



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1778 OF 2000**

**ROSEMARY ANYANGO ..... PLAINTIFF**

**VERSUS**

**EAST AFRICAN BUILDING SOCIETY ..... 1ST DEFENDANT**

**HANNAH NJERI THUBE ..... 2ND DEFENDANT**

**RULING**

The plaintiff/applicant has brought this application under O. XXXIX Rules 1, 2, 2A, 3(2) and (3) of the Civil Procedure Rules for an injunction to restrain the defendants from transferring that piece of land known as Nairobi/Block 103/183 until this suit is heard and determined.

Briefly the facts giving rise to the application are that the applicant is the registered owner of the suit property. On 24.4.1996, she obtained a loan from the 1st defendant in the sum of Shs.2,000,000/= and as security therefor created a charge over the property in favour of the 1st defendant. It is I think common ground that the plaintiff defaulted on the loan repayments and the 1st defendant's statutory power of sale under S. 74 of the Registered Land Act arose. In exercise of that power, the 1st defendant sold the property at a public auction held on 13.9.2000 at which auction the 2nd defendant's bid at Shs.2,606,000/= was accepted as the highest and he was declared the buyer.

On 5.10.2000 the plaintiff instituted this suit against both defendants. She complains that the sale was unconscionable, irregular, illegal, oppressive, harsh and in breach of the 1st defendant's duty of care to the plaintiff as well as fraudulent. Simultaneously with the suit the plaintiff lodged the application for injunction the subject of this ruling. Several grounds have been argued in support of the application but in my judgment only two deserve consideration. These are:-

(a) That the property was sold at an undervalue; and

(b) That the auction sale was illegal and a nullity on account of contravention of the Auctioneers Rules.

With regard to the first ground, the evidence available reveals that a valuation done by Lloyd Masika Limited and dated 28.6.1999 showed the forced sale value of the property at Shs.2,450,000/= and the open market value at Shs.3,500,000/=. That valuation is almost similar to the one carried out by M/S Mbiwah & Co. at the request of the plaintiff which placed the open market value at Shs.3.8 million. The latter valuers do not however show what the forced value of the property would be. Given all those circumstances, I do not think there is sufficient evidence to support the claim that the price of Shs.2,606,000/= realised at the auction was an undervalue.

The second ground alleges that Rule 15 (b) of the Auctioneers Rules was contravened in connection with the sale in that the Notification of Sale and the Advertisement did not comply with Rules 15(b) and 16(f) respectively of the Auctioneers Rules. In respect of the alleged contravention of Rule 16(f), learned counsel for the plaintiff did not explain exactly what part of the rule was offended and on my part, I cannot see any irregularity. I must therefore reject the complaint as unfounded.

Regarding the complaint alleging non compliance with Rule 15 (b) of the Auctioneers Rules, Mr. Munga submitted that the value of the property to be auctioned was not indicated. That submission is not

based on anything contained in the affidavit in support of the application. Worse still no copy of the Notification of Sale is annexed to the plaintiff's application and consequently it is not possible to determine whether or not what Mr. Munga said is correct. Section 109 of the Evidence Act provides that "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence." In the instant case, the plaintiff wishes the court to believe that the Notification of Sale did not show the value of the property. Clearly, the burden was on her to prove that fact on a balance of probability. She has not said anything about it in her affidavit and in my view the burden placed on her has not been discharged.

For all those reasons, my finding is that the applicant has not established a case with a probability of success to justify the grant of the injunction sought in this application. The application is accordingly dismissed with costs.

Dated at Nairobi this 23rd day of February, 2001.

**T. MBALUTO**

**JUDGE**