



**Wambua v Credit Bank Limited & 2 others (Civil Suit E572 of 2023)  
[2024] KEHC 12041 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12041 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E572 OF 2023  
PM MULWA, J  
OCTOBER 3, 2024**

**BETWEEN**

**FRANCIS ZAKAYO WAMBUA ..... PLAINTIFF**

**AND**

**CREDIT BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**PETER KAHARA KANYI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. The plaintiff while working as an employee of the 1<sup>st</sup> defendant between the years 2010 to 2015 took a staff loan mortgage facility of Kshs. 8,500,000.00 to construct a house on L.R. Ruiru/Ruiru East Block 7/616. He also purchased the property known as L.R. Ruiru East Block 1/4620. He resigned in the year 2015 and was re- employed in the year 2017 and then he applied for another loan facility of Kshs. 2,291,845.50. Thereafter, the staff loan mortgage facility was restructured into one loan of Kshs. 12,496,152.99.
2. The plaintiff has filed this suit to restrain the respondent from transferring the property. He further seeks the nullification of the sale by public auction which took place on 16<sup>th</sup> June 2022.
3. The plaintiff also filed a Notice of Motion dated 20<sup>th</sup> November 2023 seeking a temporary injunction restraining the defendant from evicting him, transferring and or interfering with his quiet possession of LR No. Ruiru/Ruiru East Block 7/616 and Ruiru East Block 1/4620. The application was brought under Order 40 Rule 1 of the Civil Procedure Rules 2010 and Sections 1 and 3A of the [\*Civil Procedure Act\*](#).

4. The application is supported by the plaintiff's affidavit sworn on 20<sup>th</sup> November 2023. His case is that he was never served with the requisite statutory notices and only became aware of the sale when he was served with the eviction notices. He claims the property was undervalued.
5. In opposing the application, the 3<sup>rd</sup> defendant filed the replying affidavit sworn on 15<sup>th</sup> December 2023, wherein he avers that he purchased, through a public auction, the property known as LR No. Ruiru/Ruiru East Block 7/616 for the sum of Kshs. 10 million. That he paid the deposit and the balance was financed by Equity Bank. The 3<sup>rd</sup> defendant avers that the plaintiff has refused to vacate the premises.
6. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not participate in the application. The Court, on 18<sup>th</sup> December 2023, directed that the application be canvassed by way of written submissions. Only the 3<sup>rd</sup> defendant filed written submissions dated 14<sup>th</sup> March 2024. The plaintiff's counsel elected not to file submissions.

### **Analysis and determination**

7. The application before the court is one for a temporary injunction, I need not re-invent the wheel on the principles for granting a temporary injunction. I have considered the motion, the affidavits, and the submissions by the 3<sup>rd</sup> defendant. The issue for determination is whether the application is merited.
8. The principles for granting an injunction are well settled in the case of *Giella v Cassman Brown* (1973) EA 358 to wit:
  - a. Has the applicant established a prima facie case with high chance of success?
  - b. Will the applicant suffer irreparable damages unless an injunction is issued?, and
  - c. Where does the balance of convenience lie?
9. The plaintiff admitted being indebted to the 1<sup>st</sup> defendant. He alleges that he continues to dutifully pay up the instalment though the 1<sup>st</sup> defendant fails to acknowledge. That the sale of the suit properties is illegal as he was not served with the 90-day notice of default and hence the bank's right to sell has not crystallised.
10. The plaintiff further contends that the property constitutes his home where he has developed and lives with his family. He denies executing any charge document in respect to the suit premises and submits that the transfer was a forgery. No evidence has been adduced on the alleged forgery.
11. According to the applicant, he used the pay slip as security for the loan and could not understand how the 1<sup>st</sup> defendant executed a charge in respect to the suit premises.
12. The fact that a charged property is matrimonial home is not sufficient ground for granting an injunction. I understand the law to be that any property offered as collateral for a loan may be disposed of by the bank in its exercise of its right to statutory power of sale. The plaintiff argues the suit property was undervalued, but has not produced a valuation report to counter the figures in the report.
13. The chargee is obligated to obtain the best price for the property. In the absence of any other valuation report by the plaintiff, to counter the valuation by the bank, I am not persuaded to find, at least at this stage, that the sale of the suit property was undervalued or was in breach of Section 97 of the [\*Land Act\*](#).
14. From the record it is evident that, after issuing the 45-day notice, the 2<sup>nd</sup> defendant sent a courtesy notice to the plaintiff dated 26<sup>th</sup> May 2022. The notice informed the plaintiff that the public auction

was slated for 16<sup>th</sup> June 2022. From the record the auction was duly advertised and open to the public as required by Section 98 of the *Land Act* which provides:

“ 98 (2). If a sale is to proceed by public auction, it shall be the duty of the chargee to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land, are near as may be, followed in respect of the sale.”

15. The 3<sup>rd</sup> defendant participated in the public auction and emerged as the highest bidder. He is thus protected by Section 99 of the *Land Act*. In *Joyce Wairimu Karanja v James Mburu Ngure & Another KBU HCCA No. 118 of 2017 [2018] eKLR*, Ngugi J (as he then was), held that:

“ [30] This section seems quite clear that a purchaser of property sold in the exercise of a chargee’s statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the appellant is then inoculated by section 99 from any action to recover the suit property from her.”

16. I am not convinced the plaintiff has established a prima facie case, the property having been sold through public auction where the 1<sup>st</sup> defendant was the successful bidder, the plaintiff lost the right to redeem the suit property.

17. Are damages an adequate remedy? Since the property has already been sold, the Court will refrain from interfering with the 1<sup>st</sup> defendant’s right of statutory power of sale. The statute contemplates damages in instances where the applicant demonstrates the sale was irregular.

18. On the last principle on the balance of convenience, I find the balance of convenience tilts in favour of the defendants, the applicant who is indebted to the 1<sup>st</sup> defendant may not be in a position to compensate the 3<sup>rd</sup> defendant if the suit fails. On the other hand, I find the bank will be in a position to compensate the applicant for any loss incurred.

19. In the end I find that the Notice of Motion dated 20<sup>th</sup> November 2023 lacks merit. The same is dismissed with costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Mandala for plaintiff/applicant

N/A for defendant

Court Assistant: Carlos