REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 62 OF 2002

KITUR & ANOTHER..APPLICANTS

VERSUS

STANDARD CHARTERED BANK & 2 OTHERS ....RESPONDENT

RULING

This application is expressed to be pursuant to Order XXXIX Rules 1, 2, 3 and 9 Civil Procedure Rules and section 3, 3A, 63 (c) Civil Procedure Act. The prayers are that the defendants jointly and severally be restrained by means of a temporary injunction from transferring, selling, taking possession of, leasing, charging or trespassing upon or in any way dealing with all that parcel of land known as Title No. Eldoret Municipality Block 7/184 in the name of 1st Plaintiff (1st Applicant) pending the hearing and disposal of the suit herein, and also pending the hearing and determination of this application.

The grounds upon which the application is made are on its face and also supported by the sworn affidavit of the 1st applicant dated 4th April, 2002, and a further one sworn on the 30th April, 2002.

In his submission in support of this application, Mr. Ngigi Mbugua for the applicants argued that it was not in issue that the 1st applicant charged the suit property to the 1st respondent for a loan and overdraft facility granted by the 1st respondent to the 2nd applicant. Despite making repayments to the tune of Kshs.56,459,531/10, counsel admitted that the applicants are still in arrears and that the 1st respondent is entitled to realize the security kept in its favour.

Counsel submitted that what the applicants are questioning, firstly, is the non-issuance by the 1st respondent of a statutory notice; secondly, advertising the property for sale on 27th March, 2002 but instead of sale by public auction, it was by private treaty; thirdly, that the 1st respondent acted in bad faith when it refused the 1st applicant an opportunity to redeem the suit property but proceeded to sell by private treaty at Kshs.25 million, far below the valuation of Kshs.57.5 million, and a reserve price of Kshs.40.0 million. In doing so, counsel submitted that the sale was thus irregular and that the 1st respondent acted in bad faith. Relying on the decision of Hancox J. A. (as he then was) in *KCB Ltd v James Osebe*, counsel argued that the applicants are entitled to restraining orders against 1st respondent to …………. from transferring the suit property to the 3rd respondent. He also relied on section 77 (1) Registered Land Act which provides that a chargee in exercising its power of sale must act in good faith and take into account the interests of the chargor. He charged that the 1st respondent did not only act in bad faith but was also fraudulent.

Mr. Mbugua referred to the sworn affidavit by 1st applicant in which he is willing to pay the reserve price or twice the sale price which was paid to the 1st respondent in order to redeem the suit property. In counsel’s view, if an injunction as prayed for is not granted, the 1st applicant may lose a valuable property currently valued at Kshs.57 million and thereby suffer irreparable loss which cannot be

adequately compensated by an award of damages (*Giella v C. Brown*).

In response to Mr. Jenner's replying affidavit sworn on behalf of 1st respondent, counsel observed that the Notice was sent under a certificate of posting instead of by registered mail. Further that the deponent has admitted that it is unreasonable to refuse an offer of Kshs.40 million in favour of Kshs.25 million. It was Mr. Mbugua's submission that the right to redeem has not been extinguished by virtue of sale because the sale was itself improper and fraudulent. Since, according to Mr. Mbugua, the sale and consequential conveyance were fraudulent, the applicants have proved a *prima facie* case with a probability of success. While admitting that there had been an earlier suit, Eld. HCCC. No. 183 of 1999, that suit, he submitted, dealt with an impending auction while the instant one concerns events at the auction and subsequent thereto.

Mr. Gicheru, counsel for the 1st and 2nd respondents, and who was instructed by the firm of Amolo & Gachoka & Company, opposed the application. He relied on the affidavits sworn by Mr. Jenner and Mr. Wanjuu on behalf of 1st and 2nd respondents respectively. He submitted that paragraph 19 of the plaint falsely avers that there has been no previous proceedings between the parties, purportedly in compliance with O.VII R.(1) (e) of the Civil Procedure Rules when in fact Eld. Municipality Block 7/184 was one of the suit properties between the 1st respondent and the 1st applicant in Eld.HCCC. No. 183/99 and which was dismissed under O.VIR.13(1)((a) Civil Procedure Rules. Consequently, the averment in the verifying affidavit that the pleadings are correct amounts to perjury. He urged the court to strike out the suit and thus the application under O.VIIR.1(3) Civil Procedure Rules. Mr. Gicheru submitted that the remedy for an irregular sale lies in damages as provided for in section 77 (3) Registered Land Act and since there is no prayer for damages in the plaint, it discloses no reasonable cause of action.

Counsel urged this court to dismiss the suit on the ground that a claim for redemption must be brought by way of an originating summons under O.XXXXVI Civil Procedure Rules. That is only true if there are no other prayers. In the instant suit, there are other prayers, other than the one for redemption and, therefore, the applicants were entitled to come to court by way of a plaint. There is no merit in the objection that the applicant should have come to court by way of an originating summons. This same point was taken in Eldoret H.C.C.C. NO.50 of 2002 *Sambai Kitur v Standard Chartered & 2 Others (UR)* and I reached the same holding.

On the issue of statutory notice being served by a mail sent under a certificate of posting or as registered, the underlying question should be whether or not the applicants received that notice. On the affidavit evidence presented before me, I am satisfied that they did. Counsel for the 1st and 2nd respondents submits that this is a non-issue. With all due respect, I am in agreement with his submission. The 1st and 2nd respondents denied that there had been no public auction since they published the sale in the print media and in it invited the members of the public, without any restrictions. The property was purchased by the third respondent at a public auction and according to the 1st and 2nd respondents, there is nothing new capable of being redeemed. That right is extinguished. In any case, the 1st and 2nd respondents maintained that there was not a single exhibit produced by way of an annexure to prove that the applicants had made an offer of Kshs.40 million to redeem the property in question. That is so and I must straightaway state that there is no substance in this allegation by the applicants. Had it been otherwise, there would have been an express attempt to deposit such sum in court or with the 1st and 2nd respondents. The 1st respondent denied that it accepted a very low offer and that that was a sign of bad faith. Previous attempts had yielded very low offers which necessitated their cancellations. An offer by the 1st applicant to repay the arrears at Kshs.1 million per month had also come to nought. In the premises, 1st respondent's case is that it accepted the best price in the circumstances and did not at all act in bad faith. Mr. Gicheru referred to a number of authorities which this court has looked at and considered. They established that where a chargor is aggrieved by the value of an auction sale, its remedy lies in damages and not in an injunction.

It has also been submitted that the 1st applicant is not entitled to an equitable relief of an injunction because of his past conduct. Fully aware of a previous suit and proceedings, he has denied its existence or failed to disclose the same. Secondly, he has claimed to have Kshs.40 million but has not repaid the outstanding debt which he admits, and yet from 1999, he has not repaid more than Kshs.3 million to 1st

respondent. Mr. Gicheru submitted that in the result, the application for injunction be dismissed with costs.

On his part, Mr. Manani for 3rd respondent relied on the sworn affidavit of Stephen Kiprop Chesire sworn on the 22nd April, 2002 as well as adopted Mr. Gicheru's submissions in so far as relevant to his client. He emphasized that once a property rests in a third party pursuant to an auction sale, the chargor's relief lies in damages and any irregularity in the process of sale cannot be reason for setting it aside.

In his final submissions, Mr. Mbugua stated that the applicants had proved a *prima facie* case with a probability of success and that on a balance of convenience, the court ought to decide in favour of the applicants to preserve the property until the suit has been disposed of on the merits.

Having stated the rival submissions by counsel for the parties, it is now time to apply the facts to the law. It now trite that to succeed in an application of this nature, the applicant must prove a *prima facie* case with a probability of success, and should the court be in doubt in this requirement, the court may resolve the application on a balance of convenience. But an interlocutory injunction will not normally issue unless the irreparable injury which would not be adequately compensated by an award of damages. Similar set of facts arose before me in *Samross Investments Ltd and Another v KCF Co. Ltd.*, Eld. Hccc No. 95/2001 in which I held that once a property is offered as security it by that very fact becomes a commodity for sale, and that there is no commodity for sale whose value cannot be computed and determined. Again in a suit very similar to the present, namely, *Sambai Kitur v Standard Chartered Bank and Two Others,* Eld H.C.C.C No. 50 of 2002, I had this to say, on p. 14 of the typed judgment.

> "It must also be noted that when chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with prior concurrence and consent of the chargor."

In the circumstances, it is not open to the applicant to allege that he is likely to suffer irreparable loss or injury which cannot be compensated by an award of damages. In this holding, I am conscious of the fact, of which I take judicial notice, that the 1st respondent is a giant financial institution and has the resources with which to pay such damages, should it be found against it in favour of the applicant.

The law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneer, shall be compensated by an award of damages. (See Section 77(3) Registered Land act and Section 26 (1) Auctioneers Act). I will come to the issue as to whether or not the applicant's suit herein has a probability of success, *prima facie*. But even if it succeeds, the relief available to it is in damages only.

The applicant has alleged that it was denied the right of redemption, that the sale was fraudulent by reason of a very low sale price, which was far below the reserve and market value, and that no public auction was conducted at all. These are the main grounds which have been advanced before me for the application herein. Affidavit evidence was given that previous attempts at sale had collapsed due to the depressed market values and in the result, the applicant had offered to pay a monthly instalment of Kshs1.0 million, which offer the 1st respondent accepted but the applicant defaulted in its offer. That evidence has not been rebutted. The offer to redeem was not accompanied by any concrete action on the part of the applicant. There has been no evidence that the applicant had Kshs.40 million which it could avail to the 1st respondent. It is more likely the applicant is not forthright in this otherwise, when allowed to pay Kshs.1.0 million per month, it should have had no difficulty. Likewise, leave to deposit it with the court or 1st respondent should have been, but was not sought, by the applicant. It is one thing to make an offer and quite another to be capable of honouring that offer. This court is satisfied that the sale was publicly advertised and that if in the end the process of sale was irregular, the remedy available to the applicant is as already stated above.

I have carefully scrutinized the papers presented in this application and find no evidence of fraud, only a possible irregularity here or there. The authorities relied upon by Mr. Ngigi Mbugua do not apply, in my

view, where no fraud is established.

Lastly, the averments in the plaint and in the verifying affidavit to the effect that there have been no proceedings between the parties were false and in contravention of the rules. A false affidavit is non-affidavit and thus even on a matter of technicalities, I do strike out the verifying affidavit. After doing, so, the plaint remains bare and untenable. The applicant has told lies about past suits between the parties and regarding attempts at redemption. It has not come to court with untainted hands. It is thus undeserving of an equitable relief(s).

Consequently, and for the reasons hereinabove stated, the application is struck out on technicalities and on the merits with costs to the respondents.

Dated and delivered at Nairobi this 19th day of July, 2002

G.E.O TUNYA

JUDGE