

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

Civil Case 395 of 2006

JOHN GITHI KIGUNDA.....

PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD & ANOTHER

DEFENDANT

R U L I N G

In a plaint filed on 11.7.2006, the plaintiff claims one primary relief that a permanent injunction be issued to restrain the defendants from interfering with L.R. No. Ngong/Ngong/3347 pending the rectification of the register to the plaintiff's name. This relief is sought on the ground that the sale by public auction of the suit property by the first defendant to the 2nd defendant on or about 22.4.2004 was fraudulent and illegal in that there was no notice served of any intended sale; that there was no advertisement of any intended sale; that there was no public auction held; that the second, defendant knew of the plaintiff's interest as it had offered to purchase the same land before the purported auction and that there was no Land Board Consent given to the transaction.

Simultaneously with the filing of the plaint the plaintiff lodged an application by way of a Chamber Summons seeking one substantive prayer that the defendants by themselves their agents and/or servants be restrained from interfering in any way whatsoever with the plaintiff's occupation of the suit property pending the hearing and determination of the suit. The application was expressed to be brought under the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Rules. The application was predicated on the same reasons given in the plaint. The application was supported by an affidavit of the plaintiff sworn on 11.7.2006. The application was opposed and replying affidavits were filed by the defendants. In addition to the replying affidavits, the defendants have filed their defences. The 2nd defendant has also raised a counter-claim against the plaintiff seeking the eviction of the plaintiff from the suit property.

The application was canvassed before me on 31.7.2006 by Mr. Mutiso Learned counsel for the plaintiff, Mr. Njagi Learned Counsel for the 1st defendant and Mr. Odhiambo Learned counsel for the 2nd defendant. From the affidavit evidence and the submissions made to me by counsel, the plaintiff makes three primary complaints. The first one is that there was no advertisement of the intended sale of the suit property. The plaintiff argues that when the suit property was advertised for auction, the successful bidder was one George Adams Maina but he withdrew his bid due to prolonged proceedings in HCCC No.110 of 2004. After the withdrawal of the bid by Mr. Maina no other advertisement ever took place. In the plaintiff's view, therefore the sale and subsequent transfer to the 2nd defendant was fraudulent and illegal as he was not served with a notice of intended sale which sale was not advertised and no auction took place.

The 1st defendant's answer to that complaint is that only one auction sale of the suit property took place on 16.7.2004 and the real highest bid was made by the said George Adams Maina. His bid was however as a nominee of the 2nd defendant to whom the suit property was transferred for valuable consideration of KShs.18 million. Further to that answer the 1st defendant contends that the plaintiff had in HCCC No.110 of 2004 sought to restrain the 1st defendant from advertising for sale, transferring and/or in any way alienating the suit property. The application was dismissed. In the same case in a

subsequent application the plaintiff had again sought an injunction to restrain the 1st defendant and the said George Adams Maina from transferring the suit property pending the hearing and determination of an intended appeal. That application was again dismissed. In the premises, the 1st defendant contends that this application is resjudicata as against it.

On behalf of the 2nd defendant it is contended that indeed, the said George Adams Maina attended and bid at the said auction of 16.7.2004 as its nominee and there was no truth in the allegation that he withdrew his bid because of the prolonged proceedings in HCCC No.110 of 2004.

On my own examination of the material availed to me, I am satisfied on a prima facie basis that the 1st defendant through its agents indeed advertised the intended sale of the suit property. The plaintiff was served with the relevant notices and sale notification and in fact unsuccessfully challenged the intended sale and transfer in HCCC No.110 of 2004. The 1st complaint made by the plaintiff is therefore without merit and is rejected.

The second complaint made by the plaintiff is that there was no public auction of the suit property. That complaint as discussed above has not been well taken. In HCCC No.110 of 2004, the plaintiff expressly admitted that indeed a public auction was held on 16.7.2004. Subsequent to the auction the plaintiff sought to restrain the transfer of the suit property pending the hearing and determination of a proposed appeal. That application was dismissed by Mutungi J on 3.6.2005. I do not find as serious the plaintiff's argument that the said George Adams Maina withdrew the bid he had made at the auction of 16.7.2004. The argument is unsupported and in my view is made in an attempt to find a basis for this application.

The third complaint made by the plaintiff is that no Land Board consent was given for the transfer to the 2nd defendant. The first defendant through its Relationship Manager Mr. Halkano Molu has exhibited "HM6". It is a copy of a letter of consent dated 6.12.2005 given by Oloolaiser Land Control Board to the transfer of the suit property from the 1st defendant to the 2nd defendant. That consent appears to have been accepted by the Land Registrar since on 15.5.2006, he registered the transfer in favour of the 2nd defendant. The letter exhibited as "JK3" by the plaintiff to his supporting affidavit in my view, does not advance the plaintiff's case significantly. The letter was written in July 2006 and refers to the plaintiff as the proprietor of the suit property when in fact at the time the suit property had already been transferred to the 2nd defendant. The letter does not also appear to have been written by the Land Control Board that considered the transaction between the defendants. In any event the letter states that any transaction pertaining to the suit property could not be traced. In my view that statement cannot conclusively be taken to mean that the relevant Land Control Board did not consider and approve the transfer of the suit property between the defendants.

On my part however, I am satisfied on a prima facie basis that the transfer between the 1st defendant and the 2nd defendant received the approval of the relevant Land Control Board. The plaintiff's third complaint is therefore in my view without merit.

As none of the plaintiff's primary complaints have not found favour with me, the result is that the plaintiff has failed to show a prima facie case with a probability of success at the trial. I am in no doubt as to this finding. I need not therefore consider the other two conditions for the grant of an interlocutory injunction as laid down in the precedent setting case of **Giella – vs – Cassman Brown and Company Limited and Another [1973] E.A 358.** However, even if the plaintiff would have shown a prima facie case with a probability of success, I would have held that the resultant injury to him would adequately be compensated in damages, if the injunction is not granted. If I were to decide this application on a balance of convenience, I would have found that the same tilts in favour of refusing the injunction sought. This is because, the plaintiff admits having charged the suit property to the first defendant for a credit facility of Kshs.7.8 million. That admission is in the plaint and in the affidavit in support of this application. There is no allegation that the said facility was settled. The indebtedness of the plaintiff to the 1st defendant is therefore beyond question. Yet the plaintiff makes no attempt to show how the indebtedness would be

dealt with if his application were to succeed. Besides, the plaintiff's previous attempts to challenge the 1st defendant's exercise of its statutory power of sale have all come to nought. The scape goat now used that the said George Adams Maina withdrew his bid at the auction sale is a red herring since the said Maina is not complaining. As I said in HCCC No.110 of 2004, there was no way the plaintiff could repay his indebtedness to the 1st defendant and he could not therefore benefit from an injunction then. That was on 21.5.2004. I am still of the same view. If the property had not been sold, the 1st defendant would be the worse off.

In the end, the plaintiff's application dated and filed on 11/7/06 is without merit and is dismissed with costs.

DATED and DELIVERED at NAIROBI this 11TH day of OCTOBER, 2006.

F. AZANGALALA

JUDGE

11/10/2006

Read in the presence of:-