- **TPA S52, applicant needs to prove a subsisting suit and needs to apply for prohibitory order against any dealing with the property.**

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Suit 456 of 2005

FRANCIS MUREITHI GITUKU…………………………………………PLAINTIFF

VERSUS

PATRICK KIARIE KAGWANJA……………..………………….1ST DEFENDANT

BARCLAYS BANK OF KENYA LTD……………..…….……….2ND DEFENDANT

REGISTRAR OF TITLES……………………………..……..3RD DEFENDANT

KANGERI WANJOHI T/A KINDEST AUCTIONEERS………4TH DEFENDANT

RULING

The plaintiff by the chamber summons dated 11th August 2005 seeks the

following orders: -

> 1. A temporary injunction be and is hereby issued to restrain the defendants themselves their servant and or their agent from entering, trespassing upon, wasting, levying distress, wasting, alienating or in any other way from dealing with all that parcel of land known as L.R. No. 12489/43 Karen and the residential house erected thereon or with interfering with the plaintiff's quiet user and enjoyment of the said parcel of land till this suit is heard and determined.
>
> 2. A temporary injunction be and is hereby issued to restrain the 1st and 4th defendants from selling or disposing the item listed in paragraph 8 of the plaint pending the inter partes hearing of this application.
>
> 3. a mandatory injunction to command the 1st and 4th defendants to return to the suit premises the goods mentioned in paragraph 8 of the plaint to fix the doors they removed from the suit premises all at their own costs.

The background of this matter is that the plaintiff enjoyed some financial facilities extended by the 2nd defendants, between the years 1996, 1997 and 1998. The plaintiff fell in arrears of servicing those facilities, whose payments were secured by a charge over the plaintiff's then, property, L.R. No. 12489/23 Karen. The plaintiff previously obtained an injunction to stop the 2nd defendant from selling the charged property, in case No. HCCC No. 2041 of 2000 (Milimani). On or about 7th November 2000, parties in that case marked that suit as settled by consent, and further recorded an order as follows: -

"That the matter be mentioned on 26th November 2002 to record consent orders on costs."

On or about 23rd May 2005 the plaintiff placed a notice in the newspaper entitled 'Caveat emptor', warning potential purchasers. The 2nd defendant on or about 12th January 2005 entered into an agreement of sale, of the charged property, with the 1st defendant, who was eventually registered as the owner, thereof, on 21st July 2005.

On or about 6th August 2005, through the 1st defendant's instructions, the 4th defendant levied distress for rent arrears against the plaintiff at the suit property. The plaintiff's counsel in support of the application submitted that, the 2nd defendant had failed to serve the plaintiff with the requisite notice before conducting the sale. That although the 2nd defendant had exhibited a notice purportedly served on the plaintiff, counsel argued that was not sufficient evidence of service. Counsel for the 2nd defendant drew the court's attention to the annextures to the affidavit and stated that the notice was served on the plaintiff by post and that it was evidenced by certificate of posting. 2nd defendant's counsel further stated that the plaintiff had not denied that the address used in sending the notice was not his address. Counsel also referred to the charge document clause 7 (b) (iii), which provided that service was presumed within 7 days of posting to the plaintiff's last known address.

The plaintiff's other argument was that since HCCC No 2041 of 2000, was still pending the doctrine of Lis PENDENS applied. Plaintiff relied on the High court case of MAWJI – VERSUS – INTERNATIONAL UNIVERSITY AND ANOTHER [1976] KLR 185. The following is the finding of the court.

"…..the court has power to prevent a breach of the provisions of section 52 of the Transfer of Property Act in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms at it may impose."

The counsel for the 2nd defendant submitted that there was no pending suit between the plaintiff and the 2nd defendant and that the previous injunction was spent on 7th November 2002, and accordingly the 2nd defendant was entitled to exercise its statutory power of sale. On this issue counsel finally submitted that section 52 had to be read together with section 69 (1) of the TPA.

The plaintiff accepted that the 2nd defendant was under law entitled to conduct a sale by private treaty on default of the plaintiff, but having accepted that position plaintiff's counsel argued that the sale was conducted by the 2nd defendant secretly and the same was under value. The property, counsel argued ought to have been sold for kshs 24 million as per a valuation dated 20th April 2005 exhibited by the plaintiff.

2nd defendants counsel pointed out that the plaintiff cannot with one breath accept that sale could be conducted by private treaty, and with the other state that the sale was conducted secretly. 2nd defendant relied on the court of appeal case of MARANYA - VERSUS – NATIONAL BANK OF KENYA LTD & ANOTHER [1997] LLR 2196. The holding of that case was: -

"…….the first question to be considered is whether the purported sale was lawful or irregular. In this regard, the provisions of section 69 of the Act are clear and entitle the bank to effect sale by private treaty. This right, in our view, is not taken away merely because at an early stage, the bank had advertised to sell the property by public auction."

2nd defendant counsel further submitted that once the plaintiff used his property as security it converted that property into a commodity for sale, see case of KIHARA – VERSUS – BARCLAYS BANK (K) LTD. 2nd defendant also relied on the cases CIVIL APPLICATION NO. NAI 227 OF 1995 PRISCILLAH KROBOUGHT GRANT AND KENYA COMMERCIAL FINANCE CO. LTD. & OTHERS; and CIVIL APPEAL NO. 150 OF 1993 CAPTAIN PATRICK KANYAGIA & ANOTHER AND DAMARIS WANGECHI & OTHERS, which demonstrated that the mortgagor's equity of

redemption is lost on the mortgagee, either by private treaty or by public auction, entering into a binding contract for sale. 2nd defendant therefore concluded that there is no need of granting the plaintiff the injunction he seeks in view of the fact that the property was transferred to the 1st defendant, and accordingly the plaintiff should seek damages.

The 1st defendant's counsel submitted that the 1st defendant cannot be referred, as the plaintiff has done in his pleadings as a trespasser. This is because as counsel submitted, the 1st defendant has already been registered as owner and he further said that the plaintiff's argument that the purchase priced was under value cannot be accepted because, the Government valuer, concurred with the sale price as the correct value. Counsel submitted that under section 23 the Registration of Titles Act it was quite clear, that the 1st defendant's title could not be defeated since the title issued to him was absolute and indefeasible. He concluded that the plaintiff's right lay in damages.

Counsel for the 4th defendant submitted that the 4th defendant was instructed by the 1st defendant to levy distress and on going to the suit property he was not given access which led him to obtain a breaking order and it was then that he was able to carry out the distress for rent arrears. Counsel submitted that the plaintiff had not prima facie case against the 4th defendant and for any claim; he can be compensated in damages.

That is summary are the arguments presented by the parties. I will start by considering the argument that the 2nd defendant failed to serve and a notice on the plaintiff before sale by private treaty. In response the 2nd defendant annexed evidence of service of the notice by certificate of posting. The 2nd defendant's counsel quite rightly submitted that the plaintiff had not denied that the address used to serve the notice was not his. I would add and say that once the 2nd defendant showed evidence of service of the notice the burden shifted to the plaintiff to disapprove it. The plaintiff ought to have inquired, perhaps through the post master general, to confirm whether the said notice was delivered, and if so to whom it was delivered. The plaintiff did not do so. Section 108 of Evidence Act provides: -

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

The person who would fail if it was not disproved that the notice was served by the 2nd defendant is indeed the plaintiff.

Additionally clause 7 (4) (iii) of the charge document provided that receipt would be assumed to have been effected if postage is effected at the plaintiff's last known address, and such receipt would be assumed to have been within 7 days of postage.

On the plaintiff's argument that the transfer of the suit property to the 1st defendant is defeated by the doctrine of Lis PENDENS is not correct. I am of the view that the doctrine would have applied, firstly if there was a subsisting suit and secondly if a prohibitory order was issued by the court preventing all dealings with the suit property. The plaintiff did not prove to the court that at the time of sale of the suit property that, there was a subsisting suit. HCCC No 2014 of 200 had been marked as settled, on 7th November 2002, subject to agreement of costs.

To say that a suit was subsisting because the issue of costs had not been determined is to stretch a point. Secondly even if there was a subsisting suit there needed to be a specific prohibitory order stopping any dealing with the suit property.

I also accept the 2nd defendant's argument that if indeed section 52 was operative as argued by the plaintiff its effect are defeated by section 69 B (2) which provides that the title of a purchaser shall not be impeached on the grounds stated thereof.

The plaintiff's submission that the suit property was sold at under value is not a basis for granting the plaintiff an injunction as sought. If any, the plaintiff's rights are in damages in view as aforesaid, and as provided in section 23, the Registration of Titles, Act, which provide that the 1st defendant's title cannot

be attacked and that the same is absolute and indefeasible.

On the issue of distress for rent arrears by 1st defendant I am in total agreement with the plaintiff that it had no legal basis at all. Indeed I would say that such action was tantamount to the 1st defendant, with the assistance of the 4th defendant, taking the law into their own hands. The court cannot stand by and condone such acts of lawlessness. Section 3 (1) The distress for Rent Act provides: -

"Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent service as is given by the common law of England in a similar case."

The 1st defendant did not prove to the court that there was a grant, lease, demise or contract issued to the plaintiff. What indeed is the position is the 1st defendant unilaterally imposed a rental amount and imposed the period of default of payment. It was incumbent upon the 1st defendant to follow the correct legal channels to obtain possession of his property it was not right for him to seek short cuts to obtain that possession. I find fault also with the 4th defendant for I find that it is not satisfactory for him to accept without proof, that there was a tenant, landlord relationship with out first satisfying himself of the same, particularly when he proceeded to obtain court orders for breaking in. I find that the plaintiff's prayers relating to distress for rent is merited.

In conclusion the orders of this court are: -

> **(1) A mandatory injunction is granted in favour of the plaintiff commanding the 1st and 4th defendants to return to the suit property, namely L.R. No 12489/43 Karen, the goods contained in the proclamation of the 4th defendant dated 6th August 2005, pending the final determination of this suit.**
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> **(2) The 1st and 4th defendant shall return the goods stated in (1) above within3 days from the date of reading of this ruling**
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> **(3) Prayer No. 2 of chamber summons dated 11.8.2005 is dismissed.**
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> **(4) The plaintiff is awarded the costs of the chamber summons dated 11th August as against the 1st and 4th defendants.**

It is so ordered.

Dated and delivered this 19th August 2005.

MARY KASANGO

JUDGE