



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Case 149 of 2004**

**SOLID HOLD LTD.....PLAINTIFF**

**VERSUS**

**TRANS NATIONAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**MUSTAPHA MOHAMMED HEBATULLA.....2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling is in respect of an application dated 21<sup>st</sup> May 2004 that was filed by the plaintiff/applicant. It was brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act. The applicant sought an injunction to restrain the first defendant from executing documents of transfer in favour of the second defendant in respect of land parcel number **NAKURU/MUNICIPALITY/BLOCK 3/81** (hereinafter referred to as the suit premises) or presenting for registration any documents of transfer executed in his favour by the first defendant pending the hearing and determination of a suit which the plaintiff had filed against the defendants. The application was made on the grounds that:-

- (a) The suit premises were illegally and fraudulently sold to the second defendant on 12<sup>th</sup> February, 2004.
- (b) That the second defendant is in the process of securing the transfer documents from the first defendant for the purposes of registration and if that were to happen the plaintiff's right in the property would be extinguished.
- (c) That the plaintiff stood to suffer irreparable damage if the suit property was transferred.
- (d) That the plaintiff's case had high chances of success and the suit would be rendered nugatory if the application was not allowed.

The application was supported by an affidavit sworn by one DEEPAL C. TILVAWALA as a Director of the plaintiff who had been authorised by the Board of Directors of the plaintiff to swear the same. He deposed that the suit premises had been charged by the plaintiff to the first defendant to secure a loan of Kshs.6.5 million which had been advanced to the plaintiff by the bank. The plaintiff stated in said affidavit that it had been servicing the loan regularly and had so far paid to the first defendant in respect of the loan account an amount totaling to over Kshs.7 million over and above the principal sum that was advanced. The deponent averred that the first defendant purported to sell its property without having served the requisite statutory notice as prescribed under Section 74 of the Registered Land Act Cap 300 Laws of Kenya. He further stated that no notice as prescribed under the Auctioneers Act 1996 and

Auctioneers Rules 1997 was served upon the plaintiff and further there was no proper notification of sale as prescribed by the rules clearly describing the property and the place and time of sale. The plaintiff further complained that the property was purportedly advertised for sale by public auction yet the sale was conducted by private treaty. As a result of the way in which the sale was organized, the plaintiff was denied the right to bid at the auction, the said deponent stated, adding that the first defendant set a reserve price of Kshs.4.5 million yet according to a valuation report that had been carried out in 1997, the property was valued at Kshs.8 million. By selling the property at an under value, the first defendant breached its obligations to act in good faith in respect of the charged property, the plaintiff claimed. The plaintiff further claimed that the first defendant had arbitrarily increased the rate of interest illegally and fraudulently included in the plaintiff's loan account illegal penal interest and other unexplained debit charges thereby unconscionably increasing the loan account. The plaintiff contended that at the irregular sale on 12<sup>th</sup> February, 2004 the second defendant was accepted as the highest bidder of the charged property in the sum of Kshs.4,270,000/- and urged the court to grant the orders as sought and declare that the sale of the property was void **ab initio**.

The first defendant through Mr. Joshua Kazungu, its operations officer at its Nakuru branch swore a replying affidavit. He deposed that a statutory notice was issued to the plaintiff on 5<sup>th</sup> February 2001 and exhibited a copy of the same. The relevant part thereof was as hereunder:-

***“In the circumstances, TAKE NOTICE that unless you let us have the payment of the loan of Kshs.2,500,000.00 and overdraft of Kshs.3,917,312.40 together with interest thereon at the current bank rate from 17<sup>th</sup> January, 2001 till payment in full on/or before the expiration of three (3) months from the date of receipt by you of this notice, we shall sell the charged property under the provisions of Section 74(1) of the Registered Land Act Chapter 300 Laws of Kenya.”***

On 23<sup>rd</sup> February 2001 the plaintiff responded to the said notice and pleaded for time to sell some property and settle the debt. The parties thereafter exchanged correspondence for a period of three years and the plaintiff made various repayment proposals and vide its letters dated 27<sup>th</sup> October, 2001 and 19<sup>th</sup> November, 2001 the plaintiff agreed to assist the bank in selling the suit premises.

In the letter of 27<sup>th</sup> October, 2001 the plaintiff wrote as follows:-

***“RE: OUTSTANDING ACCOUNT.***

***Our meeting in your office dated 25<sup>th</sup> October 2001 refers.***

***The way we explained in person, after July 2001 the business has deteriorated because all our creditors have refused to supply any goods on credit. And our stocks are exhausted. Under the circumstances it is not possible to generate any income. Therefore we have decided to sell the fixed asset by private treaty. We are looking for a serious buyer. At the same time we request you as well to explore and look for a possible purchaser. We shall monitor the progress to each other time to time (sic).***

***Meanwhile we have instructed our tenant to remit the monthly rent directly to the Bank on our account.***

***Yours faithfully***

***(signed)***

***DIRECTOR”***

According to a valuation of the property that was done by the Bank valuers on 15<sup>th</sup> April, 2002, the market value of the suit premises was Kshs.7,100,000/- and the forced sale value was Kshs.4,970,000/-.

Mr. Kazungu deposed that the bank had difficulty in selling the property due to the reserve value which the deponent stated was Kshs.4.5 million although I believe it was Kshs.4,970,000/- as stated above.

The first defendant further stated that the 45 days redemption notice was first served on the 21<sup>st</sup> June, 2003 and a Notification of sale was also served on the same date indicating that the property would be sold by public auction on 21<sup>st</sup> August, 2003. However, that intended auction failed as the bids made did not reach the reserve price. Another Notification of Sale and 45 days Redemption Notice were served again for an auction which was slated for the 12<sup>th</sup> of February, 2004. The auction was advertised on 26<sup>th</sup> January and 2<sup>nd</sup> February 2004 and Mr. Kazungu deposed that he attended the public auction together with the bank's lawyer Mr. Andrew Musangi and a brother to one of the plaintiff's directors, Mr. Chetan who was known to Mr. Kazungu as he had on several occasions called on the bank together with his brother, Mr. Tilwawala to negotiate on the loan repayments. The highest bidder was the second defendant whose bid of Kshs.4,400,000/- was accepted and he paid a deposit of Kshs.1 million and made arrangements with the bank for payment of the balance by 12<sup>th</sup> June, 2004.

In the circumstances, Mr. Kazungu deposed that based on advice which he had received from the bank's counsel, the plaintiff's equity of redemption was extinguished at the fall of the hammer and if at all it had any case against the defendants, its remedy would be in damages only. He further denied that the said sale was fraudulent and that the bank was guilty of illegal and fraudulent accounting as alleged by the plaintiff.

The second defendant stated in his replying affidavit that he attended the said auction and bid for the suit premises and his bid of Kshs.4,400,000/- was the highest and upon payment of Kshs.1 million as down payment a memorandum of sale was duly issued to him. He therefore denied having purchased the suit premises by private treaty. There after the plaintiff delivered to him part possession of the suit premises. The plaintiff even wrote a letter dated 22<sup>nd</sup> March 2004 to the second defendant's lawyers wherein the plaintiff acknowledged that the second defendant was the new owner of the suit premises. The first defendant had occupied part of the suit premises and carried out extensive refurbishment of the same. He therefore denied the plaintiff's claim in its entirety and stated that he was a bona fide purchaser for value without notice of any irregularities as alleged by the plaintiff.

In his submissions, Mr. Odhiambo for the plaintiff submitted that the charge document was null and void because it was drawn by an unqualified person as it was drawn by the bank itself. That was in contravention of Sections 34 and 35 of the Advocate's Act, he submitted, adding that it also contravened the provisions of Sections 109 and 110 of the Registered Lands Act. Mr. Odhiambo further submitted that the common seal of the plaintiff was not attested to as required and that there was no authority by way of a resolution for the company to borrow. He stated that a document drawn in breach of Section 34 of the Advocates Act was null and void. That section defines who is qualified to act as an advocate of the High Court of Kenya and Section 34(1) states that no unqualified person shall either directly or indirectly take instructions to prepare or draw any document. Section 35(1) of the Advocates Act required that the name and address of the person or firm which drew or prepared an instrument be endorsed thereon. Counsel cited two decisions in which the above propositions were considered and affirmed. The first one was **GEOFFREY ORAO OBURA VS MARTHA KARAMBU KOOME** Civil Appeal No. 146 of 2000 and **JAMBO BISCUITS LTD VS BARCLAYS BANK OF KENYA LTD & OTHERS**, HCCC No. 1833 of 2001 at Nairobi, Milimani Commercial Courts (unreported).

Regarding the statutory notice that was served upon the plaintiff, Mr. Odhiambo cited several authorities in support of his contention that the notice contravened the provisions of Section 65 and 74 of the Registered Land Act, saying that it should have taken effect after expiry of three months and not "***on or before the expiration of three months from the date of receipt***" of the notice. He submitted that the omission to serve a proper statutory notice was breach of statutory provisions as was held in **SAMUEL KIARIE MUIGAI VS HOUSING FINANCE CO. OF KENYA LTD & ANOTHER**, HCCC No. 1678 of 2001 at Nairobi, Milimani Commercial Courts (unreported).

Mr. Musangi for the respondents pointed out that the suit by the plaintiff was filed three months after the

sale of the property by public auction and therefore the equity of redemption was extinguished when the hammer fell and he cited the decision of Hewitt J in **GEORGE CHAKIRIS MWIKIA VS HOUSING FINANCE COMPANY OF KENYA LTD** Milimani Commercial Courts Civil Case No. 925 of 1999 (unreported) where the court refused to declare as null and void sale of a property by public auction which had been done because of some alleged irregularities in conducting the auction and advertisement. The court held that any claims that the former owner of the property had could only be for damages but the return of what used to be his property was out of question.

Regarding the submission by Mr. Odhiambo that the charge was invalid, Mr. Musangi referred to paragraph 8 of Mr. Deepal C. Tilwawala on behalf of the applicant where he deposed as follows:-

*“8. That the said charge was duly executed and registered as per the requirements of Section 65 of the Registered Land Act Cap 300 Laws of Kenya.”*

The applicant had also acknowledged its inability to pay the money that was lawfully advanced to it and even agreed to co-operate with the first respondent in selling the suit premises and so counsel urged the court to consider what the intentions of the parties was at the time when the applicant was being advanced the money in question.

Regarding the argument that the charge had been prepared by an unqualified person, the respondents' counsel submitted that the charge had been prepared on a standard form that had been drawn by the bank ***gratis*** and the form had been approved by the Chief Land Registrar and therefore any complaint under Section 34 of the Advocates Act was misplaced.

Besides, there was an affidavit sworn by Mr. James Gatune Wathigo of Sheth & Wathigo Advocates who deposed that the form of the charge was drawn by the first respondent's legal officer Ms Jacqueline Onsando, an Advocate of the High Court and registered with the Chief Land Registrar for approval and use. He further stated that the charge instrument was drawn by Sheth & Wathigo Advocates who acted for both the applicant and the first respondent in typing in all the particular entries therein.

Mr. Musangi submitted that the said firm of advocates were empowered to engross the charge document.

As regard the statutory notice, counsel submitted that the notice that had been served was proper and that it conformed to the Court of Appeal decision in **TRUST BANK LTD VS EROS CHEMISTS LTD & OTHERS** Civil Appeal No. 133 of 1999 where it was held that the notice must expressly state that the sale shall take place after expiry of the three months notice.

Having summarised the main arguments that were raised by both sides, I have to consider whether the application meets the requirements for grant of an interlocutory injunction as were laid down in **GIELLA VS CASSMAN BROWN & CO. LTD** [1973] E.A. 358 which are that an applicant must show a prima facie case with a probability of success and that he might suffer irreparable injury unless the injunction as sought is granted. And where the court is in doubt, it will decide the application on the balance of convenience.

The first issue that was raised by the applicant in its effort to show that it had a prima facie case against the respondents was that no requisite statutory notice had been served upon it by the bank as prescribed under Section 74 of the Registered Land Act. The first respondent annexed to its replying affidavit a copy of the statutory notice that it served upon the applicant. I have already reproduced the salient part of the said notice. It is obvious that the said notice dated 5<sup>th</sup> February, 2001 was served upon the applicant because subsequent to receipt of the same, it responded to it and the parties went on exchanging correspondence thereafter regarding sale of the suit premises due to the applicant's default in servicing the loan that had been advanced to it. The question that now arises is whether the said statutory notice was proper in law or not. The applicant alleged that it did not comply with the provisions of Section 74(1) and (2) of the Registered Land Act while the first respondent contended that the same was fully compliant with the aforesaid provisions. The aforesaid provisions of the law state as follows:-

**“74(1). If default is made in payment of the principal sum or any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continuous for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.**

**(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may:-**

**(a) appoint a receiver of the income of the charged property;**

**(b) sell the charged property.....”**

The above provisions of the law were well considered by the Court of Appeal in TRUST BANK LTD VS EROS CHEMISTS LTD & OTHER (supra) where it was held that:-

**“a statutory right to sell will not arise unless and until three month’s notice is given.”**

In this case, the first respondent’s notice required the applicant to pay the full balance of the outstanding loan and overdraft **“on/or before the expiration of three months from the date of receipt by you of this notice”** failing which the charged property would be sold.

The Court of Appeal stated that the objective of the notice was to guard the rights of the mortgagor because:-

**“if the statutory right of sale is exercised the mortgagor’s equity of redemption would be extinguished.”**

In the present case, the applicant was served with the said notice on 5<sup>th</sup> February, 2001 and the sale did not take place until 12<sup>th</sup> February, 2004 and the applicant brought the application under consideration on 21<sup>st</sup> May, 2004. The bank’s statutory power of sale became exercisable when the applicant failed to comply with the notice requiring it to pay the debt as demanded within three months of the date of receipt of the said notice. The applicant received the notice and responded to the same on 23<sup>rd</sup> February 2001 and requested for some more time.

I hold that the applicant was served with an appropriate statutory notice. There is also sufficient evidence that the applicant was served with the appropriate notices as required under the Auctioneers Act 1996 and Auctioneers Rules 1997. The said notices were served by M/S Legacy Auctioneering Services and were exhibited by the first respondent in its replying affidavit as **exhibit E**.

Another complaint that was raised by the applicant was that although the suit property had been advertised for sale by public auction, the same was sold by private treaty thus denying the applicant an opportunity to bid during the auction. That was stated in paragraphs 18 and 19 of Mr. Tilwawala’s affidavit. In paragraph 18 he deposed as follows:-

**“18. THAT the property was purportedly advertised for sale by public auction yet the sale was conducted by private treaty.”**

The above contention is completely negated by the averments of paragraph 26 of the same affidavit where Mr. Tilwawala deposed as follows:-

**“26. THAT the plaintiff contends that at the irregular sale on 12<sup>th</sup> February, 2004 the 2<sup>nd</sup> defendant was accepted as the highest bidder of the charged property in the sum of Kshs.4,270,000/-.”**

All I can say is that the applicant did not adduce any prima facie evidence as would suggest that there was no auction. The second respondent stated in his affidavit that there was an auction and he was declared

the highest bidder of the suit property when his bid of Kshs.4,400,000/- was accepted. Mr. Joshua Kazungu, the bank's operations officer even deposed that Mr. Chetan, a brother to one of the plaintiff's directors attended the auction. These averments were not denied by the applicant. I am persuaded that the respondents' contention is true that the property was sold by public auction and the second respondent was declared to be the highest bidder.

With regard to the reserve price, there was evidence to show that the sum realised was the best market price. The applicant itself had tried to sell the property without any success. But even if it was found that the amount at which the property was sold was inadequate, that would not be a sufficient ground for granting the orders sought as the plaintiff's claim would only be in damages.

If the applicant had any valid grounds for objecting to the sale of its property, it should have filed the application before the public auction was held. Considering its conduct before and after the auction, I find that the applicant had no valid ground upon which it could challenge the sale of its property. The applicant admitted having borrowed money from the first respondent which it had not repaid in full as at the time when the suit property was sold. It had been served with an appropriate statutory notice and the property was lawfully sold to the second respondent through a public auction. Thereafter the applicant vacated part of the premises that it was occupying and advised its tenant who occupied the other part that the second respondent was the new owner of the same. The second respondent then began extensive refurbishment of the suit premises. It is trite law that a mortgagor's right of redemption is extinguished as soon as a mortgagee sells the mortgaged property by public auction as was held by the Court of Appeal in **MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER** Civil Appeal No. 111 of 1986. All this clearly shows that the applicant has no prima facie case with a likelihood of success.

What I have stated so far is sufficient to dispose of the application before me but I am duty bound to comment on a few other issues that were raised by the applicant.

The applicant complained about the rate of interest and other charges that were increased fraudulently by the first respondent. While there was no sufficient evidence in proof of that allegation, all I can say in respect of that allegation is that a court would not ordinarily grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage, see **ABERDARE INVESTMENT LIMITED VS HOUSING FINANCE COMPANY OF KENYA & ANOTHER** Civil Appeal No. 227 of 1998. In the present case, the suit property has already been sold and what remains is registration of the transfer and even if the applicant's allegations are ultimately found to have any basis, its remedy would lie in seeking damages but not an injunction.

The applicant alleged that the charge document was drawn by an unqualified person contrary to the provisions of Section 34 of the Advocates Act. The original document was annexed to an affidavit sworn by Mr. Wathigo Advocate and it showed that it was drawn *gratis* by Trans-National Bank Limited. Mr. Wathigo stated that the bank's legal officer, Ms Jacqueline Onsando, an advocate of the High Court was the one who actually drew the document on behalf of the bank.

In my view, the whole issue of who drew the charge document was an after thought on the part of the applicant, having stated in paragraph 8 of its affidavit in support of the application that the charge was duly executed and registered. In any event, it is important to realise that the objective of Section 34 of the Advocates Act is to safeguard the role of advocates who have diligently conducted themselves in their professional practices by observing the provisions of the Act including renewing their annual practising certificates from being assumed by quacks or unqualified persons or advocates who have deliberately or otherwise refused or failed to renew their practicing certificates. Courts of law have a duty to ensure that legal documents which require to be drawn exclusively by persons duly qualified to act as advocates are not drawn by any other people. Section 34 excludes from the list of unqualified persons the following categories of people:-

- (a) any public officer drawing or preparing documents or instruments in the course of his duty; or

- (b) any person employed by an advocate and acting within the scope of that employment or
- (c) any person employed merely to engross any document or instrument.

The charge document shows that it was drawn *gratis* (without reward) by the bank and as submitted by Mr. Musangi, the document was passed on to M/S Sheth & Wathigo to engross. According to the Dictionary of English Law by Earl Jowitt to engross a document means “**typing or writing a deed, agreement or the like from the draft with all words, dates and amounts set out at length, and with the formal testatum and attestation clauses, so as to be ready for execution**”.

There is nothing to show that the charge was drawn by Ms Jacqueline Onsando, the banks legal officer and if that were so, she ought to have complied with the provisions of Section 35 of the Advocate’s Act by endorsing her name and address thereon. There was also no affidavit by the said advocate to that effect. And in any event, the drawer of the document was clearly identified in the charge as Trans-National Bank Limited. The question that may arise is this: Is Trans-National Bank Limited an “**unqualified person**” for purposes of Section 34 of the Advocates Act or not? My view is that it is an “**unqualified person**” and that is clear from a proper reading of Section 43(1) and (2) of the Advocates Act. Subsection (1) of the above defines offences by bodies corporate and subsection (2) states as follows:-

**“In this part, references to unqualified person and to persons include references to bodies corporate.”**

The “**part**” that is referred to is part VIII of the Act which has the heading:-

**“PROVISIONS WITH RESPECT TO UNQUALIFIED PERSONS ACTING AS ADVOCATES AND OFFENCES BY ADVOCATES”**

The qualifications for one to act as an advocate are clearly spelt out by Section 9 of the Act. The bank was therefore an unqualified person and should not have drawn the charge.

If it had been drawn by its legal officer as a duly qualified advocate who also complied with the provisions of Section 35 of the Act then passed on to M/S Sheth & Wathigo Advocates for engrossing that would have been proper. The bank may have committed an offence as prescribed by Section 43 of the Act but that is not for me to decide now. What I must resolve is whether the plaintiff is entitled to the orders sought simply because the aforesaid charge was drawn by an unqualified person. The plaintiff is seeking an equitable remedy without clean hands and being guilty of laches. It defaulted in servicing its liability to the bank and forced the bank to exercise its statutory right of sale of the charged property. The plaintiff did not make any effort to injunct the bank from selling the property. It fully co-operated with the bank and the second defendant lawfully purchased the suit property and the plaintiff vacated the portion which it had occupied and gave possession to the new owner. The plaintiff also notified the tenant who was in occupation of the other part of the building that the property had been acquired by the second defendant. The tenant, Mack Precastings Limited, then filed a suit in this court against the first defendant, **HCCC No. 93 of 2004**, seeking orders to restrain the first defendant from evicting it from the said premises. The first defendant filed a defence and a counter claim and prayed, *inter alia*, for an order of vacant possession. Kimaru J. heard the matter and not only did he dismiss the tenants application but also ordered it to vacate the suit premises. The second defendant then took possession and began to renovate the same.

If the plaintiff truly knew that the charge document had been prepared by an unqualified person and wanted to advance that argument to hold on to the property, why did it wait to file the suit and the application after a period of more than three months from the date when the property was sold? I would have been more sympathetic to the applicant had it raised the above argument immediately after it was served with the statutory notice of sale of the property but coming so late in the day, I say that delay defeats equity. The applicant’s claim must therefore fail in its entirety and I hereby dismiss the same with costs to the respondents.

DATED, SIGNED AND DELIVERED at Nakuru this 23<sup>rd</sup> day of November, 2005.

**D. MUSINGA**

**JUDGE**

**23/11/2005**

Ruling delivered in open court in the presence of Mr. Ndumia holding brief for Mr. Musangi for the respondent and N/A for the applicant.

**D. MUSINGA**

**JUDGE**

**23/11/2005**