



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 406 of 2005**

**JACKSON KAMAU NDEGWA**

**T/A BIRDS PARADISE TOUR & TRAVEL .....  
PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LIMITED .....  
DEFENDANT**

**RULING**

By a Plaint filed on 21.7.2005, the Plaintiff prayed for a permanent injunction restraining the Defendant from selling, auctioning by public auction or in any other manner interfering with the Applicant's enjoyment and peaceful stay at property L.R. No. Nairobi/Block 72/1178 – Ngei Estate. The basis of the Plaintiff's claim in the plaint was that the Plaintiff fully repaid to the Defendant sums advanced by the Defendant but the Defendant continued to demand unreasonable interest which was not part of the agreement between the Plaintiff and the Defendant.

Simultaneously with the Plaint, the Plaintiff filed an interlocutory application seeking a temporary injunction restraining the Defendant from selling, auctioning by public auction or in any other manner interfering with the Applicant's enjoyment and peaceful stay at the suit property. The Application was supported by the Plaintiff's affidavit which substantially elaborated upon the averments in the plaint and added that the Defendant had instructed Dolphin Auctioneers to sell the suit property by public auction and the same had been advertised for sale on 22.7.2005. The Plaintiff further swore that the said auctioneers had undervalued the suit property by putting the reserve price at Kshs 3,500,000/= yet the market price for other similar property in the same area was shs 8,000,000/= and if the property was to be sold at the reserve price the loss to the Plaintiff would be heavy. The Plaintiff further deponed that the suit property is a matrimonial home where the Plaintiff resides with his family which was likely to be inconvenienced if they are evicted and the property sold.

The Application was certified urgent by Waweru J. who on 22.7.2005 granted ex parte an interim injunction pending the hearing of the application inter partes on 29.7.2005. The application was placed before Kasango J. on the said date who was told by Counsel for the Defendant that the property had been sold by 2.7.2005 and further that the Plaintiff's other suit HCCC No.1877 of 1997 had been dismissed before the filing of this suit. The Learned Judge declined to extend the interim order of injunction for the reason that if the property had been sold the interest of a party who was not before the Court was involved and had to be joined before proceeding with the matter.

On 30.8.2005 the Plaintiff amended his plaint and this time prayed for *inter alia* a permanent injunction restraining the Defendant from transferring and/or registering transfer of the suit property. The Plaintiff further prayed for the taking of accounts to determine how much money was owing to the Defendant if any.

On 20.9.2005 the Plaintiff lodged the present application seeking *inter alia* a temporary injunction restraining the Defendant from transferring and/or registering transfer of the suit property pending the hearing of this application and the suit.

The primary reasons for the application were that:-

1. ***The Defendant is claiming to have sold the suit property by way of public auction to another undisclosed person for an alleged outstanding loan but which the Plaintiff has fully repaid.***
2. ***The Defendant has not explained to the Plaintiff how they have arrived at the interest demanded and has refused to discharge the Plaintiff's mortgage despite the payments.***
3. ***The Plaintiff is likely to suffer irreparable loss as the property due for sale is his matrimonial home where he resides with his entire family. If the property is sold and the Plaintiff evicted the whole family will be rendered homeless and may reside in the cold.***
4. ***The Defendant will suffer no loss and prejudice if the orders sort are granted as the mortgage was intended to be a long term loan but which has been fully paid.***
5. ***The Auctioneers undervalued the Plaintiff's property giving a reserve price of Kshs 3,500,000/= yet the market price for similar houses in the same area is Kshs 8,000,000/=. The sum demanded by the Defendant is only Kshs 900,000/=.***
6. ***Even if there was any valid auction the Plaintiff ought to have been given priority over any other buyer but this was not done. The Plaintiff was not even consulted about the alleged sale..***
7. ***There was no public auction conducted at the intended premises as both the Plaintiff and other interested buyers attended, but failed to witness any auction.***

The application is supported by an affidavit sworn by the Plaintiff which again substantially elaborated upon the averments in the amended plaint and the grounds in the body of the Chamber summons.

The application was opposed. The Defendant filed a replying affidavit sworn by one Joseph Kania the Manager Legal Services of the Defendant. The said Manager swore *inter alia* that the Plaintiff's interest in the suit property was extinguished when the property was sold in a public auction on 22.7.2005 to one Paul Rungu Murwithania. According to the Defendant the property having been sold by public auction in exercise of the Defendant's statutory power of sale, the Plaintiff's equity of Redemption was extinguished. The Defendant through the said Manager Legal Services further deposed that the Plaintiff had been in breach of the agreement under the charge and had defaulted in the payment of his monthly installments with the last payment having been made on 15.2.1999 and that the outstanding balance as on 30.6.2005 was Kshs 15,863,065.65. The said Manager further deposed that the Defendant served a valid statutory notice and lawfully instructed auctioneers to sell the suit property when there was default and the auctioneers did in fact sell the property by public auction before any order was served upon them. In the premises the said Manager deposed that the Plaintiff had not established a *prima facie* case with a probability of success and the application was an abuse of the Court process in view of another application dated 21.7.2005 which has not been determined or withdrawn.

The Defendant further filed a supplementary affidavit of the same Joseph Kania, Manager Legal Services in which it was deposed that in fact the suit property had been transferred and registered in the name of the said Paul Rungu Murwithania on 12.10.2005 and the Plaintiff's remedy if any was in damages.

The application was canvassed before me on 18.10.2005 by Mr. Odhoch Learned Counsel for the Plaintiff and Mr. Issa Learned Counsel for the Defendant.

The Plaintiff's counsel took me through the affidavits and contended that the Plaintiff had established a *prima facie* case with a probability of success. Counsel maintained that there had been no auction and there could therefore be no transfer to the said Paul Rungu Murwithania. Counsel emphasized the complaints in his submissions with respect to failure to serve the requisite notices.

Reliance was placed upon the case of CALEB KOSITANY AND ANOTHER –V- I.C.D.C. AND ANOTHER: HCCC NO. 473 OF 2004 (UR) for the proposition that a mortgagee's statutory power of sale cannot arise where there was failure to serve a Statutory Notice of Sale.

Further reliance was placed upon the case of PROTEIN & FRUIT PROCESSOR LTD –V- CREDIT BANK LTD & 2 OTHERS: HCCC NO. 128 OF 2003(UR) for the proposition that an auction carried out pursuant to irregular notices would itself be irregular.

Responding to the submissions made on behalf of the Plaintiff Counsel for the Defendant was precise. He argued that the Plaintiff had not shown a *prima facie* case with a probability of success at the trial. He pointed out that the Plaintiff's case in the amended plaint was not predicated on want of a Statutory Notice of Sale and even in the body of the Plaint there was no ground challenging service of statutory notice of sale. Counsel further submitted that the Plaintiff became aware of the sale and transfer of the suit property to a third party before this application came up for hearing yet he did not seek leave of the Court to join the said third party in these proceedings or further amend the plaint and this application to challenge the sale and transfer. In Counsel's view no orders can be issued against the said third party without joining him in this suit.

Counsel relied upon the case of CALEB OCHIENG MUGANDA –V- HFCK LTD: CIVIL APPL. NO. NAI 453 OF 2001 (UR) for the proposition that where property has been sold at a public auction to a purchaser, the remedy available to the chargor is damages. Counsel further placed reliance upon the case of GEORGE GIKUBU MBUTHIA –V- JIMBA CREDIT FINANCE COPROPRATION & ANOTHER: C.A. NO. 111 OF 1986 (UR) for the proposition that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it.

There was also reliance placed upon the case of ZE YU YANG –V- NOVA INDUSTRIAL PRODUCTS LTD (2003) 1 E.A. 362 for the proposition that the remedy of injunction is unavailable to an Applicant where there has been an auction sale.

I have now considered the application, the pleadings, and the affidavits together with the annexures thereto. I have also considered the submissions of Counsels appearing and the cases cited. Having done so I take the following view of the matter.

The Plaintiff in his amended plaint seeks *inter alia* a permanent injunction restraining the Defendant from selling, auctioning by public auction or in any other manner interfering with the Applicant's enjoyment and peaceful stay at the suit property. The Plaintiff further seeks a permanent injunction restraining the Defendant from transferring and or registering transfer of the suit property.

The Defendant has shown that the suit property has been transferred to one Paul Rungu Murwithania. The Manager Legal Services of the Defendant in his supplementary affidavit has exhibited a Transfer by chargee in exercise of Power of Sale and a Certificate of lease in the name of the said Paul Murwithania. The above prayers would seem to be no longer available to the Plaintiff since the Defendant's cannot be restrained with respect to property in the name of a party who has not been joined in these proceedings. There is no challenge made against the auction sale and the transfer of the suit property to the said Paul Murwithania.

This Chamber Summons repeats the same prayers and in addition seeks an order that if there has

been a sale of the suit property to any person other than the Plaintiff by public auction private treaty and or any other way the same be declared null and void and be set aside. There is no such prayer in the amended plaint upon which this application is predicated. The Plaintiff does not seem to have any regard for the interests of the registered proprietor of the suit property. It is elementary that one of our basic principles of natural justice is that a person should not be condemned unheard. To grant the orders sought in this application would in effect amount to making a decision against the said Paul Murwithania without hearing him.

With respect to the challenges made against want of service of what Plaintiff calls requisite notices, I have found that the objection has not been well taken. The amended Plaintiff raises no objection to want of service of any Notice Statutory or auctioneers. The Plaintiff's case at the trial will be that he has fully repaid the entire sum advanced by the Defendant. As per the amended plaint the validity or otherwise of the Statutory notice of sale or the notices issued under the auctioneers rules will not be issues at the trial. In any event even if these complaints were well founded, it would appear on the authorities that an order of injunction would not be available to the Plaintiff.

In JACOB OCHIENG MUGANDA –V- H.F.C.K. LTD (supra) the Court of Appeal stated that where property has been knocked down at a public auction if there was any irregularity in the conduct of the auction the Applicant would be entitled to damages against the auctioneer pursuant to section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action.

In GEORGE GIKUBU MBUTHIA –V- JIMBA CREDIT FINANCE CORPORATION & ANOTHER (SUPRA) the Court of Appeal (per Apaloo J.A. as he then was) held at page 24 of the judgment that on the acceptance of a bid at an auction, there is an immediate sale binding on the chargor and the question of setting aside the sale against a *bona fide* purchaser for value does not arise.

It is clear from my above findings that the Plaintiff has not shown a *prima facie* case with a probability of success at the trial. I am not in doubt at all with regard to this finding. It is not therefore necessary to consider the other conditions for the grant of a temporary injunction set out in GIELLA –V- CASSMAN BROWN & CO. LTD AND ANOTHER (1973) E.A. 358.

In the end the Plaintiff's application dated 20.9.2005 and filed on the same date is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-