



REPUBLIC OF KENYA

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

Civil Suit 1318 of 1997

BANK OF BARODA.....PLAINTIFF/RESPONDENT

VERSUS

KENYA RECLAIMED RUBBER (1985) LTD.....1ST DEFENDANT

MOSES MBUGUA MWANGI.....2ND DEFENDANT/APPLICANT

CRITIN MITHIRI MBUGUA.....3RD DEFENDANT

LAWRENCE TONY KURIA.....4TH DEFENDANT

JOYCE WAITHIRA KURIA.....5TH DEFENDANT

R U L I N G

Delay in preparation and delivery of this ruling has been caused by my recent illness, hospitalization and long recuperation. The same is regretted.

This is an application by the 2nd Defendant by chamber summons dated 17th May, 2006 seeking two main prayers as follows:-

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d) That the Plaintiff do unconditionally avail to the 2nd Defendant the details of the sale transaction of the property known as KIAMBU/RUIRU TOWN/220 to any third party.

e) That the purported sale of the 2nd Defendant’s property known as KIAMBU/RUIRU TOWN/220 below its value be cancelled and/or nullified.

f) -----”

The application is stated to be brought under Order 39, rules 1 (a) and 3 of the Civil Procedure Rules; section 3A of the Civil Procedure Act; and sections 128 (1) and 4 (2) of the Registered Land Act, Cap. 300. The grounds for the application stated on the face thereof are:-

“(i) That the Plaintiff has, despite written requests by the 2nd Defendant’s advocates, refused to disclose the details of the sale of the 2nd Defendant’s property herein.

(ii) ***That the Plaintiff alleges to have sold the 2nd Defendant's property at Kshs.14,250,000.00 yet in May 2005, the Plaintiff had authorized auctioneers to sell the property at a reserve price of Kshs. 25,000,000.00.***

(iii) ***That the property's current value is Kshs.46,000,000.00.***

(iv) ***That according to the Plaintiff, the claim herein stands at over Kshs.100,000,000.00, yet they allege to have sold the same at Kshs.14,250,000.00, way below its value.***

(v) ***That it is clear that the alleged sale herein did not take into consideration the 2nd Defendant's interests.***

(vi) ***That the alleged sale is unfair and the Plaintiff acted negligently."***

There is an affidavit of the 2nd Defendant sworn in support of the application to which various documents are annexed.

The Plaintiff has opposed the application upon the following grounds (grounds of opposition dated 22nd May, 2006):-

"1. The application lacks merit and is an abuse of the process of the court.

2. The property has not been sold at an undervalue.

3. The Applicant has not met the conditions in GIELLA V CASSMAN BROWN to merit an injunction.

4. Damages are an appropriate remedy.

5. The Applicant has given no undertaking as to damages."

There is a replying affidavit sworn by one Gandhi Jayakumar Keshavdas, a senior manager of the Plaintiff.

I have considered the submissions of the learned counsels appearing after reading the supporting and replying affidavits and also after perusing the court record. On 8th October, 2002 the court (Mbaluto, J.) allowed as prayed and by consent the Plaintiff's application by notice of motion dated 19th September, 2002. In that application the Plaintiff had sought leave of the court to sell the 2nd Defendant's charged property, namely, KIAMBU/RUIRU TOWN/220, by private treaty. The supporting affidavit discloses that after diligent attempts to get a good price for the property the Plaintiff was unable to sell the property by private treaty. The Plaintiff then decided to sell the property by public auction, as it was no doubt entitled to do under the law and also under the charge instrument, the 2nd Defendant being in default. Before exercising its statutory power of sale the Plaintiff issued the necessary statutory notice and notifications. The 2nd Defendant now complains that his property was sold at an under-value. It is true that the sale by public auction did not realize a price anywhere near the value of the property. But then, forced sales rarely realize prices comparable to the value of the property sold. In any event, under section 77 (3) of the Registered Land Act, Cap. 300, the 2nd Defendant's remedy for any loss suffered because of the Plaintiff's alleged irregular exercise of its statutory power of sale, lies in damages.

It is also doubtful that the 2nd Defendant can in the present application obtain an order to cancel or nullify the sale of the property. A third party has acquired rights to the property. He is not a party to this present suit and no attempt has been made to enjoin him. Secondly, it appears to me that a proper suit would be necessary for that kind of order to be issued. There is no such suit herein as the 2nd Defendant did not file any counter-claim. In effect therefore, the 2nd Defendant has not established any prima facie

case with a probability of success, and as already held, damages would be an adequate remedy for any loss he may have suffered. I must therefore refuse the application for cancellation or nullification of the sale which in reality is an application for a mandatory injunction.

Regarding the prayer for the Plaintiff to avail to the 2nd Defendant details of the sale of the property, I think the 2nd Defendant is entitled to that information, if it has not already been given to him. The replying affidavit does not state that the information was given to him. I will allow that part of the application and order that the Plaintiff do supply to the 2nd Defendant, if it has not already done so, details of the sale transaction of the property KIAMBU/RUIRU TOWN/220 within fourteen (14) days of delivery of this ruling. The application is otherwise refused with no orders to costs. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 1ST DAY OF DECEMBER, 2006.