



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 187 of 2004**

PATRICK KARIUKI MUIRURI.....1ST PLAINTIFF

RACHEAL WANJIKU MUIRURI.....2ND PLAINTIFF

MESSRS CLEAN LIMITED3RD PLAINTIFF

VERSUS

NIC BANK LIMITEDDEFENDANT

R U L I N G

The plaintiff's chamber summons dated 13th October 2001 is brought under order XXXIX Rules 1,2, 3 and 4 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act.

The application seems to seek orders in alternative as follows: -

- That this Honourable court do issue an order restraining the defendant through itself, servant and/or employees from executing a transfer as chargee in terms of purported sale by public auction conducted on 12th day of October, 2005 in respect of land parcel number **KAJIADO/OL CHORO-ONYORE/4209** pending the hearing and determination of the Notice of Motion dated 9th September 2005.
- That this Honourable court do set aside the purported public auction conducted on 12th day of October 2005 by **GARAM INVESTMENTS**

The brief background of this matter is that the plaintiff filed an application on 12th September 2005, which sought, amongst other prayers that the defendant be enjoined from selling the charged property.

On 12th September the court granted, *ex parte*, interim orders of injunction. The *inter partes* was fixed on 20th September 2005.

A day before the *inter partes* hearing the plaintiff was served with a notice of change of advocates, acting for the defendant, and a replying affidavit. Because of that service the matter did not proceed on 20th September 2005. The application was adjourned for hearing to 12th October 2005. It seems that no specific order was made for extension of the interim orders to 12th October 2005.

On 11th October the plaintiff noticed in the newspaper, an advertisement of sale of his property due on 12th October 2005 at 11.00 am. This necessitated another application being filed on certificate of urgency to stop that attempt to sell the charged property, on 12th October as afore said.

When the file was presented before the duty judge on 12th October 2005, counsel's found the said judge engaged by part heard matters, and by the time the plaintiff's matter was reached, 12.00 p.m. the defendant confirmed that the property had been sold at 11.00 am.

It is that sale that the plaintiff now seeks to set aside. The plaintiff in making that application states that the defendant's action was wrongful and had gone against the basic principle, that once the parties had submitted themselves to the jurisdiction of the court, sale would not proceed. The plaintiff described the defendant's act of sale of the property as, contemptuous and disrespectful to the court.

The plaintiff further deponed that the charged property is 100 acres and it had been sold in respect of a dispute of only kshs 2 million.

The defendant in opposing the application stated that statutory notices and notification of sale were served on the plaintiff. That a dispute of amount was not sufficient reason for granting an injunction. That such application for injunction was an abuse of the court process since the plaintiff had admitted owing some money, and that since the plaintiff had defaulted in payment, the defendant was entitled in exercise of its rights under the charge to sell the property.

The application was also opposed by one, **PAUL MAGU MUHIU** who stated was the purchaser who purchased the property at a public auction for kshs 5.1 million and that he had paid a deposit of kshs 1, 275, 000/-. He further stated that the plaintiff's application was not meritorious since he had become the rightful owner of the charged property.

That is the summary of the party's arguments. I have looked at the exhibits of the defendant, annexed to the replying affidavit. I find that the defendant served the plaintiff, through its advocate; a statutory notice dated 22nd July 2002. That notice was not addressed or copied to the District Commissioner as required under section 78 R.L.A. That section requires that such notice be served. But over and above that section 77 R.L.A. provides in part: -

“A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor.....”

It is clear that the chargee has to pay regard to the interest of the chargor in exercising its power of sale. Can it be said that the chargee did so in this matter. Undoubtedly no, the defendant led the plaintiff, up the garden path in adjourning a matter to a further hearing, on 12th October, knowing very well that sale was due on that day. In those circumstances I find that the law cannot, particularly, section 77 R.L.A., allow litigant parties, pending that litigation the right to sell the charge property, while all along leading the plaintiff to believe that on a subsequent date there will still be property which is capable of being litigated upon.

I find that the plaintiff's application is merited and I therefore hesitate not in granting the following orders: -

- (1) That the sale by public auction on 12th October 2005 of parcel NO. KAJIADO/OL CHOR-ONYONE/4209 is hereby set aside.**
- (2) The costs of the application dated 13th October 2005 shall be in the cause.**
- (3) That the order of inhibition granted hereof on 13th October is extended until interpartes hearing of the Notice of Motion dated 9th October 2005.**

Dated and delivered this 30th November 2005.

MARY KASANGO

JUDGE