits filing several suits on the advise of his advocates. The application is opposed and there are affidavits of John Ombuor, the 1<sup>st</sup> defendant's Corporate Credit Analyst and the 3<sup>rd</sup> defendant. John Ombuor also swore a further affidavit.

John Ombuor depones that the plaintiffs have filed numerous cases relating to the same suit property in different parts of the country and is abusing the court process. He has exhibited pleadings in those cases and other documents showing that the plaintiffs have been served with Statutory notices and their default is beyond question.

The 3<sup>rd</sup> defendant depones *inter alia* that he is now the registered proprietor of the suit property and has charged the same to Savings & Loan (K) Limited and has difficulties making his mortgage repayments because of the inability to have possession.

The application was canvassed before me on 24.10.2007 by Mr. Mukuria, Learned Counsel for the plaintiff. Mr. Kamau, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and Mr. Bundotich, Learned Counsel for the 3<sup>rd</sup> defendant. I have considered the application, the affidavits filed, the submissions made to me and the authorities relied upon. Having done so, I take the following view of the matter. The plaintiffs had to show that they have a prima facie case with a probability of success at the trial. Secondly, even if such a case had been shown, the plaintiffs had to establish that they would suffer irreparable injury unless that injunction is granted and if the court is in doubt it will decide the application on the balance of convenience. (See **Giella vs. Cassman Brown & Co. [1973] EA 355 LTD.**). Have the plaintiffs satisfied the above conditions?

In HCCC No.1035 of 1997 Nairobi between the plaintiffs and the 1<sup>st</sup> defendant together with Sangam Investments Ltd., the plaintiffs sought an injunction to restrain the sale of the suit property. They obtained a temporary injunction but when they failed to prosecute the suit the same was dismissed on 17.3.2000.

When the 1<sup>st</sup> defendant sought to realize its security again, the plaintiffs filed **Bungoma HCCC No.124 of 2000** against the 1<sup>st</sup> defendant. The plaintiffs sought an interim injunction, obtained the same ex parte, and again failed to prosecute the application and the suit. On 9.10.2000, the application for interim injunction was dismissed for want of prosecution.

The same scenario was repeated in **KAKAMEGA CMCC NO. 205 of 2002** and when the plaintiff failed to prosecute the application and the suit, the suit was struck out on 14.8.2002.

In time the Bungoma suit was transferred to this court and became **MILIMANI HCCC NO.1056 of 2002**. The plaintiffs once more sought restraining orders in their application dated 25.8.2002. That

application was heard by Mutungi, J. and in a reserved ruling delivered on 24.2.2004, the Learned Judge dismissed the plaintiffs' application. At page 4 of his ruling, the Learned Judge said as follows:-

**“In the present application the Guarantorship contract signed by the Guarantors – the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs herein granted the defendant the liberty to vary the terms or make any other arrangements with the customers without giving any notice or requiring the consent of the plaintiffs herein. In other words, consent to vary the terms of the guarantee was granted in advance. That ground and indeed the only ground in support of the applicant's case must fail.”**

The Learned Judge referred to the cases here referred to above and concluded that those cases and applications are sufficient data to illustrate that the plaintiffs maintain the suit and application to keep the 1<sup>st</sup> defendant at bay from realizing its security. He accordingly dismissed the application seeking to restrain the 1<sup>st</sup> defendant from selling the suit property.

The 1<sup>st</sup> defendant believed that the matter had been put to rest at least with regard to applications for temporary injunctions. It was mistaken because the plaintiffs are back in this suit seeking to restrain the 1<sup>st</sup> defendant from realizing its security and for other reliefs.

This case makes very depressing reading. The various ex parte orders granted in favour of the plaintiffs by various courts is evidence of how our justice system can be used to perpetuate an injustice. For now over 10 years, the plaintiffs have succeeded, using the courts to stop the sale of the suit property and when the property was finally sold to the 3<sup>rd</sup> defendant, the plaintiffs are back with a fresh set of complaints. They now challenge the charge instrument, the execution thereof, the lack of service of a Statutory notice, the want of Statutory Power of Sale, the breach of Auctioneers' Rules, levying of exorbitant, oppressive, illegal and non contractual interest rates. This time round however they have come when the horse has left the stable. The property has now been registered in the name of the 3<sup>rd</sup> defendant. The challenge made against registration of the suit property in the name of the 3<sup>rd</sup> defendant is to say the least a feeble one. The affidavit in support does not suggest that the 3<sup>rd</sup> defendant is guilty of fraud or any other impropriety or irregularity. Prima facie therefore, the plaintiffs at the trial may not succeed in their challenge of the title now held by the 3<sup>rd</sup> defendant.

As the 3<sup>rd</sup> defendant is not blamed for anything in the plaintiff's affidavit, any orders that would be made against him would occasion more injury to him than the injury the plaintiff may suffer if their application is refused.

In the premises, the plaintiffs have not shown a prima facie case with a probability of success at the trial. They have therefore not gone beyond the first hurdle in their attempt to obtain an interim injunction. Strictly speaking, I need not consider the other conditions for the grant of an interlocutory injunction. But even if I were to do so I would still hold that the injury the plaintiffs can suffer if the injunction is declined, is compensable by an award of damages. On the balance of convenience, the same tilts in favour of declining the injunction. The 1<sup>st</sup> defendant has been in court for over 10 years whenever it has sought to realize its security courtesy of the numerous suits filed by the plaintiffs which they subsequently abandoned.

I have also found that the conduct of the plaintiffs must be frowned upon in equity. They have instituted numerous suits with the sole purpose of restraining the sale of the suit property wherever the 1<sup>st</sup> defendant has attempted to exercise its undoubted Statutory Power of Sale. They have denied proper execution of the charge instrument in their affidavits yet their own pleadings acknowledge execution. They have denied service of a Statutory Notice of Sale when all evidence points to the contrary. They seek to challenge the charge document 10 years after they executed the same and long after they had taken benefit of the same.

In the premises even if a prima facie case had been established, the plaintiffs would not have been entitled to the equitable relief of an interim injunction on account of their having come to court with tainted hands.

In the end the plaintiffs application dated 28.8.2006 and amended on 31.8.2006 is dismissed with costs.

Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 27<sup>th</sup> day of November 2007.

**F. AZANGALALA**

**JUDGE**

Read in the presence of Wangai Ms. holding brief for Mukuria for the plaintiff. Kamau for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and holding brief for Mr. Bundotich for the 3<sup>rd</sup> defendant.

**F. AZANGALALA**

**JUDGE**

**27/11/07**