



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 660 OF 2002

**SAMUEL O. TIMA
LYDIA NYAMBONYI PLAINTIFFS**

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.

JOSEPH KARIUKI WANYUGIDEFENDANTS

R U L I N G

The plaintiffs herein, Samuel O. Tima and Lydia Nyambonyi seek by amended Chamber Summons dated 21.3.2007, the following primary orders:-

- 1. That a temporary injunction do issue restraining the defendants from transferring, leasing, charging, alienating, disposing and/or otherwise whatsoever interfering with L.R. NO.36/111/948 Nairobi (hereinafter “the suit property”) pending the hearing and determination of this suit.**
- 2. That a temporary injunction do issue restraining the 2nd defendant from taking possession, occupying, collecting or demanding rent or other benefit of whatsoever nature and/or from evicting or otherwise interfering with the plaintiff’s peaceful occupation and possession of the suit property pending the hearing and determination of this suit.**
- 3. That all further registration or change of registration in the ownership, leasing, sub-leasing, allotment, user occupation or possession of right title or interest in the suit property be prohibited.**

The application is expressed to be brought under the provisions of

Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, Sections 3 A and 63 of the Civil Procedure Act and Sections 52 and 53 of the Transfer of Property Act. Nine grounds are set out on the face of the application. The main ones are as follows:-

- 1. That the 1st defendant has without serving a Statutory notice on the plaintiffs fraudulently sold the suit property in purported exercise of its Statutory Power of Sale to the 2nd defendant vide private treaty at a throw away price of Kshs.9,000,000.00 whereas the market value is approximately Kshs.18,000,000.00.**
- 2. That the suit property was irregularly, and fraudulently sold to the 2nd defendant without a current and valid valuation report having been conducted secretly and illegally without informing**

the plaintiffs.

3. That the 1st defendant has been charging exorbitant, oppressive, illegal and unconscionable interest rates and other charges and penalties to the plaintiff's account contrary to the mortgage document, the Banking Act and the Central Bank of Kenya Act.

4. That unless the orders sought are granted the property is likely to be transferred or charged to a 3rd party and the plaintiffs will suffer loss and damage in that the suit property is a commercial building where the plaintiffs reside and will lose substantial revenue and/or be rendered homeless.

There is an affidavit sworn by the 1st plaintiff in support of the

Application and filed herewith. There are affidavits in opposition to the application sworn by one Joseph Kania, the 1st defendant's Legal Officer and the 2nd defendant.

The main points taken in opposition to the application are that a valid Statutory Notice was served. There was default in the repayment of the mortgage debt and the 1st defendant's Statutory Power of Sale had arisen and had been lawfully exercised. There had also been an earlier order recorded by consent vide which the plaintiffs had agreed to pay Kshs.7.6 million in full settlement but had not been honoured by the plaintiffs thereby paving the way for the sale of the suit property to the 2nd defendant which sale was regular and untainted by fraud.

The 2nd defendant contends that he lawfully purchased the suit property and is registered as proprietor thereof. Collusion and sale at an under value are denied. In his view the plaintiff's remedy is in damages even if they were to prove their allegations as their equity of redemption has been extinguished.

In the amended plaint filed on 21.3.2007, the plaintiffs seek several reliefs including two permanent injunctions restraining the further transferring of the suit property and eviction of the plaintiffs; two declaratory orders that the sale and transfer to the 2nd defendant by the 1st defendant were *inter alia* fraudulent and unlawful and that the plaintiffs account with the 1st defendant was not in arrears when the suit property was sold. The plaintiffs further seek an account and damages.

The defendants have entered appearance and filed defences. The 2nd defendant has in addition raised a counterclaim against the plaintiffs for their eviction and mesne profits. Learned Counsel for the plaintiffs and the defendants submitted at length and quoted several authorities. I have considered all the pleadings. I have also considered the submissions of counsel in so far as they are relevant and germane to the present application and do not intend to stray into the province of the trial judge. It is to be noted that there is pending in his suit an application by the 2nd defendant seeking *inter alia* orders that the rental income from the suit property be deposited in court in a joint account. That application was filed on 17.5.2007. I should therefore be careful not to make orders that prejudice the hearing of that application.

There is also the 2nd defendant's counter claim for the eviction of the plaintiffs and for mesne profits. I should also not make orders that will prejudice the trial of the counter claim.

At this stage the applicants had to show that their legal or equitable rights have been violated or are threatened with violation by the unlawful acts of the defendants. The necessary conditions for the grant of interim injunctions were laid down in the case of **Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358.** They are as follows: First an applicant must show a prima facie case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide the application on the balance of convenience.

As already stated above the plaintiffs have pleaded that the 1st defendant has failed to account for sums recovered during the time when its Receiver was in place. They have further pleaded breach of the

charge terms by the 1st defendant leading to imposition of uncontractual levies, interest and penalties. The plaintiffs have also pleaded fraud, illegality and malice. Detailed particulars of the same are given. Collusion is pleaded and the suit property is alleged to have been sold on a Sunday by private treaty when the best price could not be obtained. The sale is alleged to have been at an undervalue particularly as the price is alleged to have been about half the true value of the suit property.

The defendants have of course denied all those allegations by the plaintiffs. The plaintiffs have repeated their allegations in their affidavits and in equal measure denied by the defendants in their replying affidavits. In my view the allegations raise weighty issues that cannot be adjudicated upon at this stage upon the affidavits. They will have to await the trial of the action.

I am therefore persuaded that the plaintiff has shown a prima facie case with a probability of success at the trial. The justice of this case requires the preservation of the suit property pending the hearing of this suit. That will allow both the plaintiffs and the defendants to canvass their various positions fully. If the suit property is transferred to a 3rd party and the plaintiffs succeed in their allegations at the trial the property would be beyond them. The 2nd defendant has his own counter claim in which mesne profits are sought. An order declining the injunction sought might preempt the 1st defendant's prayer of eviction.

In the premises, I will allow the plaintiff's amended application in terms of prayers (b) and (d) thereof. The orders are conditional on the plaintiffs filing separate undertakings under oath to pay damages if any to the defendants in the event that it is found at the trial that the injunction ought not to have been issued. The undertakings shall be filed within seven (7) days from the date hereof.

Costs shall be in the Cause.

Parties have liberty to apply.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of December 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Masese for the plaintiff and Wahome for the 2nd defendant.

F. AZANGALALA

JUDGE

4/12/07