



Editorial Note

**AUCTIONS**

- effect of courts order canceling sale
- validity of title or transfer after court order canceling sale is communicated is doubtful arguable point in law.
- A sale impeachable.

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

**CIVIL CASE NO 259 OF 2004**

**JOSEPH M MBUYA ..... PLAINTIFF**

**VERSUS**

**PIONEER BUILDING SOCIETY LTD**

**& ANOTHER ..... DEFENDANT**

**RULING**

The application dated 18th March 2004 seeks an injunction to restrain the defendants, their agents and/or servants from interfering in any way with the land parcel LR 2787/XII Nanyuki pending the hearing of the suit.

The applicant claims to be a purchaser of the land in question and an unregistered transfer in his favour has been exhibited. The applicant claims to be in possession of the land.

On the other hand the second defendant has been registered as owner of the land pursuant to sale to him by the chargee the first defendant Building Society in an auction. Both the first defendant and the second defendant claim that there was a sale by public auction on 21st October 2003 and the first defendant as chargee did hold a public auction and on the same day did sign a transfer by chargee in favour of the 2nd defendant who became owner as a result. The entries in the grant show that the charge has not yet been discharged although upon presentation of a transfer by chargee the charge entry ought to have been discharged.

The transfer by chargee para (e) states that the sale by public auction was on 21st March, 2003. The affidavit in reply and the transfer by chargee are therefore in conflict concerning the date of when the public auction was held.

The applicant claims that on 21st March 2003 when the public auction was supposed to have been held the 1st defendant had been served with a court order from a subordinate court canceling or stopping the auction. The applicant therefore contends that if the sale took place on 21st March 2003 in violation of a court order the sale was null and void and incapable of passing a good title or any title to the second defendant. The court order was supposed to stop the sale and not intended for registration. With the three considerations or limbs set out in the case of *Giella v Cassman Brown* in view, I find that the application does raise a fairly arguable and serious point of law concerning the validity of the sale in the face of a court order (although there could be a jurisdictional issue on whether the subordinate court had the jurisdiction in view of the value of the subject matter). Ordinarily court orders when communicated to the parties intended ought to have legal the required effectiveness and should be obeyed although I cannot make any finding on this at this stage. There are also arguments on whether or not a public auction was held at all and the legal effect of this. Although I cannot at this interlocutory stage make any final findings

on any issue or point I find that a prima facie case has been established.

On the second point on whether the applicant has suffered irreparable harm incapable of being compensated in damages I find that this is a border line matter in view of the possession.

It is therefore necessary to consider the final point which is the balance of convenience. This tilts in favour of the applicant by virtue of his possession.

The end result, is that I grant an injunction restraining any further sale or transfer of the land whatsoever until the determination of the full hearing or final determination of this suit. Costs shall be in the cause.

**DATED and delivered at Nairobi this 28th May 2004 .**

**J G NYAMU**

**JUDGE**