



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 285 of 2005

JOHN MWENJA NGUMBA.....  
PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED & ANOTHER.....  
DEFENDANTS

R U L I N G

The plaintiff has been granted Letters of Administration ad colligenda bona in respect of the estate of Andrew Kirrani Ngumba deceased who died on 31.5.1997. In a plaint filed on 27.5.2005 by the plaintiff, it is pleaded inter alia that the said Andrew Kimani Ngumba (**hereinafter called “the Chargor”**) was at all material times the registered proprietor of L.R. No.74/16 Nairobi (**hereinafter called “the charged property”**); that no statutory notice was validly issued by the 1<sup>st</sup> defendant (**hereinafter called “the chargee”**); that the defendants through Garam Investments purported to issue a Notification of Sale of the charged property on or about 3.3.2005; that the purported sale was to take place on 26.4.2005 in satisfaction of an alleged debt owed to the chargee by the chargor and the 2<sup>nd</sup> defendant who was well aware that the chargor was deceased went ahead to purchase the charged property despite the want of legal right on the part of the chargee, that the Notification of Sale issued to the chargor is void in that no statutory power of sale could have accrued for failure to adhere to statutory procedures, and that the sale be declared a nullity. The plaintiff further prays for a permanent injunction restraining the defendants from executing any transfer and/or engaging in any further dealings whatsoever with the charged property.

Simultaneously with the filing of the plaint the plaintiff lodged an application by way of chamber summons seeking inter alia a temporary injunction in terms of the prayer in the plaint. The grounds for the application are that the statutory power of sale had not accrued; that the notifications of sale were addressed to a deceased person and that statutory provisions of procedure were not adhered to. The application is supported by an affidavit sworn by the plaintiff in which it is deponed inter alia that it has come to his knowledge that the charged property was sold through an alleged public auction on or about 26.4.2005 in satisfaction of an alleged debt owed to the chargee. It is also deponed that the said Garam Investments Limited on instructions of the chargee sent out a Notification of Sale on 3.3.2005 by registered mail that the charged property would be sold by public auction on 26.4.2005. It is further deponed that the 2<sup>nd</sup> defendant (**hereinafter called the purchaser”**) who was aware that the registered proprietor of the charged property was deceased as the deceased was a public figure. It is also deponed that the said notice was invalid for failure to comply with statutory provisions with regard to notices of

sale upon a deceased person. It is further deponed that from the details of the notices the defendants were well aware that the chargor was deceased and that the said property was fraudulently sold the hammer having not fallen on the material day of the alleged sale and later being sold secretly at a gross undervalue and yet the property is valued at over Shs.40,000,000/=.

The application is opposed and the defendants have filed replying affidavits. The 1<sup>st</sup> defendant's affidavit is sworn by one Edward Onyango a credit analyst with the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant's affidavit is sworn by himself. In addition to the replying affidavits, the defendants have also filed defences. The plaintiff has not replied to the defences nor has he filed any further or supplementary affidavit.

The 1<sup>st</sup> defendant in the said relying affidavit states inter alia that the chargee granted to one Zacharia Gakibe t/a Equitorial Builders (**hereinafter called "the borrower"**) a financial facility which facility was secured by a charge over the charged property which was registered in the name of the chargor. The borrower defaulted in the repayment of the amount due to the chargee who instructed its advocates to demand the same. Its advocates sent demand notices to the borrower and the chargor. Copies of the demands are annexed as exhibit "A". The borrower and the chargor failed to pay the sum demanded whereupon the chargee instructed auctioneers to advertise and sell the charged property by public auction which auction was to take place on 25.5.1994. The borrower had filed HCCC No.1850 of 1993 and in that case applied for an injunction to restrain the intended sale. On 24.5.1994 a consent order was recorded in the said suit withdrawing the application, canceling the intended sale and vesting upon the chargee the right to sell the charged property in the event of the borrower defaulting in the payment of the debt. A copy of the consent order is annexed as exhibit "B". The borrower defaulted in the repayment and the chargee once again instructed auctioneers to proceed with advertisement of the charged property for sale by public auction which they did and scheduled the sale for 10.8.1999. Before the sale on 30.7.1999, the borrower filed HCCC No.1531 of 1999 against the chargee and in a simultaneous application sought to restrain the sale of the charged property which application was dismissed. The 1<sup>st</sup> defendant further states that according to the auctioneer a notification of sale was served upon the chargor's daughter-in-law and upon the borrower. The 1<sup>st</sup> defendant further depones that it did not receive any payment within the period set out in the notification of sale or at all and the charged property was sold at a public auction on 26.4.2005. The chargee further states that prior to the sale the property was valued and a reserve price of KShs.23,000,000/= was set. The valuation report is exhibited as exhibit "F".

The 2<sup>nd</sup> defendant in his replying affidavit states that he saw an advertisement in one of daily newspapers of the intended auction of the charged property. On 26.4.2005 he attended the auction and was declared the highest bidder at KShs.23,000,000/=. He executed a memorandum of sale exhibited as annexure "EPM2". He further states that he is a bona fide purchaser for value and no fraud and/or irregularity have been alleged and further that there is no proof that he knew the chargor since being a public figure per se does not translate to being known by everyone.

The application was canvassed before me at length on 22.9.2005 and 27.4.2006 by Mr. Mutiso Learned Counsel for the applicant/plaintiff and Mr. Ougo Learned Counsel for the 1<sup>st</sup> defendant. Mr. Chege Learned counsel opposed the application for the 2<sup>nd</sup> defendant. The advocates elaborated the points raised in their respective clients' affidavits.

Before proceeding to consider the application I will first set out the principles applicable to the grant of an interim injunction. These were laid down in the rule setting case of **Giella –vs- Cassman Brown & Co. Ltd and Another [1973] E.A.358**. They are as follows:-

Firstly the applicant must show a prima facie case with a probability of success. If the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot adequately be compensated in damages. I will consider the application in the light of those principles.

The plaintiff's primary argument is that the auction that took place on 26.4.05 was a nullity because the auctioneers' notices were allegedly sent when the chargor was deceased and infact no notice at all was served under Rule 15(d) of the Auctioneers Rules. The chargor having died could not exercise his right of redemption. Reliance was placed upon the case of **Olato –vs- National Bank of Kenya: HCCC No.665 of 1999 (UR)**. In that case Auctioneers Notice was purportedly served when the chargor was deceased. The auction was for that reason stopped.

Reliance was also placed upon the case of **Joseph Kamau Mwangi –vs- Kenya Commercial Bank Ltd: HCCC No.661 of 2003 (UR)** in which my Learned brother Emukule J held that non-service and issue of notices by an unlicensed person under the Auctioneers Rules was fatal to the exercise of the statutory power of sale by the chargee.

The plaintiff further complains that the charged property was sold at an undervalue which negates the chargee's duty of care to the chargor. The foundation of this argument is that the value given on the Notification of Sale was KShs.36,750,000/= and the plaintiff had had the property valued at KShs.40,000,000/= yet it was knocked down for only KShs.23,000,000/=.

The chargee's principal arguments are that the borrower even before the demise of the chargor, was clearly indebted to the chargee and infact an attempt to sell the charged property had been twice challenged by the borrower ending with a failed application for injunction in 1999. The 3<sup>rd</sup> attempt to sell the charged property ended with the sale of the property for Kshs.23,000,000/= to the 2<sup>nd</sup> defendant. According to the chargee, on the sale of the charged property the chargor's remedy is in damages as provided under the provisions of Section 69 B of the Transfer of Property Act. Reliance was placed upon the case of **Priscillah Krobought Grant –vs- Kenya Commercial Finance Co. Ltd and 2 others: C.A.No.227 of 1995 (UR)** in which the Court of Appeal found that a purchaser at a public auction was protected by Section 69B and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice.

With regard to the complaint raised against non compliance with the Auctioneers Rules, reliance was placed upon the case of **Jacob Ochieng Muganda –vs- Housing Finance Company of Kenya Ltd : HCCC No.1436 of 1999 (UR)** in which Ringera J as he then was held that irregularity on the part of the auctioneer could not invalidate the sale and that the remedy of a person who can prove he has been damnified by the irregularity would be damages against the auctioneer as per Section 26 of the Auctioneers Act.

Further reliance was placed upon the case of **Ze Yu Yang –vs- Nova Industrial Products Ltd [2003] I EA 362** for the proposition that the existence of a valid sale agreement extinguished the equity of redemption and no one had remedies touching on the property both as against the former mortgagee and against the person exercising the power.

Reliance was also placed upon the case of **Komassai Plantations Limited –vs – Bank of Baroda Kenya Limited [2003] 2 EA 535** for the proposition that Rule 15(d) of the Auctioneers Rules which provides for 45 days' notice before sale, was ultravires the Auctioneers Act and its general purpose and was a clog on the power of sale and violated sections 69A and 69B of the Transfer of Property Act as well as sections 65 and 74 of the Registered Land Act.

There was yet further reliance placed upon the case of **Kiran Ramji Kotedia –vs- Trust Bank Ltd: HCCC No.1319 of 1999 (UR)** in which Mulwa J found that non compliance with the provisions of Rule 15 of the Auctioneers Rules would not invalidate a sale and would not by itself entitle the applicant to an injunction.

Finally it was argued for the chargee that the plaintiff's conduct was merely to frustrate the chargor in the proper exercise of its power of sale. The basis of this argument was that since the death of the chargor in 1997 the plaintiff had done nothing until the chargee sought to exercise its statutory power of sale. For the above reasons, it was the chargee's submission that no prima facie case had been made out by the plaintiff.

The 2<sup>nd</sup> defendant's position was simple. He argued that he is a bonafide purchaser of the charged property and has met all the conditions of the auction sale and as there was no allegation of wrong doing on his part the injunction sought should not issue and even if there was such allegation the plaintiff's remedy would be in damages.

Having considered the above contentions I have taken the following view of this matter. The plaintiff made very serious allegations against the defendants in its chamber summons and the supporting affidavit. He alleged that the chargee's power of sale had not accrued and "***the statutory provisions of procedure were not adhered to***". He further alleged that the property was fraudulently sold "***the hammer having not fallen on the material day of the alleged sale and later being sold secretly at a gross under-value***". The plaintiff did not attempt to establish the alleged fraud at all. Indeed there is no allegation of fraud in the plaint nor are any particulars given anywhere in the plaintiff's documents.

It is also illustrative that no submissions were made on the want of or non-service of a statutory notice of sale. The challenge raised that no statutory notice was validly issued by the chargee or that the statutory provisions of procedure were not adhered to remain just that: mere allegations unsubstantiated by evidence.

The thrust of the plaintiff's challenge was directed to the notices or want of the same under the Auctioneers Rules the argument being that as the chargor was deceased no notice of any kind could be validly served. That argument loses its attractiveness when a consideration is given to the documents exhibited by the chargee. I have especially noted exhibit "B" which is an order recorded by consent in HCCC No.1850 of 1993 between the borrower and the deceased chargor the chargee and a company called Mbango Investments Limited. It was ordered by consent inter alia that the proposed sale of the suit property be cancelled on the plaintiff's proposal contained in his letter dated the 24.5.1999 and that in default of any one repayment, the interested party (**the present chargee**) to be at liberty to exercise its power of sale.

In my view there is no doubt that the plaintiff in that case defaulted in his repayment of the sums due to the chargee. This is not in fact disputed by the plaintiff. With the default the chargee was at liberty to exercise its power of sale. It should be noted that that consent order was recorded on 25.5.1994. There is no dispute that the second attempt to restrain the chargee from exercising its statutory power of sale was made in July, 1999 by the borrower in HCCC No.1531 of 1999. The application to restrain the sale of the charged property was dismissed. The plaintiff was not a party to the said suit and did not challenge the intended sale then.

I have perused exhibit "C" annexed to the chargee's affidavit. It is a certificate under Section 15(e) of the Auctioneers Rules. The auctioneer clearly states that apart from serving a notification of sale and a letter of notice upon the chargor's daughter-in-law in person the same documents were served upon the personal representative of the chargor by registered mail. The plaintiff did not file a supplementary affidavit to deny the allegation. In my view therefore, there was substantial compliance with the auctioneers rules. In my view, even if there was non-compliance that alone would not be fatal as I agree with Ringera J as he then was in **Jacob Ochieng Muganda –vs- Housing Finance Company of Kenya Ltd (Supra)** and **Mulwa J in Kiran Ramji Kotedia and Trust Bank Limited (Supra)** that such non compliance is a mere irregularity which would not invalidate the sale herein.

As already found above, no fraud has been shown against the defendants. Indeed none is alleged in the plaint. That being the position the sale to the 2<sup>nd</sup> defendant is clearly protected by Section 69B of the Transfer of Property Act. The Section reads:

**"69B (1) A mortgagee exercising the mortgagees statutory power of sale shall have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights, and encumbrances to which the mortgage has priority, but subject to all estates, interests, rights, and encumbrances which have priority to the mortgage.**

(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground –

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised,

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

The Court of Appeal in **Priscillah Krobought Grant and Kenya Commerical Bank Ltd (Supra)** considered the provisions of Section 69B of the Transfer of Property Act and held that where a chargee had exercised its statutory power of sale and caused the property to be sold by public auction the remedy of the chargor was a claim for damages if she would prove that there was an improper or irregular exercise of the statutory power of sale.

On the authority of Section 69B of the Transfer of Property Act and the above, Court of Appeal decision I find and hold as **Nyamu J did in Ze Yu Yang –vs- Nova Industrial Products Ltd (Supra)** that the sale of the charged property herein extinguished the plaintiff's equity of redemption and he has no remedies touching on the charged property.

With regard to the complaint about the property having been sold at an undervalue I have not been persuaded that that is the case. The chargee in its replying affidavit has deponed that prior to the sale it sought advise on the value of the charged property and the valuers recommended a reserve price of KShs.23,000,000/=. The valuers report is exhibited to the said affidavit as **annexture “F”**. This report is not challenged by the plaintiff. The property was infact sold for the said reserve price of KShs.23,000,000/=. There is no allegation that the said valuers were not qualified to carry out the valuation or that their valuation was influenced in an improper manner.

My above findings show that the plaintiff does not have a ***prima facie*** case with a probability of success at the trial. That being the position, I need not trouble myself with the other conditions for the grant of an interlocutory injunction. This application must fail and is dismissed with costs to the defendants.

Orders accordingly.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2006.**

**F. AZANGALALA**

**JUDGE**

**26.5.2006**

**DATED AND DELIVERED ON 26<sup>TH</sup> DAY OF MAY, 2006.**

**M. KASANGO**

**JUDGE**

**26.5.2006**

Read in the presence of: