



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1885 OF 1999

RUHANGI PROPERTIES LIMITED & 2 OTHERS.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK OF KENYA LTD.....DEFENDANT

RULING

In this suit the plaintiffs Nos 1, 2 & 3 are the former registered proprietors of three plots:

1. Loc 9/Kiruri/830
2. Loc 9 Kiruri/127
3. Loc 9/Kiruri/860

As guarantors of the borrowing of Ruhangi Properties Limited they had charged the properties to the 1st defendant: the Bank. They fell into arrears and in the fullness of time, the Bank exercised its power of sale and appointed the 2nd defendant the auctioneer, to sell the properties. The 3rd defendant is the auction purchaser.

The plaintiffs now sue for:

- a) A declaration that there was no 'public auction' on 21st October, 1999 when the plots were sold.
- b) A declaration that the sale of the suit premises was fraudulent, illegal, null and void.
- c) An injunction to restrain any of the defendants from dealing in any way with the properties.
- d) Damages
- e) Costs.

The plaint was dated 15th December, 1999. What is now before me is the application dated the same day for an injunction. In the events which have happened no interim orders have been made: the auction purchaser became the registered proprietor of the premises on the 18th November, 1999: all that is in force is mutual undertakings to maintain the status quo.

The properties were registered under the Registered Land Act cap 300 and accordingly a public auction is the only way the power of sale can be exercised under section 77 (1).

The regulations in respect of 'a public auction' are contained in rule 17 Auctioneers Rules which read as follows:

"17. (1) Subject to order 21, rules 62, 63, 65, 66, 68 and 69 of the Civil Procedure Rules a public auction shall take place –

(a) of goods seized or repossessed under any contract or any written law between the hours of 10.00 am and 6.00 pm; or

(b) in other sales between the hours of 10.00 am and 10.00 pm and in either event.

(c) in a venue open to and accessible to the public, provided that it shall be lawful for an auctioneer to charge prospective bidders a reasonable sum for a sale catalogue or other list of lots for sale as a condition precedent to entry to the auction premises.

2.The auctioneer shall make reasonable arrangements for the identification of the items for sale by list or catalogue and by the allocation of lot numbers which shall so far as possible be indicated on the goods at the time of sale.

3.The auctioneer shall call out each lot for auction identifying the lot number and showing to bidders the lot for sale or in the case of immovable property identifying the lot for sale by reference to a map or sketch and shall invite bids on it.

4.The highest bidder shall be the purchase subject to compliance with the conditions of sale."

The sale is attacked on a number of fronts. These are:

i) The Notifications of Sale were dated 14th September, 1999 giving notice for the auction at the Nairobi office of the auctioneer on 21st October, 1999.

- That is a period of 36 days when 45 days notification is necessary under rule 15 (d) Auctioneer Rules

- It is also evident that the Notifications contained 'Forced Sale' values and it is submitted these are not "Value" as required by rule 15 (b) Auctioneers Rules.

Okuom v Victoria Commercial Bank Limited HCCC 990/99 and *Lakeland Motors v H Singh Sembi CA 24/ 98* are cited but in those cases no value was shown at all. Also cited was *Kuza Farms and Allied Limited v AFC* but that was in part decided under section 33 of the Agricultural Finance Corporation Act which does not apply here.

ii) The public auction on 21st October, 1999.

- It is said first that this was not held in a 'venue open and accessible to the public' contrary to rule 17(1) (e) Auctioneers Rules.

I debated some aspects of 'a public auction' in HCCC 902/2000 *Auto Travel v Diamond Trust of Kenya Limited* but only as regards non compliance with the conditions of sale and the time taken from the beginning to the end of the auction process neither of which is under challenge here.

The plaintiffs depone that they went to the auction at the right time and place but were chased away by security guards from EARS. The response of the auctioneer is that he only employs one guard and not from EARS but from someone else. If they were not in truth there that would explain why they did not see the auction purchaser at the auction.

The auction purchaser does not say whether he personally was at the auction or whether he deputed someone else. What seems clear is that either he personally or his agent bid for the properties, which were sold as follows:

1. Loc 9/Kiruri/830 - 400,000/-
 2. Loc 9/Kiruri /127- 960,000/-
 3. Loc 9/Kiruru/860- 260, 000/-
- 1,620,000/-

The auction purchaser paid by bank cheque Shs 600,000/- although a 25% deposit as per the conditions of sale would have needed only Shs 405,000/-

Note that another property Ngong/Ngong/14098 was up for sale at the same time and that other people attended for those sales.

Memoranda of Sale were prepared accordingly and signed by both parties the same day: the balance of the price was to be paid within 30 days; time of the essence. It is in my humble opinion a pity that neither the Auctioneers Rules nor the Conditions of Sale in this case speak about the fall of the hammer when the final bid is accepted. Whether it is a hammer, a fist, a newspaper, anything, there is sense of finality coupled with an instant in time when the equity of redemption departs and the auction purchaser enters the stage. The phrase used in the Conditions of Sale in this case is: 'The purchaser shall immediately after the sale....'

The auction purchaser moved fast. On 18th November, 1999 he had become the registered proprietor of all three parcels with new Title Deeds issued that day. There is no dispute he paid the prices and within time. It is said for the plaintiffs that this haste indicated fraud: truth to tell this haste also indicated a tight dead line for payment and completion. Registration of the transfer puts further obstacles in the way of the plaintiffs. Once registration is complete section 77 (3) Registered Land Act indicates that the Registrar has accepted it as sufficient evidence that the power of sale has been duly exercised and "any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power." That section reads:

"A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

That is a statutory provision that damages are thenceforward the only remedy from which it would logically follow that an injunction should not be granted. I considered this matter in HCCC 937 of 1986 *G G Mbutia vs Jimba Credit Corporation Limited & another* on 9th March 2000 as also had Platt JA, *obiter*, in the same case in Civil Appeal 111/86.

The errors in the Notifications of Sale and the error, if any, in the place of the auction, are swept as it were under the carpet. All the plaintiffs can get for those irregularities now that the auction purchaser is the registered proprietor is damages.

The exceptions to that, although not spelt out in the statute would be fraud or mistake. That is borne out by section 143, which reads.

"143. (1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

“(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

The curious thing about this plaint is that although it is alleged the sale by public auction was fraudulent, no particulars are given contrary to order 6 rule 8. Fraud of course, in addition to requiring particulars, requires a higher standard of proof.

Establishing a *prima facie* case of fraud with a probability of success especially on affidavits presents the plaintiffs’ advocate with a very difficult task; more so when as here the statute provides that in these circumstances damages are an adequate remedy. The difficulties in relation to a *prima facie* case of fraud were considered by the Court of Appeal in CA 215/96 *Central Kenya Limited v Trust Bank and others* at pages 9-11 of the judgment. The onus is on the applicant and the burden of proof is heavier than in an ordinary civil case.

In summary it seems to be that the plaintiffs have not established the high burden of a *prima facie* case with a probability of success: furthermore that there is at least an even argument that damages are an adequate remedy.

If I am held wrong in those, I would hold that the balance of convenience favours the new registered proprietor who has paid his money and should enjoy the fruits of his investment.

It would be fair to mention that it seems the plaintiff and the 3rd defendant are political opponents which it is alleged provides some motive for the 3rd defendant to be fraudulent. That may be relevant at the full hearing but in the absence of any very positive evidence I have ignored that aspect in this ruling.

Dated and Delivered at Nairobi this 1st day of December 2000.

P.J.HEWETT

JUDGE