



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE NO. 147 OF 2004

BOMET BEER DISTRIBUTORS LTD.....1ST PLAINTIFF
WILSON MARITIM LASOI.....2ND PLAINTIFF
VERSUS
KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT
JOHNSON MITEY.....2ND DEFENDANT
MOSES KORIR.....3RD DEFENDANT
GARAM INVESTMENTS.....4TH DEFENDANT
JOEL KIPKIRUI BETT.....5TH DEFENDANT

RULING

This is an application made under the provisions of **Order XXXIX Rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules, Section 77 of the Registered Land Act and Section 3A of the Civil Procedure Act** by the plaintiff seeking orders that the defendants by themselves or their agents or servants be restrained by temporary injunction from obtaining consent to transfer, transferring or taking possession or in any manner whatsoever interfering with the plaintiff's ownership and possession of land reference numbers ***Kericho/Silibwet/1437/Bomet and Kericho/Silibwet/261/Bomet***. The application is supported by the annexed affidavit of Wilson Martim Lasoi and the grounds stated on the face of the application. The application is strenuously opposed. The 1st and 4th defendants filed grounds of opposition. In summary, they state that the 2nd plaintiff's equity of redemption was extinguished when the hammer fell and therefore the chargee was by law entitled to complete the transfer to the highest bidder. The 5th defendant filed a replying affidavit opposing the application.

I have considered the arguments that were made before me by the counsels of the parties to this suit. I have also carefully read the pleadings filed by the parties to this application. The issue for determination is whether the plaintiffs have established a prima facie case to enable this court grant him the orders of injunction sought. It is conceded that the plaintiffs charged the suit properties to the 1st defendant to secure a loan. It is not disputed that the plaintiffs failed to repay the said loan advanced. The plaintiffs were issued with a statutory notice. Upon the expiry of the statutory notice period, the properties were advertised for sale. The 5th defendant attended the public auction, bid for the properties and was declared to be the successful highest bidder. The properties were knocked down to the 5th defendant. He paid the entire purchase consideration soon after the public auction was held on the 17th of May 2004.

The plaintiffs initially filed an application for injunction against the defendants on the 26th of May 2004. The plaintiffs however withdrew the application for injunction on the 1st of December 2004. They alleged that they withdrew the said application because an understanding had been reached with the defendants that the main suit was to go to full trial. According to the plaintiffs, they were constrained to

file the current application for injunction when they learnt that the 5th defendant had applied to the Local Land Control Board to be granted consent to have the said properties transferred to him. The plaintiffs were outraged that the 5th defendant had attempted to obtain the consent of the Local Land Control Board, yet the suit filed had yet to be heard and determined on merits.

I have considered the issues argued before me by the parties in this suit. What the plaintiffs are saying in essence is that the sale by public auction which was conducted on the 17th of May 2004 by the 4th defendant on instructions of the 1st defendant whereby the 5th defendant purchased the suit properties was fraudulent and ought to be set aside. The plaintiffs are saying that their equity of redemption of the said properties were not extinguished by the alleged fraudulent sale which was conducted on the 17th of May 2004. What is the legal position in this regard? In **Jacob Ochieng' Muganda –versus- Housing Finance Company of Kenya Ltd C. A. No. NAI 453 of 2001 (UR 241/2001)** (unreported) it was held by the Court of Appeal at page 7 that:

“If there was any irregularity in the conduct of the auction the applicant would be entitled to damages against the auctioneer pursuant to Section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licenced auctioneer shall be entitled to recover damages directly suffered by him from the auctioneer by action.”

In **Margaret Anyango –versus- National Bank of Kenya Ltd & Anor Nairobi HCCC No. 2533 of 1992** (unreported) the court held that

“Section 77(1) of the Registered Land Act Cap 300, Laws of Kenya gives the chargor a right to redeem the charge at any time before it has been sold by the charge in exercise of the statutory power of sale. The provision also clarifies that for the purpose of the subsection, a sale shall be deemed to have been effected when a bid has been accepted at the auction sale. Section 74(2) (b) empower the chargee to sell the charged property if default is made in repayment of the agreed sum after the expiry of three months notice to comply served on the chargee. Section 77 (1) enjoins the charge to act in good faith and have regard to the interest of the chargor when exercising the power of sale. Subsection (2) confers on a chargee a right to recover possession of the land charged upon a bid being accepted at the auction sale. And subsection (4) states that upon registration of the transfer, the interest of the chargor shall pass to and vest in the transferee free from all liabilities on account of the charge. From these provisions it is plain to me that a chargee’s right to redeem the charge is extinguished once a bid has been accepted at the auction.”

In **Kitur & Anor –vs- Standard Chartered Bank & Anor (No. 2) [2002]1 KLR 640** at page 645. It was held that:

“The law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneer, shall be compensated by an award of damages (See Section 77(3) of the registered land Act and Section

26(1) of the Auctioneers Act.”

There are other decisions made on this point but the above referred cases will suffice for the purposes of this application. What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.

In the present case, the chargee in exercise of its powers of sale under a charge sold the suit properties in a public auction. The plaintiffs are now complaining that the said sale was irregularly conducted. They are seeking injunctive orders of this court to restrain the said property from being transferred to the transferee who purchased the said properties in a public auction. The principles for the grant of interlocutory injunction are now well established. In the landmark case of **Giella –versus- Cassman Brown [1973] EA 358** it was held that an injunction would be granted where an applicant establishes a prima facie case. The applicant is further required to establish that he would suffer irreparable loss which may not be compensated by an award of damages. If the court fails to decide the case on the two principles stated above, then it would decide whether or not to grant the injunction based on a balance of convenience.

In the present application, the plaintiff's have not established a prima facie case. The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they were are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5th defendant who purchased the property in the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction. In the premises therefore and for the reasons stated, the application for injunction must fail. It lacks merit. It is hereby dismissed with costs to the defendants.

DATED at NAKURU this 25th day of February 2005.

**L. KIMARU
JUDGE**