



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

**CIVIL CASE NO. 1353 OF 1998**

**JOSEPH KAARA HENRY MWETHAGA..... PLAINTIFF**

**VERSUS**

**CHRIS M. GATURU T/A CRIMA ENTERPRISES**

**& THREE OTHERS.....DEFENDANT**

**RULING**

This is the plaintiffs application for orders that:

1. Defendants be restrained from transferring alienating or otherwise dealing with or parting with right title interest, taking and or interfering possession of land Title NO. Mutira/Kaguyu 839 in Kirinyaga District until the hearing of this application inter partes or further order of this court.
2. All further registration or charge of registration in ownership, leasing sub - letting allotment occupation or possession of land title no. Mutira/Kaguyu/839 with any land Registry, Government Department and all other registering authorities be prohibited until further orders of the court.
3. The 3rd and 4th defendants do remove the hired thugs guards, agents servants, employers from who have been trespassing occupying and interfering with plaintiffs possession of land title no. Mutira/Kaguyu/839 until further orders or hearing of the suit. Prayer No. 3 was abandoned at the hearing because defendants took possession of the suit land after the application was filed.

Plaintiff had obtained a loan from Thabiti Finance Co. ltd (2nd) defendant - in liquidation) on the security of his land title no. Mutira Kaguyu/839. The land is 7 acres. Plaintiff deposes that the land is valued at shs 9000,000 and that there are tea bushes on the land and a permanent house worth shs 1.9 million and that he has lived on land with his family of 25 members. He defaulted in the repayment of the loan and 2nd defendant decided to exercise its statutory power sale. The land was advertised for sale by public auction at Kerugoya Town for 19.12.96. Chris Gaturu - first defendant alleged conducted a public auction on 19.12.96 and that he sold the land to Mr. Ephantus Njaramba for shs 750,000. Mr. Ephantus Njaramba deposes in his replying affidavit that he was instructed by Mr. Kinisu - one of the directors of 3rd defendant to go and bid for up to shs 800,000. He deposes further that Mr. Kimisu informed him that if the bid was successful property would eventually be registered in the name of Mugunadu Farm ltd (3rd defendant) and that his bid of shs 750,000 was the highest and was accepted. Mr. Phillip Kanisu on his part deposes that he instructed Mr. Njaramba to bid and that Mr. Njaramba later informed him that the bid was accepted and that the sale was completed by Mr. Joel Gatimu Kibuchi (4th defendant) - a director of Mugunandu Farm ltd. Mr. Joel Gatimu Kibuchi (4th defendant ) that deposes that the requisite 25% deposit and balance of purchase price were eventually paid, consent of land Control Board obtained and the land eventually registered in the name of Mugunandu Farm ltd on 7.10.97 after which he forcibly took

possession of the land which he has greatly improved. He annexed a receipt dated 15.1.97 showing that Kibuchi and Co. Advocates paid shs 187,500 to Ocharo & Co Advocates being the 25% deposit. He also annexed a memorandum of sale dated 19.12.96 signed by first defendant showing that first defendant sold the land to Mugunandu Farm ltd at shs 750,000 "Subject to conditions overleaf"; that purchaser had paid shs 187,500 as deposit to the auctioneers and that purchaser had agreed to pay the balance of purchase price on or before 17.1.97.

The conditions referred to in the memorandum of sale have not been annexed. IT is not disclosed when the balance of the purchase price was paid and no receipt for payment has been annexed There is however a transfer by chargee in favour of Mugunandu Farm ltd dated 4.8.97 which acknowledges receipt of shs 750,000.

Plaintiff deposes that he was present on the date of the auction and that no public auction was held and that the purported auction sale is a fraud, facade and pretence intended to give legitimacy to fraudulent transaction intended to deprive him of his land. Two main reliefs are sought in the plaint - namely, a declaration that sale of suit property was irregular, a fraud, a facade pretence, unlawful and therefore a nullity and should be set aside and order that property be restituted to the plaintiff and the Register be rectified.

He has given particulars of fraud in paragraph 10 of the plaint which includes an averment that consent of land Control Board was not given on 11.3.97 (para 10(I)). Defendants have filed Defence denying allegations in the plaint.

The 2nd defendant has filed a counter claim for balance of sums due under the charge. The 3rd and 4th defendant also filed a counter claim for legal costs incurred in a previous suit. Plaintiff deposes that he filed a complaint against first defendant before the Auctioneers licensing Board being Disciplinary case NO. 17 of 1998. He has annexed the proceedings and decision of the Board They show that the Board made a full inquiry of the alleged auction sale of suit property and concluded that:

1. There was no auction on 19.12.96
2. Auctioneer has admitted that he backdated the memorandum of sale and produced two memorandum of sale on the request of purchasers advocates
3. He accepted the highest bid of an agent whose principal was not disclosed
4. He failed to receive 25% deposit at the fall of the hammer
- 5 He caused an agreement of sale to be signed in his absence.

The Board revoked the first defendants licence. The court was informed that first defendant has filed an appeal against the decision of the Board being High Court Civil Appeal No. 213/98

The proceedings of the Board show that first defendant did not receive 25% deposit at the fall of the hammer; that first defendant prepared the Agreement of sale and forwarded it to chargees advocates unsigned; that he later dated 19.12.96; that he does not know the date of signing of the agreement, that he does not know who received the 25% deposit and that he made two memorandum of sale at the request of Mr. Kibuchi & Co. Advocates so that his client could choose which one to use for purposes of registration. Phillip Kimusu also gave evidence before the Board. He admitted that the 25% deposit was paid on 14.1.96 by his advocates, that he does not know when his advocates paid the balance; that he had two memorandum of sale; that the date in the memorandum 19.12.96 is false; and that the auctioneer was not present when he signed it.

The purpose of the two orders sought in the application is to preserve the suit land pending the hearing and determination of the suit plaintiff has been dispossessed and is not asking that he be restored into the premises pending the determination of the suit.

I am required to find out whether or not plaintiff has established a prima facie case with probability of success. If he establishes such a case he is entitled to preservation orders subject to the discretion of the court.

I appreciate as decided in the case of George Gikubu Mbuthia versus Simba Credit Finance Corporation & Anor C.A No. 111/86 that, the equity of redemption is extinguished at the fall of a harmer when a successful bid is accepted at the auction. After the bid is accepted and a harmer falls a contract is made between the purchaser and the chargee. But this equity of redemption is extinguished subject to the completion of the contract made after the fall of the harmer.

If the contract of sale made after the fall of the harmer is successfully completed the equity of redemption is extinguished. Although an injunction will not issue to stop the chargee from completing conveyance of a contract of sale of charged property, it is clear from the decision of Crossman J in Waring Widon and Wanchester Assurances Co. ltd (1935) 1 CH 310 an injunction can issue if it is proved that the chargee entered into a contract of sale in bad faith in which case the contract is liable to be set aside.

The plaintiffs case is firmly that his land was not sold by the chargee in a public auction. That is denied by defendants. It is not within my province to decide disputed facts at interlocutory stage. The implication of the plaintiffs claim is that this was a fraudulent sale, and so, no enforceable contract was made through which 3rd defendant could validly acquire title to plaintiff's land. If plaintiffs at the hearing proves that the chargee did not sell his land at the public auction and that the chargee fraudulently transferred his land to the 3rd defendant, the 3rd defendant would not be held to be a bona fide purchaser for value and the sale would be liable to be set aside.

Plaintiff has placed facts before the court which prima facie show that, a contract of sale was not made at the public auction between the 3rd defendant and the chargee. It is probable that the chargee and the 3rd defendant will at the hearing convince the court that there was a sale at a public auction and that indeed a valid contract of sale was made at the fall of the harmer.

Firstly plaintiff has shown prima facie that there was no contract of sale containing conditions of sale which was signed between the auctioneer and the agent of the third defendant after the fall of harmer. Proceedings before the Auctioneers licensing Board show that no documents were signed as between the Agent of 3rd defendant and the auctioneer.

Secondly, plaintiff has shown prima facie that there were two memoranda of sale executed in Nairobi several weeks after the alleged public auction but back dated to 19.12.96 - the date of the auction.

Thirdly, plaintiff has shown prima facie that the chargee published condition of sale in the Daily Nation of 26.11.96 and that one of the conditions of sale was that the purchaser was required to pay 25% of the purchase price at the fall of the hammer in cash or Bankers cheque and balance within 30 days from the date of the auction and that the 25% deposit was not paid until 15.1.97 There is no evidence when the balance was paid and although the memorandum of sale refers to conditions, the conditions were not annexed. The court at the hearing will have to investigate whether or not the payment of 25% deposit was a condition precedent which if not fulfilled terminated the contract - See Myton Ltd versus Schwan - Morris {1974} WLR 33 The court will also have to investigate at the hearing whether there were other conditions attached to the sale and if they were varied by the chargee and whether that variation was lawfull and revived the equity of redemption. (See S. 97 of the registered Land Act).

Fourthly, plaintiff has shown that the Auctioneers licensing Board has already found that there was no auction on 19.12.96 Although there is a pending appeal this finding is of the Board and relevant at this stage and court has to take them into account.

Fifthly, there is a doubt at this stage whether the Land Control Board gave consent to the transfer of the land to the 3rd defendant plaintiff has produced minutes of the meeting of land control Board on 11.3.97. He states that the minutes show that the application for consent was not approved The 2nd, 3rd and 4th defendants claim that application for consent of the land control was made on 11.3.97 and granted

on the same day. There is a genuine dispute which can only be investigated at the hearing of the suit.

The 2nd, 3rd and 4th defendants claim that the application is resjudicata as a similar application was made before Kuloba J. in a previous similar suit and dismissed. The court of Appeal found the previous suit incompetent. The incompetent suit has already been withdrawn. As the suit was incompetent, the application for injunction in that suit and the Ruling have no force of law. Aganyanya J. has in the present suit already ruled that the suit application and suit are not resjudicata. In any case, it is apparent that the Ruling of Kuloba J deals with different circumstances. The circumstances have changed as plaintiff has been dispossessed and is not asking that possession be restore to him.

From the foregoing I am satisfied that plaintiff has shown a prima facie case with probability of success for reliefs sought in the plaint.

Prayer No. 2 of the application is not clear. I interpret it to mean that plaintiff is asking for an inhibition under section 128 of the registered Land Act.

Consequently, I allow the application with costs in the cause and grant an order of injunction in terms of prayer No. 1 of the application and an inhibition under S. 128 RLA inhibiting the registration of any dealing in the land title No. Mutira/Kasuyu 839 until the determination of the suit.

E. M. Githinji

Judge

10.5.2000