



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
COMMERCIAL DIVISION MILIMANI  
Civil Suit 664 of 2004**

**WINAM PETROLEUM PRODUCTS.....1ST PLAINTIFF**

**ZEPHANIA JUMA AJOWI.....2ND PLAINTIFF**

**VERSUS**

**KENYA SHELL LIMITED.....DEFENDANT**

**R U L I N G**

The plaintiff's by their summon have come under Order 59 Rule 1,2,3 and 5 of the Civil Procedure Rules seeking an injunction to restrain the defendant from disposing, transferring, alienating or passing possession of the suit property known as L.R. 1870/116/1V. There is a second prayer, although it was not canvassed at the hearing; that is an order to restrain the defendant its servants or agents from evicting the 2nd defendant from the suit property.

The plaintiff accepts that they are indebted to the defendant. That the defendant's advance was secured by a charge over the 2nd plaintiff property that is the suit property.

Indeed the 2nd plaintiff in his affidavit in support of the application stated that the 1st plaintiff's indebtedness rose to over kshs 80 million and in time the plaintiffs had repaid a total of kshs 40 million.

The 2nd plaintiffs further deponed that the defendant began to act in a "bullish way" and in "bad faith" because; he or his representatives have always attended schedule but no auctions have been conducted; that the plaintiff's neighbour, Gaetano Ruffo has conspired with the defendant to buy the suit property and is now purported to have bought the property at public auction on 28th May 2004; that on that day because the plaintiff's representative confirmed that no money was paid by that purchaser; that no transfer has been lodged against the property. That the 2nd plaintiff on 2nd December offered to redeem the property by paying kshs 10, 000 when the defendant declined on the basis that the property had been sold.

The plaintiff's learned counsel Mr. Ocharo asserted that no sale had taken place of the charged property because no transfer had been effected and accordingly the chargor's rights of redemption had not been extinguished. That in view of this position, taken by the plaintiff that there was no sale, the defendant failed to respond to this specifically, even failed to prove the sale with a copy of sale agreement. Counsel further argued that the value of the property could not be compensated by damages and to allow any sale to go through would be to allow the breach of plaintiff's fundamental right to own property.

Learned counsel for the defendant argued in opposition and said that the plaintiffs had failed to demonstrate a prima facie case with probability of success. That the offer by the 2nd plaintiff to pay kshs 10, million, the plaintiffs had failed to explain how they would pay the balance of the debt. That the defendant had a right under T.P.A. to sell the charged property by private sale. That the plaintiff has

been aware of the debt since year 2001, and yet it sat on its right, and accordingly equity could not assist because equity aids vigilant.

The plaintiff relied on the case HCCC NO. 943 of 2002 (Milimani). In that case the applicant to an injunction sought to restrain the respondent from transferring the property to auction purchaser where that purchaser had not been made a party. The court held: -

**“An order in those circumstances would offend the cardinal rule of natural justice that no person should be condemned unheard. A court of equity cannot look at such an application gladly.”**

Indeed in our case the plaintiff state that there is a purchaser of the suit property, and even proceeded to name their neighbour, and yet they fail to join him in this matter. That failure on its own would disentitle the plaintiffs from orders sought.

The principles of granting an injunction are clearly stated in the case of GIELLA V CASSMAN BROWN & CO LTD (1973) EA 355. The applicant has to demonstrate a prima facie case with probability of success. The plaintiff’s claim is based on two grounds; firstly that the suit property was not sold at the auction. The 2nd plaintiff deponed that he got the information of non-sale at the auction from his representative.

That representative was not named and accordingly that paragraph and others that mention the unnamed representative breach order 18 and are therefore rejected. The other ground is that the plaintiffs right of redemption has been impeded. To this I can do no better than quote from Halsbury Laws of England, 4th Edition, Vol 32 Paragraph 725.

**“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court.”**

**The plaintiffs could possibly have qualified fro an interim injunction if they had paid the amount claimed by the defendant into court.**

The second test to be applied under the Giella V Cassman Brown case is, whether the applicant will suffer irreparable injury. The plaintiff’s counsel argued that the suit property is of immense value and if sale was to proceed the plaintiffs will suffer. The defendant argued that the moment the plaintiff charged the suit property; the suit property became a commodity of sale and that there is no commodity for sale whose loss cannot be compensated in damages. I accept that argument indeed whatever loss the plaintiff may suffer if the sale proceeds can be compensated by damages

Having found that the plaintiff has failed the above two tests I will not proceed to examine where the balance of convenience lies.

Accordingly the court’s order is that the plaintiff’s application dated 8th December 2004 is hereby dismissed with costs to the defendant.

**Dated and delivered at Nairobi this 16th day of June 2005.**

**MARY KASANGO**

**JUDGE**