REPUBLIC OF KENYA

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IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 558 OF 2004

ANDREW OUKO :: PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD ::::::::::::::::::::::::1st DEFENDANT

KENYA AIDS NGO CONSORTIUM ::::::::::::::::::::::2ND DEFENDANT

PATRICK KAMUNYU ::3rd DEFENDANT

JAMES NJUGUNA :: 4th DEFENDANT

RULING

By a Plaint dated 10th October, 2004 and filed on 14th October 2004 the Plaintiff prayed for a declaration that the sale of L.R. No.11877 on 2nd September 2004 to the 2nd and 3rd Defendants was null and void abinitio and did not pass any title to the said 2nd and 3rd Defendants and therefore an injunction should issue restraining the Defendants by themselves, their agents, or servants from transferring or dealing in any way with the said property pending determination of the suit. The Plaintiff further sought an order nullifying and/or canceling the said sale. The Plaintiff also claimed damages. The sale which was sought to be cancelled was effected by a firm of auctioneers called Garam Investment Limited on the instructions of the 1st Defendant in the exercise of its statutory power of sale. In the Plaint the Plaintiff alleged that the purported exercise of the statutory power of sale was illegal, null and void as the necessary 90 days statutory notice was never served and that at the time of the purported exercise of the power of sale there existed no person vested with the right of redemption against whom the notice could be served and if there was such a person no notice was duly served upon him.

Consequently, the purported sale was null and void abinitio and passed no title or right of ownership to the 2nd and 3rd Defendants in law or equity.

Simultaneously with the Plaint the Plaintiff filed an interlocutory application seeking primarily one prayer which was that the Defendants , their servants and or agents be restrained from lodging with the Registrar of Titles, Nairobi a transfer or any other document that would transfer the ownership of the suit property pending determination of the suit. The application was supported by the Plaintiff's affidavit in which he deponed that he was the administrator of the estate of his late father Jason Moracha Atinda Ouko who died on 2nd September, 1996 and before his death had charged the suit title to the 1st Defendant for about 9.2. million for the benefit of a company called Kaputiei Meat Products and the family of the deceased believed that having informed the 1st Defendant of the death of his father the chargor the 1st Defendant would recover the charge debt from the said company as the principal debtor. The Plaintiff further swore that despite the death of his father the 1st Defendant purported to exercise its statutory power of sale and sold the suit property to the 2nd and 3rd Defendants for Ksh s16.2 million which was far below their

valuation of Kshs 45 million. The Plaintiff further swore that service of the statutory notice of sale was not possible as there was no administrator of the estate of his late father. The Plaintiff further deponed that he was aware that the Official Receiver had applied for a Limited Grant but the said Official had declined to institute the injunction proceedings leaving him with no alternative but to apply for a Limited Granted himself which grant he obtained on 28th September, 2004.

The Application was opposed. The Defendants filed Replying Affidavit. In the Affidavit sworn by Edward Onyango the 1st Defendant's Credit Analyst it was deponed that the Plaintiff's late father charged the suit property to the 1st Defendant for a financial facility granted to Kaputiei Meat Products Limited. The said company defaulted and a demand was made for payment of the sums owing to the 1st Defendant. The company sought indulgence from the 1st Defendant for 12 months repayment moratorium which the 1st Defendant granted but the company did not honour its promise with the result that realization of the 1st Defendant's securities commenced.

The said Edward Onyango further swore that in l996, Rosalyin Dola Ouko, Aaron Ouko and David Scott Ongosi claiming to be relatives of the chargor filed HCCC No.1438 of 1996 against the 1st Defendant seeking to restrain the sale by public auction which had been scheduled for 19.6.96. On 17.6.296 an interim order restraining the said sale was issued. The said company again sought indulgence from the 1st Defendant but the promises made were not kept leading to another advertisement to sell the suit property on 19.2.97. The Public Trustee then intervened on behalf of the estate of the chargors and the 1st Defendant on its own suspended the sale. The said Edward Onyango further swore that no payment was made by the Public Trustee. Two suits HCCC No.944 and 1074 of 2004 were subsequently filed by persons claiming to be administrators of the estate of the chargor. In HCCC No.1074 of 2004, the Plaintiff therein filed an affidavit in which he deponed that a limited grant of probate of the estate of the chargor was granted to him jointly with the Plaintiff in this suit. The said Edward Onyango swore that the suit property was sold to the 2nd Defendant.

The original 2nd and 3rd Defendants in their Replying Affidavit deponed that the property had been sold to the 2nd Defendant in the amended Chamber Summons. This averment led to the filing of an amended plaint in which the purchaser Kenya Aids NGO Consortium was introduced as the 2nd Defendant. The Amended Plaint was filed on 29th November, 2004.

One Allan Ragi the Executive Director of the 2nd Defendant in the amended plaint deponed that the 2nd Defendant was irregularly enjoined to the proceedings as the same was without leave. He also swore that the Plaintiff could not maintain the proceedings without joining the Plaintiff's co-administrator and further that as the grant issued to the Public Trustee had not been revoked the Plaintiff's suit was incompetent especially in the light of the fact that the Public Trustee had in fact filed HCCC No.944 of 2004 which suit was pending before this Court.

Allan Ragi also swore that the Plaintiff's co-administrator David Scott Ongosi had filed HCCC No. 1074 of 2004 which suit was pending before this Court. He also deponed that the 2nd Defendant had lawfully bought the suit property at an auction sale on 2.9.2004 where it was the highest bidder and the purchase price of Kshs 16 million was the forced value of the suit property. Consequently it was not true that the property had been sold at an under value. The said Allan Ragi further averred that the sale of the suit property to the 2nd Defendant was unimpeachable as the Plaintiff's equity of redemption had been extinguished under the provisions of section 60 of the Indian Transfer of Property Act 1882. The Affidavit of the said Allan Ragi further argued that the Plaintiff had not demonstrated that damages would not be an adequate remedy and in the circumstances the Plaintiff had not made out a prima facie case.

The Plaintiff put in a further affidavit sworn on 1st March 2005 in which he deponed that the Public Trustee obtained a limited grant without the Plaintiff's knowledge and further failed to notify the Plaintiff of the correspondence exchanged between the Public Trustee and the firm of Oraro & Co. Advocates. He further deponed that the said correspondence did not include a valid statutory notice as the Public Trustee had no powers to meet the 1st Defendant's demand.

The Application was canvassed before me on 4th March, 14th March and 25th March 2005 by Mr

Mureithi, Learned Counsel for the Plaintiff, Mr. Ougo Learned Counsel for the 1st Defendant and Mr. Angima Learned Counsel for the 2nd, 3rd and 4th Defendants. Counsel for the Plaintiff recited the averments in the Supporting Affidavit and submitted that the Plaintiff had established a prima facie case with a probability of success that the purported sale was null and void abinito as a statutory notice had not been served as a grant of Representation had not been obtained in respect of the estate of the chargor. Counsel argued that the Limited Grant issued to the Public Trustee did not entitle the Public Trustee to receive and act on the purported notice served upon him. Counsel also submitted that even if the said notice could be taken as valid, the same gave the Public Trustee inadequate notice and the subsequent sale was not valid. Reliance was placed on the case of **Trust Bank Ltd –v- Ebos Chemists Ltd Nairobi C.A. No. 133 of 1999 (UR)** for the proposition that a statutory notice must give three months period after service of the notice to the chargor for the notice to be valid. Counsel also relied upon the case of **Zachary Warwimbo Ruhangi & 2 Others –v- Standard Chartered Bank of Kenya and 2 others HCCC. No.885 of 1999**. I did not see the relevance of this case. Indeed in my view the decision in the case advances the Defendant's case.

Counsel also submitted that the Notification of sale by the auctioneer was not a valid notice and offended the rules made under the Auctioneers Act because the addressee was deceased.

Regarding the auction sale, Counsel submitted that the same was not valid as it was pursuant to a void exercise of Power of Sale and Section 69 of (2) offered no protection to the purchasers. For this proposition Counsel relied upon **Gatonye Victor Kariuki and another –v- The Cooperative Bank of Kenya and 3 others: HCCC No.479 of 2003 (UR.).**

__ Mr. Ougo Learned Counsel for the 1st Defendant vigorously opposed the Application. His opposition was multibarrelled. He submitted that the Plaintiff had no *lucus standi* to bring the action in the light of the fact that the Grant issued to the Public Trustee had not been revoked and further that the subsequent Limited Grant issued was to the Plaintiff together with one David Scott Ongosi who was not enjoined to the suit. The existence of the two Limited Grants had led to a multiplicity of suits filed by the administrators named in the Grants. Counsel submitted that the Plaintiff had not disclosed the other suits in the Plaint and was therefore guilty of material nondisclosure. In Counsel's view this alone disentitled the Plaintiff to the equitable remedy of injunction. Counsel further submitted that the Public Trustee having obtained the 1st Limited Grant was the one entitled to come to Court in the shoes of the chargor. Reliance was placed on the case of **Nairobi Mamba Village –v- National Bank of Kenya (2002) 1 E.A. 197** in which Ringera J. as he then was observed that the only person who can legitimately complain that the power of sale is being exercised unlawfully irregularly or oppressively is the chargor. This position had already been stated by the Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –V- Afraha Education Society (2001) 1 E.A. 86** where their Lordships stated that a person without a registered interest in land had not demonstrated a prima facie case with a probability of success.

Counsel further placed reliance upon the case of ***Mrao Limited –V- First American Bank of Kenya Limited and others: Mombasa C.A.No 39 of 2002*** for the proposition that the Plaintiff had not shown a prima facie case with a probability of success as the chargor's liability to the 1st Defendant had never been disputed.

On whether or not damages would be an adequate remedy for the Plaintiff Counsel for the 1st Defendant submitted that under Section 69 B of the Transfer of Property Act, this was the only option left to the Plaintiff after the auction sale. Counsel placed reliance on the case of **Ze Yu Yang –V- Nova Industrial Products Ltd (2003) 1 E.A.362** for the proposition that the existence of a valid sale agreement extinguished the equity of redemption of the chargor or mortgagor whose remedy lay in damages. For the same proposition Counsel for the Defendant placed reliance on the case of **Jacob Ochieng Mugada –V- Housing Finance Company of Kenya Ltd: HCCC. NO.1436 of 1999 (UR).**

Counsel further submitted that the Plaintiff had not done equity and could not obtain an equitable remedy. Besides the debt was not disputed. Yet no payment had been made. Reliance was placed upon the case of **Maithya –V- Housing Finance Co. of Kenya and Another (2003) 1 E.A. 133** where Nyamu J. stated that failure to service the loan or pay into Court of sums admitted removed an Applicant from the

realm of the exercise of the discretion to grant an injunction. Counsel further relied upon this case for the proposition that as securities are valued before lending loss of the same by sale is clearly contemplated by the parties even before the security is formalized. Consequently damages are clearly an adequate remedy.

Counsel reiterated the averments in the affidavits in opposition that valid notices were served both under the charge and under the Auctioneers Act. In the premises Counsel urged me to dismiss the Plaintiff's application with costs.

Mr. Angima Learned Counsel for the 2nd, 3rd and 4th Defendants associated himself with the submissions made by Counsel for the 1st Defendant. He however, emphasized that the 2nd Defendant had been improperly enjoined to the proceedings without the leave of the Court. for this proposition he relied upon the case of **American Life Insurance Co. –V- Factory Guards Ltd: HCCC No. 997 of 1975 (UR).**

Counsel further emphasized that the Plaintiff had not in the title of the plaint disclosed his capacity which capacity had also to be endorsed on the summons to enter appearance. According to Counsel this failure was fatal to the Plaintiff's suit.

Counsel also argued that the 2nd Defendant as purchaser cannot be challenged and the sale is not impeachable by dint of the provisions of Section 69 B(2) of the Transfer of Property Act. The auction sale in Counsel's view extinguished the Plaintiff's equity of redemption. In the premises the Plaintiff had not shown a prima facie case with a probability of success and even if he had shown the same damages would be an adequate remedy for the Plaintiff.

In a brief reply Mr. Mureithi reiterated that the Plaintiff had locus standi to bring the action and that failure to enjoin the Defendant's co-administrator was not fatal. On the issue of leave to enjoin the 2nd Defendant Counsel submitted that failure to obtain leave was not fatal and the Court can still maintain the 2nd Defendant to the proceedings.

Before I consider the application let me first set out the obvious i.e the principles applicable for the Grant of an interlocutory injunction. These were set out in the precedent setting case of **Giella –v- Cassman Brown & Co. Ltd and Another (1973) E.A. 358.** They are as follows:- First, the Applicant must show a prima facie case with a probability of success but if the Court is in doubt it should decide the application on a balance of convenience. Secondly normally a temporary injunction will not be granted unless the Applicant would suffer an injury which cannot be compensated in damages. It appears to me that the first issue to resolve is whether or not a valid statutory notice was served. A perusal of the material availed through the affidavits shows that the letter dated 24th February, 2004 annexed to the Replying Affidavit of Edward Onyango aforesaid was relied upon as the Statutory Notice of Sale. This letter warned that if payment was not made within three (3) months of service of the letter the statutory power of sale would be exercised. In my view a plain reading of this letter shows that a period of three months from the date of service of the letter was given to the Public Trustee to redeem the charged property. On a prima facie basis in my view the period given in the notice was adequate as a sale would only take place three months after the said notice.

As to whether or not service upon the Public Trust was valid service, I have no hesitation in holding that at the time the Public Trustee was in possession of a Limited Grant of Representation to the estate of the chargor. He was therefore in law the body to be served. There is no averment that the Public Trustee did not receiver the said Statutory Notice. The Plaintiff's argument that the Public Trustee could not validly receive the said Statutory Notice is in my view not a serious one.

The Plaintiff also complained against he auctioneers notice dated 29th June 2004 annexed to his further affidavit sworn on 1st March 2005. Although this notice gave adequate notice it was addressed to the deceased chargor. In my view such a notice cannot be said to be in accordance with the Auctioneers Act.

The next issue to resolve is the effect of the invalid auctioneer's notice to the sale that was made to the 2nd Defendant. In my view failure to correctly address the party to be served with the notice in the

circumstances of this case is not fatal and is not sufficient to vitiate the auction sale. On a *prima facie* basis I find that the failure to correctly address the person to be served with the notice by the auctioneer is an irregularity which did not invalidate the sale to the 2nd Defendant.

It appears to me that even if I had been convinced that the Statutory notice of sale was not valid and that the auctioneer's notice was not a mere irregularity, a plain reading of Section 69 B of the Transfer of Property Act clearly shows that a subsequent or resulting auction sale cannot be impeached. The section reads:-

(1) A mortgagee exercising the mortgagee's 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 mortgagee.

(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;

(b) that due notice was not given or

(c) that the power of sale was 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."

It does appear on a prima facie basis that in the present case the only remedy of the Applicant would be in damages in the event that he will be able to prove that the 1st Defendant exercised its Statutory power of Sale improperly or irregularly.

Turning to the second condition for the grant of an interlocutory injunction the record of this matter shows that both sides to the dispute put a valuation to the suit property. It follows therefore that the Plaintiff could be adequately compensated in damages. The suit property was charged to the 1st Defendant for a known sum. It has also been sold to the 2nd Defendant for a specific sum. Accordingly the Plaintiff's Application would fail on this second test also.

In my mind however, I have no doubt that the Plaintiff does not have a prima facie case with a probability of success at the trial. I did not even have to consider the other conditions set in the **Giella –V- Cassman Brown and Co. Ltd & Another (supra).**

Before concluding this matter, the Plaintiff's conduct has caused me grave concern. He joined the 2nd Defendant without the leave of the Court. He obtained an exparte interlocutory injunction without disclosing that under the Limited Grant issued on 28th September, 2004, he had been appointed Administrator of the estate of the chargor together with one David Scott Ongosi. He did not also disclose that the said David Scott Ongosi together with 2 other persons had instituted Nairobi HCCC No.1438 of 1996 seeking an injunction against sale of the suit property. He further did not disclose that the same David Scott Ongosi together with the Public Trustee and 2 others had instituted Nairobi HCCC No. 944 of 2004. Seeking an order nullifying/canceling the sale of the suit property to other parties.

In my view the above were material non-disclosures and if the same had been disclosed at the ex-parte stage of these proceedings the Plaintiff would not have been granted the interlocutory ex-parte injunction. On my part even if I had found that the Plaintiff had shown a prima facie case with a probability of success, these nondisclosures would have disentitled the Plaintiff to the equitable relief of injunction. This

is not a new principle. Courts have always applied the same principle for as long as I can remember. In the English case of the **King –v- the General Commissioners For the Purposes of the Income Tax Acts for the District of Kensington (1917) 1 KB 486** the Learned Chief Justice Viscount Reading expressed himself as follows:-

> ***"Where an ex parte application has been made to this Court for a rule nisi or other process if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such away as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of the merits. This is a power inherent in the court but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the Applicants affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the results of this examination is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."***

And Lord Warrington L.J. in the same case delivered himself as follows:-

> ***"The Court will not allow a Plaintiff to obtain any advantage from an ex-pare injunction which he has improperly obtained."***

And Lord Scrutton L.J. in the same case at page 514 delivered himself as follows:-

> ***"…The Court is supposed to know the Law. But it knows nothing about facts and the applicant must state fully and fairly the facts and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action it has taken on the faith of imperfect statements……"***

A Plaintiff applying ex-parte comes (as it has been expressed) under a contract with the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction that any material fact has been suppressed or not properly brought forward, the Plaintiff is told that the Court will not decide on the merits and that, as he has broken faith with the Court, the injunction must go."

Applying the principle expounded in the said English case, I would have held that the Plaintiff was guilty of material non-disclosure and on that basis the ex-parte temporary injunction would have had to go even without considering the merits of the Application.

The upshot of the above consideration of the application dated 12th October, 2004 is that the same is dismissed with costs to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-