



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 62 of 2001**

**NDOLA FLOWERS LIMITED..... 1<sup>st</sup> PLAINTIFF**

**ALICE KWAMBOKA NYAMBANE..... 2<sup>nd</sup> PLAINTIFF**

**ZACHARIA NYAMBANE KENG'ARA..... 3<sup>rd</sup> PLAINTIFF**

**STEPHEN KENG'ARA..... 4<sup>th</sup> PLAINTIFF**

**- VERSUS-**

**NATIONAL BANK OF KENYA LIMITED..... 1<sup>st</sup> DEFENDANT**

**GARAM INVESTMENTS..... 2<sup>nd</sup> DEFENDANT**

**RULING**

This application is brought by way of a Chamber Summons dated and filed in court on 8<sup>th</sup> January, 2004. It is made under O.XXXIX rules, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, and all enabling provisions of the law. The main order which the application seeks is that a temporary injunction be issued restraining the defendants, whether by themselves, their servants and/or agents or however, from auctioning for sale KAKAMEGA 504/96 KAKAMEGA DISTRICT, L.R. NO. ELDORET MUNICIPALITY/BLOCK 5/126/1 (WEST INDIES ESTATE) ELDORET

TOWN on 14<sup>th</sup> January 2004 and L.R. NO. 3734/1095 (IR NO.52129/2) LAVINGTON ESTATE as scheduled on 15<sup>th</sup> January, 2004 pending the hearing and determination of this suit on 29<sup>th</sup> January, 2004 as aforesaid properties are the subject matter of this suit and the suit will be rendered nugatory if the sale proceeds.

The application is supported by the affidavit of ZACHARIA NYAMBANE, the third plaintiff and director of the first plaintiff, and especially on the grounds that this case is scheduled for hearing from 29<sup>th</sup> January 2004 when the same is to proceed to its conclusion to enable the court to determine whether the respondents are justified in realizing the securities charged; that to circumvent the scheduled hearing the respondents have proceeded to issue statutory notices and advertised the suit properties for sale despite the pending hearing which was fixed by mutual consent; and that the suit herein will be rendered nugatory if the intended auctions scheduled for 14<sup>th</sup> January 2004 and 15<sup>th</sup> January, 2004 should proceed.

The application is opposed. In her replying affidavit sworn on 14<sup>th</sup> January, 2004 and filed in court the following day, Ms. Zipporah K. Mogaka, the legal services manager of the first defendant, avers

that the first plaintiffs have failed to honor their obligations under the agreements between the parties by paying the sums advanced together with interest thereon, which sums were secured by the charges executed over the suit premises. Upon this failure, the defendants/respondents issued statutory notices which were duly received, and since there is no order restraining the defendants from exercising their statutory power of sale pending the hearing and determination of the suit herein, the defendants were entitled to advertise the sale of the suit premises by public auction, and therefore to realize the securities.

Ms. Omondi canvassed the application orally on behalf of the applicants. Her main argument was that since the hearing of the main suit was only a stone's throw down the road, it was fair and proper to allow the plaintiff to prove its case.

In response, Mr. Kariuki for the respondents adopted in toto the contents of Ms. Mogaka's affidavit. In short, his case was that the defendants had played by the book, and that therefore they were entitled to their pound of flesh as they had complied with all the requisite procedures.

Having heard the submissions of both counsel, I don't find it prudent to consider this application in isolation and independently of the main suit. The two are so closely and inseparably interwoven that they ought to be considered together. In a nutshell, the history of this case is that sometime in or about 1996, the first defendant through the European Investment Bank advanced to the first plaintiff a loan for expanding the first plaintiff's horticultural project. The 2<sup>nd</sup> and third plaintiffs were guarantors to the said loan. As guarantors, they offered as security for the loan properties at Eldoret, Kakamega and in Nairobi. For some reasons, the horticultural project did not prosper; instead it failed, and the plaintiffs fell into arrears in servicing the loan.

On account of pressure for payment from the first defendant and the threat to sell and realize the security, the plaintiffs went to court and filed this action in May, 2001. On or about 29<sup>th</sup> August, 2002, the first defendant served statutory notices on the plaintiffs to the effect that the first defendant would sell the charged property upon the expiry of three months from the date of service of the

notice, in realization of the security thereby conferred. The threatened sale was not effected at that time.

Meanwhile the court process took its usual course. Amendments to pleadings were made; lists of documents filed, and other pre-trial procedures were commenced. On 3<sup>rd</sup> October, 2002, by consent a hearing date was fixed for 30<sup>th</sup> January, 2003. On the hearing date, the matter came before Justice Osiemo but by consent it was taken out and stood over generally. On 3<sup>rd</sup> February, 2003, fresh hearing dates were taken and the matter was fixed for hearing on 16<sup>th</sup> and 17<sup>th</sup> July, 2003.

On 16<sup>th</sup> July, 2003, the matter came for hearing before Justice Mwera. Mr. Githara for the defendants said that they had filed their list of documents in mid-2002, and their draft was sent to the plaintiff but was not yet agreed upon as both pleadings had been amended. Mr. Onguto for the plaintiffs confirmed that the issues had not been agreed upon and it was the intention of counsel to agree on a bundle of documents. Besides, the plaintiff's 'principal witness was in the USA as he was unwell and the defendants had been briefed. In

the premises, he was not ready to avail evidence. Mr. Onguto thereupon applied for an adjournment.

Mr. Githara said that when the matter came for hearing on 30<sup>th</sup> January, the plaintiff had caused the adjournment. Fresh dates were taken immediately because the defendants were anxious to get the matter over with as they had a counterclaim therein. They were ready for the trial with one witness. After noting

the concerns of both sides, Justice Mwera further noted that discovery and inspection were incomplete and ordered that the trial be given priority dates during this term. He granted an adjournment with the days costs and witness expenses to the defendant. The plaintiff was also ordered to pay the court adjournment fees before the next listing. He finally fixed the matter for mention on 30<sup>th</sup> July, 2003 for the parties to inform the court the progress made in discovery and inspection. When the matter came before him on that day, Justice Mwera stood it over generally until the court adjournment fee of 16<sup>th</sup> July, 2003 was paid.

On 21<sup>st</sup> October, 2003, by consent, the hearing date was fixed for 29<sup>th</sup> January, 2004. This marked the turning point on this case.

On the same date, M/s Garam Investments, the second defendant herein, sent notices to the plaintiffs, giving them 45 days in which to redeem the suit premises. These were closely followed by a formal notification of sale dated 23<sup>rd</sup> October, 2003, wherein the plaintiffs were warned that their suit premises would be sold on 14<sup>th</sup> January, 2004 for the properties in Kakamega and Eldoret, and on 15<sup>th</sup> January, 2004 for the property in Nairobi. This was followed by publication in the Daily Nation of December 22, 2003, advertising the properties for sale. These developments precipitated the filing of the present application.

I have taken the liberty to summarise the above goings on in order to place this application in its historical perspective. The main suit herein was filed in order to forestall that which the defendants now seek to accomplish thereby forcing the application before the court. It is noteworthy that the notification of sale and the notice of sale were sent out on the same day that the hearing date was being taken. If that was by sheer coincidence, then it was a very neat coincidence. But if it was not by coincidence, then the timing of the sale cannot be bona fides.

The fact of the matter is that this case had been listed for hearing twice before. The defendants did not take any steps to realize their securities at that time. Having come this far, is it really in the interests of justice that the suit premises should be disposed of at a time when the hearing of the suit has already commenced? Justice is all about fairness. The plaintiff's main witness has already started testifying. If we now stop him in his tracks, we shall breach an implied promise that he would have his day in court. Such a practice would be no better than that of gazumping buyers. It would be unfair, patently unfair, unfair to the meanest intelligence if he were to be denied the opportunity to have his case fully heard and determined on merits, now that the matter is already part-heard.

If the hearing of this case had not commenced, I would in all probability, have dismissed the application without butting an eyelid. But now that we have started, I consider it fairer to hear the case to its very end. For these reasons, the court hereby grants prayer for order number 2 by granting an injunction restraining the defendants whether by themselves, their servants and/or agents or howsoever from auctioning for sale Kakamega 504/96 Kakamega District, L.R.

No. Eldoret Municipality/block 5/126/1 (West Indies Estate) Eldoret Town as scheduled or at all, and L.R. No. 3734/1095 (IR No. 52129/2) Lavington estate as scheduled or at all pending the hearing and determination of this suit. Any other decision would mean less work for the court, yes, but it would be inequitable and morally reprehensible.

However, it is not lost on this court that some plaintiffs find contentment in temporary injunctions and are thereafter very reluctant to prosecute their suits. I hope and trust that this will not be the case here as the matter is already part-heard. But should the plaintiff's change course and begin delaying the final determination of this case, the defendants will be at liberty to apply.

Costs in the cause.

Orders accordingly.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of February 2004**

**L .NJAGIJUDGE**