REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 3231 of 1985

NATIONWIDE FINANCE CO. LTD……..…...……..……PLAINTIFF

VERSUS

MECK INDUSTRIES LTD..……..…….1ST DEFENDANT

MICHAEL GERALD KIMANI…..……..……..2ND DEFENDANT

GEORGE GIKURU MBUTHIA…….……..3RD DEFENDANT

RULING

The applicant GEORGE KIBUKU MBUTHIA purchased the suit property L.R. NO.NYANDARUA/KARATI/728 at a public auction on 18th March 1998. The said sale was set aside by the court on 29th May 2001 on the application by HAMILTON HARRISON & MATHEWS who had been instructed by CONSOLIDATED BANK.

The applicant has appealed against that order being Civil Appeal No. 100 of 2005. Before this appeal was heard. Consolidated Bank went before the Principal Deputy Registrar (Mrs. Matheka) and obtained an order for the resale of the suit property. The order for resale was issued on 5th May 2005.

This is what provoked the applicant and he moved to court under Certificate of Urgency seeking the following orders:-

(1) That the ex debito justitae orders made on 5th May 2005 be set aside as an abuse of the court process.

(2) That any future execution do await the outcome of the Civil Appeal No.100 of 2005 now pending hearing at the Court of Appeal.

(3) That costs of this application be provided for.

The application is opposed on the following grounds:

(i) That there is no power to grant the orders sought under the provisions cited.

(ii) That the applicant is a busy body and is not entitled to be heard on the sale of the immovable property being LR NO.NYANDARUA/KARATI/728 the sale to him having been set

aside on 29th May 2001.

(iii) That the applicant has failed to disclose that he has made an application to the Court of Appeal for an injunction which has not been considered urgent. The courts discretion ought not to be exercised in the applicant's favour.

(iv) The application is an abuse of the process of the court when one considers the circumstances of the case.

(v) The application is an improper attempt to review or set aside by way of an appeal the ruling of Njagi, J. given on 30th March 2005 in Milimani Civil Suit No. 406 of 2004. There is no jurisdiction to do this.

(vi) It is desirable that all litigation comes to an end and the present application is a bar to that being achieved.

(vii) That the applicant has no legal or equitable right to make the application.

Essentially what the applicant wants is an order of injunction restraining the Consolidated Bank from auctioning the suit property until his appeal is heard and determined. The granting of interim injunction is an exercise of judicial discretion.

The conditions for the grant of an injunction as was laid down in the classic case of GUELLA VS. CASSMAN BROWN 1973 EA 358 are:

(a) First, an applicant must show a prima facie case with a probability of success.

(b) Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages.

(c) Thirdly, if the court is in doubt, it will decide an application on the balance of convenience EA INDUSTRIES VS. TRUFOODS 1972 EA 420.

For the principles on which the court should exercise its jurisdiction, I refer to the two well known cases namely: GITHUNGURI VS. JIMBA CREDIT CORPORATION CIVIL APPEAL NO. 161 OF 1988 decided on the 18th November 1988, and J.K. INDUSTRIES LTD VS. KENYA COMMERCIAL BANK decided on 20th November 1987 reported in [1982-1988] 1KLR 1088. Both laid down almost identical principles as the basis under which an interlocutory injunction or stay of execution pending an intended appeal should be granted, namely, first the applicant must present an arguable case for the consideration of the Court of Appeal and Secondly, the applicant must show that if the stay is withheld, it would lender the intended appeal nugatory. Both cases were decided on the basis of these principles. In **Githunguri** case, the application of that principle led to the grant of the injunction sought.

In the **J.K. Industries** case, it led to the opposition result, that is, that application failed and was refused. The divergent conclusions reached in these two cases on the application of the same principle show that, by and large, it is the facts of each particular case that determine the result.

The first question to consider therefore, is whether on the particular facts of this case the applicant has an arguable case.

In any event what appears to me to be a complete answer to the applicant's claim is the statutory provision in Section 69B of the Transfer of Property Act, which reads as follows:

(1) A mortgagee exercising the Mortgagee's Statutory Power of Sale shall have the 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 and encumbrances to which the mortgage has priority, but subject to all estates, interests rights and encumbrances which have priority to the mortgage.

(2) Where a transfer is made in exercise of the mortgages statutory power of sale, the title of the purchaser shall not be impeachable on the ground –

(a) that no case had risen to authorize the sale; or

(b) that the notice was not given; or

(c) that the power was otherwise 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.

The applicant was an innocent purchaser at a public auction. There is no suggestion that the purchaser had any notice of any irregularity or impropriety in the exercise of the power of sale so as to lose the protection provided by Section 69B of the Transfer of Property aforesaid.

On the issue of whether or not on these particular facts of this case the applicant has arguable case.

The applicant submits that he has arguable appeal on two grounds:-

First when Hamilton, Harrison & Mathews instituted the process and applied to set aside the auction sale, they were not properly on record, since 1998 the Consolidated Bank had not taken over the assets of Nationwide Finance Co. Ltd who were the holders of the decree which led to the sale of the suit property. Consolidated Bank took over the assets of Nationwide Finance Co. Ltd. On 15th July 2002 pursuant to Consolidated Bank of Kenya (vesting) Order 2002. The order obtained by the Consolidated Bank was a nullity for it did not establish any locus on the basis of which it instructed Hamilton Harrison & Mathews to apply for the Sale of 18th March 1998 to be set aside. This ought to have been done by Nationwide Finance Co. Ltd.

Secondly, the sale challenged on the ground that it was tainted by material irregularity to the extent that the auctioneer accepted bids contrary to express instructions not to do so and also that the sale was executed without a Reserve Price contrary to the Provisions of Rule 11 of the Auctioneers Rules 1997.

I find it hard to comprehend how such irregularities committed by an auctioneer who was instructed by the Consolidated Bank to conduct a public auction on their behalf could be visited upon Mbuthia an innocent purchaser for value and who had no knowledge or notice, let alone being privy to any such instructions, Consolidated Bank ought to have invoked the provisions of Section 26 of the Auctioneer Act against the auctioneer. The applicant has demonstrated that he has arguable appeal.

Accordingly and for the reasons above stated, the application succeeds and the same must be and is hereby allowed in terms of prayer 1, 2 and 3 of the Notice of Motion dated 1st July 2005.

Dated and delivered at Nairobi this 28th day of October 2005.

.L.A. OSIEMO

JUDGE