



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 11 OF 2004**

**NGENGI MUIGAI )**

**CATHERINE WANGUI NGENGI ) ..... PLAINTIFFS**

**- versus -**

**EAST AFRICAN BUILDING )**

**LUCY MBUGUA ) ..... DEFENDANTS**

**R U L I N G**

Sometimes in 1998 the plaintiffs borrowed a sum of Sh.5,000,000/= from the first defendant. As security for that advance the plaintiffs charged to the first defendant their property situate in Mombasa known as Title No. Mombasa Block XVII/Parcel 587 for the same amount. They say that out of that sum they have repaid a sum of Sh.4,000,000/=. Upon receipt of a notification of sale from M/s G.A. Dato & Co. Ltd. on or about the 14th October 2003 the plaintiffs say they made frantic efforts to stop the sale. They talked with the Vice President, Hon. Moody Awori, who wrote to the Managing Director of the first defendant and requested him not to sell the plaintiffs' charged property. The plaintiffs say they thought the first defendant would favourably

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consider that request coming from none other than Hon. Moody Awori who is not only a director of the first defendant but also the Vice President of this Republic. That, however, was not to be. Their property was re-advertised for sale. They went back to the Vice President who, according to them, assured them that the sale would not go on. They were later surprised to learn that the sale after all went on and that the first defendant was the auction purchaser of the property at a price of Sh.19,000,000/=. They therefore filed this suit alleging inter alia, fraud on the part of the first defendant and applied for a temporary injunction to restrain the first defendant from having the property transferred and registered in its name. The application is brought under Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act and is supported by the affidavit of the first plaintiff.

In opposition Rina Chatrath, the legal officer of the first defendant swore a replying affidavit. She denied that the defendant made any representation to the plaintiffs that the sale would be stopped. She admitted that Hon. Moody Awori made a request to the first defendant in his capacity as the Vice President and Minister for

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Home Affairs and not as a director of the first defendant. The request was however not granted given the history of the account and that it was clear to the plaintiffs that the sale would go on as the property was

advertised for sale on 9th December, 2003 and 5th January 2004. She said that prior to auction sale on 7th January 2004 the property was valued at Sh.19,000,000/= and that the first defendant being the highest bidder at the auction sale it bought the property for that sum. She accused the plaintiffs of being guilty of material non-disclosure in that they alleged in paragraph 19 of their plaint that there is no other suit between the parties and yet there is one – Mombasa HCCC No.547 of 2001 in which the plaintiffs' application for injunction to stop the sale of the property was dismissed. Counsel for the parties made long submissions raising several legal points and cited several authorities which I will deal with in the course of this ruling.

The first legal point raised by Mr. Omolo, counsel for the first defendant, is the one of material non-disclosure. He submitted that the plaintiffs should have disclosed that there is a pending suit between the plaintiffs and the first defendant over the same matter. The fact that there is a second defendant in this case does not make

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any difference as the prayers in this suit are all sought against the first defendant and that the second defendant is wrongly sued. Mr. Gikandi's response to that was that the parties and the reliefs sought in the first suit are different from those in this suit.

I have perused copies of the plaint and chamber summons for injunction in the earlier suit along with the plaint and chamber summons for injunction in this suit. The earlier suit sought a declaration that the intended sale was illegal. This one seeks a declaration that the auction sale of 7th January 2004 was highly irregular and therefore null and void. Both of them are aimed at thwarting the sale of the charged property.

Are the plaintiffs guilty of material non-disclosure? I think they are. It does not avail them to argue that because there is a second defendant in this suit and that since this suit is seeking a nullification of the sale it is different from the earlier one. In **John Murilu Kigwe & Another Vs Agip (Kenya) Ltd. Nairobi (Milimani Commercial Court) HCCC No.2382 of 1999** it was held that on an ex-parte application uberrima fides is required. A

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person making an ex-parte application is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not he will be deprived of any advantage he will have already obtained by an ex-parte order. If there is any deception practiced on the court, then the court should not go into the merits of the case and instead it should dismiss the application.

Materiality is to be decided by the court and not by the assessment of the Applicant and his legal advisers. See **Rex Vs Kensington Income Tax Commissioners (1917) 1 K.B. 486 at 504**. The material facts are those which are necessary for the court to know when dealing with an application. They include not only the material facts within the knowledge of the applicant but also any additional facts which he would have known if he had made proper and reasonable enquiries. In this case the fact that the plaintiffs' application seeking to stop the first defendant from selling the self same property had earlier on been dismissed was a material fact that should have been brought to the attention of the court. An Injunction being an

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equitable remedy the applicant should ensure that his conduct does not betray him.

Mr. Omolo also argued that this suit will not see the light of day as it is based on the doctrine of equitable Estoppel as the cause of action. I do not wish to make any definite findings in this case at this stage. All I wish to say is that that submission is not without basis given the authority in **Combe Vs Combe [1951] ALLER 767**. But that is not the only cause of action. Paragraph 13 of the plaint seems to suggest that the property may have been sold at an under value. That remains to be seen at the hearing of

the suit. Mr. Gikandi submitted that the first defendant should not have bidden at the auction sale without leave of court. He cited Order 21 Rule 65(1) of the Civil Procedure Rules. With respect that provision is not applicable in this matter. That provision forbids decree holders from purchasing property in auction sales in execution of their decrees. Section 77(1) of the Registered Land Act (Cap300) expressly allows a chargee to bid at a sale in exercise of the chargee's power of sale.

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I cannot see anything wrong in the first defendant bidding and purchasing the charged property. The sale is not challenged. The allegations of fraud and impropriety on the part of the first defendant are general and bare. No particulars have been given as required by law. In the circumstances there is nothing before the court upon which I can at this stage hold that the purchase by the first defendant of the charged property was fraudulent or improper in any manner as suggested by the plaintiffs.

The plaintiffs also contended that the interest charged by the first defendant is exorbitant and unconscionable. According to them the total amount due to the first defendant should not exceed Sh.10,000,000/=. That is to say the amount should not exceed twice the sum advanced. They want me to consider the Parliamentary debate on the Donde Bill. I cannot for the simple reason that the Donde Bill is not law. In **Habib Bank A.C. Zurich Vs Pop in Kenya Ltd. and Others Civil Appeal No. 147 of 1989 (C.A.) (unreported)** it was held that a dispute as to the exact amount owing under a mortgage is no ground upon which a mortgagee who has served a valid statutory notice can be restrained from exercising his statutory power of sale. In this case

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the power of sale has already be exercised and there no allegation of any irregularity in the sale. In my view a prima facie case for the grant of injunction has not been made out. My sympathies are with the second plaintiff for whom it was contended that the charged piece of land was given to her as a wedding present and as a result she attaches great sentimental value to it. I cannot, however, help her. Once a property is charged it becomes a commodity for sale upon default being made in the loan repayment. Default was made in this case and the property was sold.

The other point I want to consider is whether or not the plaintiffs will suffer irreparable loss if an injunction is not granted. The law on the point is clear. "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them no interlocutory injunction

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should normally be granted, however strong the plaintiff's claim appeared to be at that stage".- Lord Diplock in **American Cynamico -vs- Ethicon Ltd. [1975] A.C. 396 at p. 406 and 408**. This authority was followed in the Kenyan case of **Wairimu Mureithi - VS- City Council of Nairobi Civil Appeal No.5 of 1979 (CA)**.

According to the first defendant the property was valued at Sh.19,000,000/=. The plaintiffs say they had buyers offering between Sh.30,000,000/= and Sh.35,000,000/= for it. I do not think that it will be a problem ascertaining the correct value of the property. The first defendant is a reputable banking institution. It has not been suggested that it will not be in a position to pay damages. If at the end of the day the plaintiffs succeed in this case they can in my view be adequately compensated by an award of damages. This being the view I hold in this matter I do not need to consider the balance of convenience. In the circumstances the plaintiffs' 10 application fails and it is hereby dismissed with costs.

DATED this 4th day of June, 2004.

D.K. Maraga

Ag. **JUDGE**