



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION, MILIMANI  
CIVIL SUIT NO. 501 OF 2004**

**BOWERS MALESI MUGALO .....1ST PLAINTIFF**

**MISPAH NASIMIYU MUGALO .....2ND PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT**

**GARAM INVESTMENTS .....2ND DEFENDANT**

**RULING**

The Plaintiffs have four substantive prayers in their chamber summons dated 15th September 2004 but only one is relevant for this ruling.

The relevant prayers seeks “*the court do nullify the sale of L.R. No. 11877 which took place on 2 nd September 2004 pending the hearing and determination of this suit.*”

The background of this matter is that the Plaintiffs entered into a sale agreement to purchase two acres of the property L.R. No. 11877 in May 1990. The Plaintiffs had previously taken possession of those two acres and had built a house thereof. According to the plaintiffs before that subdivision of the two acres could be undertaken the owner passed away. It is then that the Plaintiffs discovered that the owner had charged the entire property to the first defendant. Indeed it is not disputed that the charge was registered on 7th June 1995. The Plaintiffs were awaiting the dependants to obtain letters of Administration but also registered a caveat on 9th February 2000.

It is in that background that the plaintiffs seek an order to stop the 1st defendant from transferring the property to the person who purchased the same on 2nd September 2004.

The first issue is that the Plaintiff ought to have joined the purchaser into these proceedings because the outcome of the same will affect him or her.

The 1st defendant’s counsel said that Section 23 of the R.T.A. states that title is conclusive evidence of proprietorship and since they are not the registered owners their right is to seek damages and not an injunction.

In its Replying Affidavit the 1st defendant states, “*that at the time the first defendant took the charge over the property, there was no encumbrances registered against the title and ....the first defendant is not aware of and certainly did not consent to any subdivision or sale of any part of the property.*”

I have noted the 1st defendants reference to Section 54 of T.P.A, which states that a contract of sale of

immovable property “*does not, of itself, create any interest in or charge on such property .*”

I have considered the authorities cited by the 1st defendant and I also wish to refer to the Court of Appeal ruling in Civil Application No. **NAI 349 OF 2003 (174/03 UR) VENTURE CAPITAL & CREDIT LTD AND CONSOLIDATED BANK OF KENYA LTD.**, where it was held as follows: -

**“The suit property does not belong to the applicant. The owner of the suit property M/S Komarock View Estate Ltd. is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the bank. So, even if the suit property is sold, the applicant will not loose any proprietary right to the property.”**

This quote I think captures the facts of this case, the plaintiffs have no proprietary interest in the suit land which can entitle them to the prayer they seek to restrict the transfer by 1st defendant of that land. They therefore cannot be heard to say that the sale was irregular or that the auctioneers breached their rules. They are strangers in the suit property and I agree the right they may have is the right of damages.

Accordingly the Plaintiff’s application dated 15th September 2004 is dismissed with costs to the defendants.

**Dated and delivered this 23rd day of November 2004.**

**MARY KASANGO**

**AG JUDGE**