



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

**Civil Case 1552 of 2001**

**MARY WAMBUI NJURI .....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA .....1<sup>ST</sup> DEFENDANT**

**JOSEPH GIKONYO**

**T/A GARAM INVESTMENT AUCTIONEERS .....2<sup>ND</sup> DEFENDANT**

**JANE NYAWIRA KINYUA .....3<sup>RD</sup> DEFENDANT**

**RULING**

This is the application of the 3<sup>rd</sup> defendant, who is seeking the striking out of the Plaintiff's suit against her, on the grounds that the plaint does not disclose any reasonable cause of action or any remedy which could be enforced against the said 3<sup>rd</sup> defendant. It is also the applicant's case that following the transfer of title to herself, the suit, as against her, was misconceived, vexatious, untenable, unwarranted, legally absurd and unsustainable in law.

The 3<sup>rd</sup> defendant, (who will hereinafter be cited as "the applicant") was the purchaser of the suit property. The said property had been registered in the plaintiff's name, prior to the transfer to the applicant.

However, after the property was sold and duly transferred to the applicant, it is her case that pursuant to Section 77 (3) of the Registered Land Act, the applicant's title was accorded statutory protection. Therefore, the applicant submitted that the only remedy available to the plaintiff would be for damages, as against either the chargee or the auctioneer, or both of them.

In support of that contention, the applicant cited **ZE YU YANG –VS- NOVA INDUSTRIAL PRODUCTS LTD, HCCC NO. 9 OF 2003**, for the proposition that any irregularity, misrepresentation or fraud would only give rise to a cause of action against the chargee, in damages.

The applicant also cited the decision **in JACOB OCHIENG MUGANDA –VS- HOUSING FINANCE COMPANY OF KENYA LIMITED, HCCC NO. 1436 OF 1999**, to back her contention that for any person damaged by the irregular exercise of a chargee's powers of sale, his remedy was only against the chargee, in damages.

Relying on those two authorities, the applicant pointed out that as the chargee was already a party to these

proceedings, the claim against the applicant should be struck out.

The other issue that was canvassed by the applicant was in relation to the provisions of Order 2 rule 3 of the Civil Procedure Rules, which was said to bar the joinder of any cause of action, to an action for recovery of immovable property, unless the plaintiff first sought and obtained leave of the court to do so.

In this case, the applicant's view is that the plaintiff's claim emanates from the termination of his employment. Therefore, by joining to this claim for immovable property, the claim regarding the termination of his employment, the plaintiff's claim was not properly founded.

In the face of those submissions, the plaintiff first pointed out that at paragraphs 21, 22 and 23 of the Further Amended Plaintiff there were serious allegations of fraud, as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Having perused the Further Amended Plaintiff, I noted that paragraph 21 merely made the statement that the 1<sup>st</sup> defendant did instruct the 2<sup>nd</sup> defendant to advertise and dispose of or sell, by public auction, the suit premises. Therefore, there is no plea of fraud at paragraph 21.

However, at paragraphs 22 and 23 of the Further Amended Plaintiff, there are of assertions illegality, fraud, and collusion. Those assertions were directed at both the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants.

In the light of the pleadings, in which fraud illegality and collusion have been asserted, the plaintiff believes that the Plaintiff cannot be summarily struck out. The main reason advanced by the plaintiff for the said belief is that Section 77 of the Registered Land Act only excuses irregularities, but not an illegality. By way of an example, the plaintiff said that an illegality would arise in cases wherein the auctioneer was un-licensed; or where no debt was due; or if the chargee had failed to issue the mandatory statutory notice. In such circumstances, the plaintiff submitted, the sales would be void. In support of her case, the plaintiff cited **PAUL ETEMESI NANDEBEKWA –VS- ICDC HCCC NO. 82 OF 2001** (at Bungoma)

A reading of that decision reveals that the court made a finding that the chargee had failed to provide proof of service of a statutory notice, as is required by Section 74 of the Registered Land Act. Therefore, the court held that the sale was rendered void. The HON. J. K. SERGON J. went on to state as follows;

**"I have already come to the conclusion that the sale by auction, of the suit premises, was null and void for want of compliance of Section 74 of the Registered Land Act Consequently, a void sale cannot confer any legal proprietary rights or title."**

The learned judge went on to order that although the title was, at the time already registered in the plaintiff's name, that would be reversed, so that the defendants name was reinstated to the title.

The plaintiff also relied on the decision of the HON. J. W. GACHECHE J., in **TRIPLE EIGHT INVESTMENTS (K) LIMITED –VS- CITY FINANCE BANK LTD & ANOTHER, HCCC NO. 1240/2000 (O.S.)**, to backs its contention that the mere fact that a person was the registered proprietor of the suit property could not, by itself, be an automatic bar to the claims by a chargor who was challenging the process which led to the transfer. In that case, the court declined the application by the purchaser, to restrain the former chargor from interfering with the suit property, which had already been transferred to the applicant. Although the applicant was the registered owner, the learned judge made a finding that the sale itself was illegal, as it was conducted in contravention of a court order. She expressed herself as follows;

**"Granted, the applicant might not have been aware of such orders and was a buyer for value, but the illegal act undertaken by the bank in direct contravention of a court order, cannot constitute a legal act against which one can seek cover or protection behind the said sections of the Transfer of Property Act and the Registration of Titles Act."**

Meanwhile, as regards Order 2 rule 3 of the Civil Procedure Rules, the plaintiff submits that the same was inapplicable to this case.

I do accept the plaintiff's contention in that regard. In arriving at that decision, I have derived the benefit of the reasoned decision of my learned brother, the HON. L. NJAGI J., which he delivered in this very case, on 20<sup>th</sup> January 2005. That decision was given in an application which had been filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, who sought to strike out the plaint, as against them. The application was founded on, amongst others, the contention that the suit offended the provisions of Order 2 rule 3. After giving due consideration to the application, the learned judge held as follows;

**"Even though none of the counsel cited any authorities on the point, the import of the old English case of GLEDHILL –VS- HUNTER (1880) 14 CH. 492 is that an action to establish title to immoveable property, not claiming possession, is not an action for the recovery of immoveable property within the meaning of Order II rule 3 so as to require the leave of the court for its joinder with another cause of action."**

Therefore, as the plaintiff herein remains in possession of the suit property, I do concur with my learned brother that this suit does not flout the provisions of O.2 rule 3 of the Civil Procedure Rules.

Moving on from that aspect of the application, I note that in PAUL E. NANDEBEKWA –VS- ICDC, as well as in TRIPLE EIGHT INVESTMENTS (K) LTD –VS- CITY FINANCE BANK & ANOTHER, the courts decisions clearly suggest that the fact of registration of a transfer to a purchaser, does not always provide a foolproof protection to the purchaser. It would appear that if the process leading up to the sale and transfer was illegal or fraudulent, the transfer could still be challenged.

Of course, that position is at variance with the decision in the case of ZE YU YANG –VS- NOVA INDUSTRIAL PRODUCTS LTD (supra). Indeed in that case, the learned judge did come to the conclusion that any person aggrieved by the chargee's exercise of his statutory powers of sale shall have his remedy in damages, only against the person exercising the power. In arriving at that decision, the learned judge held as follows;

**"fraud, misrepresentation and all other possible sins are covered by the terms *irregular exercise of the powers* except in case of fraud subject to what I have said about MULLA'S commentary."**

He went on, elsewhere to say;

**"In terms of the Section such title or transfer can be challenged for fraud or misrepresentation if the transferee was party to such irregularities. That section (which is S. 23 of the Registration of Titles Act), unlike S. 69B of TPA specifically stipulates fraud and misrepresentation."**

All those remarks were made in relation to the Transfer of Property Act. In pertinent part, S. 69B (2) of that statute says that where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable, whether no case had arisen to authorise the sale; or if the due notice was not given; or even if the power was otherwise improperly or irregularly exercised.

In my view, the decision in the case of ZE YU YANG did not address itself to a situation where there was an illegality. I say so because I would hate to imagine that if a chargee disregarded an order of the court, restraining him from selling off a charged property, the subsequent transfer to the purchaser should be held sacrosanct. If that were allowed to happen, crooked chargees would simply rush to transfer properties, so as to put the same beyond the reach of the chargors. And to imagine that the chargor would then be told that the property was lost for good, and that he could only seek to recover general damages against the chargee, does not sound justifiable.

It will be noted that in the case of CENTRAL KENYA LIMITED –VS- TRUST BANK LIMITED & 4 OTHERS, CIVIL APPEAL NO. 215 OF 1996. the HON. KWACH J. A. held as follows;

**"The appellant, it appears, has no right or title left in the suit property unless, of course, it proves at the trial of the suit, the substantive ground of fraud or conspiracy to defraud, to which First National was a party."**

For those reasons, the Court of Appeal declined to give an interim injunction, as the appellant was said to have failed to demonstrate a prima facie case with a probability of success.

Implicit in that finding is the possibility that the appellant may yet adduce evidence to prove fraud or conspiracy at the trial.

That is the view that I hold in this case too. That the law on the issue as to whether or not fraud and illegality should upset a transfer to a person who had purchased a charged property, is not well settled yet. It appears to be an arguable point of law.

Indeed, the parties to this case appear to acknowledge that that is an issue that ought to be determined by the trial court, as they have incorporated the matter on the list of issues which are to be placed before the court which will be hearing this case.

I therefore share the same view as expressed by the Hon. L. Njagi J., in his ruling dated 20<sup>th</sup> January 2005, when he said;

**"Arising out of the above observations, and given the serious allegations levelled against the 2<sup>nd</sup> and third defendants, I don't think that this is a proper case for striking out. It raises serious issues for argument, and the plaintiff should have her day in court."**

Accordingly, the application dated 7<sup>th</sup> March 2006 is dismissed with costs.

Dated and Delivered at Nairobi this 29<sup>th</sup> day of June 2006

**FRED A. OCHIENG**

**JUDGE**