



**Figondo v I & M Bank Limited & another; Gandhi (Interested Party) (Commercial Case E117 of 2024) [2024] KEHC 14644 (KLR) (Commercial and Tax) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14644 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E117 OF 2024  
JWW MONG'ARE, J  
NOVEMBER 21, 2024**

**BETWEEN**

**HENRY KISSINGER FIGONDO ..... PLAINTIFF**

**AND**

**I & M BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

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

**AND**

**KAVITA GANDHI ..... INTERESTED PARTY**

**RULING**

**Introduction And Background**

1. By a Complaint dated 8<sup>th</sup> March 2024, the Plaintiff filed the present suit claiming that pursuant to a Letter of Offer dated 22<sup>nd</sup> September 2020, the 1<sup>st</sup> Defendant (“the Bank”) extended to him a loan facility of Kshs. 33,375,000.00 secured by a charge over property number L.R. No. 2951/675(Original No. 2951/344/2) (“the suit property”). The facility was to be repaid in a maximum of Eighty-Four (84) equal consecutive monthly instalments of approximately Kshs 607,157.00 each. The Plaintiff admits that in the repayment of the loan, there was delay on his part to pay some instalments leading to the Bank issuing statutory notices against him as follows: By the Statutory Demand notice dated 4<sup>th</sup> June 2022, the Bank demanded the total amount of Kshs.3,690,412.16 that was in arrears and by the Statutory Demand notice dated 16<sup>th</sup> December, 2022, the Bank demanded a sum of Kshs. 4,402,358.83 which demand notice also contained an instruction to Kentrack Auctioneers to issue notification of sale of the suit property.



2. The Plaintiff claims that in compliance with the aforementioned notices, he duly paid the sum of Kshs. 4,402,358.83 and as such, the intended sale ought to have been put off as per section 102 of the [Land Act](#) (Chapter 280 of the Laws of Kenya). However, the Bank instructed Kentrack Auctioneers to proceed with the sale, through auction, of the suit property, in total breach of the aforementioned provision and that to protect his interest, he proceeded to court in Nairobi High Court Commercial Case No. E405 of 2023, which has since been spent as he sought various injunctive orders to stop the sale of the suit property. That no orders were granted in that suit and the Defendants herein without issuing any further notices proceeded to advertise for sale and sold the suit property through auction to the Interested Party.
3. The Plaintiff avers that this sale was illegal, unlawful and in breach of various provisions of the law. He accuses the Bank of selling the suit property prior to any such valuation being obtained and contrary to section 97 of the [Land Act](#), rendering the sale illegal. That the Bank sold the suit property despite the Plaintiff paying the amount demanded in the statutory notice and that the 2<sup>nd</sup> Defendant (“the Auctioneers”) proceeded with the auction of the suit property without any reserve price being provided. The Plaintiff claims that at the time of the auction, he carried out a valuation of the suit property and the same was valued at Kshs. 90,000,000.00 and that as per section 97 of the [Land Act](#), the best reasonable price of the suit property is 75% of its value which is Kshs. 67,500,000.00.
4. The Plaintiff contends that in the sale of the suit property, the Defendants relied upon a valuation whose visit had been conducted in the year 2022, which was more than twelve months prior to the date of the auction sale, hence violating Rule 11(b)(x) of the Auctioneers Rules and that they valued the land and not the development thereon, arriving at a minimal valuation of Kshs. 60,000,000.00 only which did not cover the development that was valued at Kshs. 30,000,000.00.
5. The Plaintiff avers that despite the sale, the process has not been completed as the suit property is still registered in the Plaintiff’s name, as the Defendants proceeded to advertise the suit property for sale in a second advertisement after the alleged date of sale. That the second advertisement was done in the full knowledge that there had been no sale of the suit property, following of which the alleged purchase of the suit property by the Interested Party can only be concluded to have been done through back door means of ensuring the suit property was taken away from the Plaintiff.
6. The Plaintiff states that in the intervening period, prior to the sale by auction he had provided the Bank with alternative properties to use as securities as they were more prime and could raise more value, but the Bank remained mute, solely geared towards selling the suit property, in total contravention of the [Land Act](#). He thus accuses the Defendants and the Interested Party of fraud and connivance to ensure that the suit property is wrestled out of the Plaintiff’s hands fraudulently in total breach of the provisions of the [Land Act](#).
7. The Plaintiff thus prays for declaratory orders that the sale of the suit property was illegal, contrary to the provisions of the [Land Act](#) and [Auctioneers Act](#), hence null and void; an order nullifying the sale and cancelling entries of transfer of the suit property to the Interested Party and an order of injunction barring the Defendants and the Interested Party their agents, servants, representatives or any other person acting under their instructions from interfering in anyway whatsoever with the suit property. In the alternative, the Plaintiff seeks damages equivalent to the value of the suit property for the alleged illegal and unlawful sale of the suit property, a mandatory injunction compelling the Bank to pay the Plaintiff the excess sums realized from the sale and a declaration that the Plaintiff be discharged from all liabilities under the charge.
8. Contemporaneously with the suit, the Plaintiff has also filed the Notice of Motion dated 8<sup>th</sup> March 2024 made under sections 1A, 1B, 3, 3A and 63 of the [Civil Procedure Act](#)(Chapter 21 of the Laws of



Kenya), Order 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules and section 104(1) (a) & (b) of the *Land Act* seeking an injunction against the Defendants and the Interested Party from dealing with the suit property. The application is supported by grounds set out on its face and the Plaintiff's supporting affidavit sworn on 8<sup>th</sup> March 2024. It is opposed by the Defendants through the replying affidavit of Andrew Muchina the Bank's Senior Manager- Legal Department, sworn on 5<sup>th</sup> April 2024 and by the Interested Party through the replying affidavit of Clapton Evans Kagimu, the Interested Party's advocate, sworn on 19<sup>th</sup> March 2024 (erroneously dated 19<sup>th</sup> March 2023). The court directed that the application be canvassed by way of written submissions, which are on record and I will make relevant references to them in my analysis and determination later on.

9. The Plaintiff's application is premised on the same grounds set out in the plaint and which I have already analyzed above and therefore, I will therefore not rehash the same. In response, the Defendants aver that the present application is res judicata as the issues raised herein were raised, heard and determined by the late Justice Majanja in Nairobi High Court Commercial Case No. E405 of 2023. As such, the court cannot entertain the present application as it would be akin to sitting on appeal of the said ruling without a proper appeal having been filed for consideration by an appellate court. The Defendant accuse the Plaintiff of abuse of the court process as he had filed another similar application in that suit that he later withdrew.
10. In any case, the Defendants state that the Plaintiff's equity of redemption has been extinguished and the orders sought cannot be granted as the suit property was successfully sold by public auction on 20<sup>th</sup> September 2023 and transferred to the Interested Party. As such, the Defendants contend that the Plaintiff's remedy, if any, is in damages against the Bank in the event the court finds that the Bank is culpable after a full hearing of the suit.
11. The Defendants contend that the Plaintiff lacks locus standi as he is no longer a person recognized in law as one of the persons to seek relief under section 103 of the *Land Act*, he is no longer a chargor to the suit property and as such, he has no legal interest in the suit property as defined and conferred by section 24 of the *Land Registration Act* (Chapter 300 of the Laws of Kenya).
12. The Defendants further claim that the Plaintiff is a vexatious litigant and they aver that the present suit and application should be struck out as they are bad in law, an abuse of the court process and a mere waste of time.
13. On his part, the Interested Party depones that it has been stated by the Plaintiff and indeed true that, the suit property was sold through an auction by the Defendants to the Interested party in the exercise of their powers under the charge. That for all intent and purposes, this means that the suit property belongs to the Interested party having obtained it through the auction.
14. The Interested Party avers that the Plaintiff has not established the dangers that are foreseeable to befall his property rights in the suit property that cannot be compensated by damages. That the Plaintiff has no protectable rights in the suit property and that having sold the suit property through auction, the Defendants have no residual powers through which they can act to interfere with the suit property in a way that endangers it.
15. Further, that it is now trite law in Kenya and in like-minded jurisdictions that a person damnified by a transfer of property by mortgagee to an auction purchase pursuant to any irregular or improper exercise of statutory power of sale is entitled to recover damages directly suffered by him from the auctioneer. That it is thus obvious that, as the bonafide purchaser for value through an auction without notice of any fraud (if any), the Interested party is protected from any adverse claims and orders emanating



therefrom specifically an order of cancellation of title. Consequently, the suit herein becomes one for damages against the Defendants but not for recovery of the suit land.

16. The Interested Party restates that since the auction had taken place, the Plaintiff's equity of redemption had been extinguished, the sale could not be reversed as he is guided by section 99 of the *Land Act*, that the Plaintiff's remedy is in damages.
17. The Interested Party avers that to succeed in such an application, one must have, and establish a prima facie case and a prima facie case cannot be established unless one has a right in the subject or suit property. That by declaring that there was a sale to the Interested party through an auction, the Plaintiff testifies to having retained no residual right in the suit property as it was extinguished by the said auction whether it was done mala fide or otherwise to the Interested party. Consequently, the Interested Party states that the Plaintiff cannot and, has not established a prima facie case since he has no right in the suit property and that his right is at peril of loss unless protected by the court by grant of the orders sought.
18. The Interested Party depones that the Plaintiff has not demonstrated that he stands to suffer any irreparable injury that cannot be compensated by damages if a temporary injunction is not granted. That since the suit property was sold and transferred to the Interested party, the subject matter of preservation pending the hearing of the suit has moved and the Plaintiff has no locus standi to seek preservation of property right which do not vest in him. That it is no longer available for protection at the behest of the Plaintiff. Consequently, that there's no demonstrable damage that the Plaintiff can suffer but also if suffered, that cannot be compensated by damages as dictated by law. Further and without prejudice to the Defendants, that since the fact of having owned the suit property and being sold by the Defendants is incontrovertible, then it is proper to simply prove a case against the faulting parties (if any) and recover damages.
19. That the court must further be satisfied that the injury the Plaintiff will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Defendants are capable of paying, no interlocutory order of injunction should normally be granted, however strong the Plaintiff's claim may appear at that stage. That if prima facie case is not established, then irreparable injury and balance of convenience need no consideration. In sum, the Interested Party contends that the Plaintiff has failed to meet the requirements for a temporary injunction.

### **Analysis and Determination**

20. I have carefully considered the parties' pleadings and their rival submissions. I note that the Defendants have raised the issue that this application is res judicata in that it is similar to an application made in Nairobi High Court Commercial Case No. E405 of 2023 and as such, I propose to first deal with this issue as it may preliminarily dispose of the application. From the record I note that the Plaintiff admitted that he was involved in the previous suit with the Bank and that he had similarly sought injunctive orders therein. However, he submits that the orders sought therein were before the sale happened and that those being sought now are after the sale has taken place.
21. The Court of Appeal, in *Uhuru Highway Development Limited v Central Bank of Kenya, Exchange Bank Ltd (Involuntary Liquidation) & Kamlesh Mansukhlal Pattni* [1996] KECA 102 (KLR) held that

“.....once an application for injunction within a suit has been heard and determined under the principles laid down in *Giella v. Cassman-Brown*, a similar application cannot be brought



unless there are new facts, not brought before the court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling.”

Going through the ruling of the previous application, I am inclined to agree with the Plaintiff that he was seeking an injunction to forestall the auction of the suit property. However, in this suit, he is seeking an injunction after the sale of the suit property which presents a new set of facts that were not presented in the previous suit and were never heard or determined therein. The present suit and application are therefore not *res judicata* as averred by the Defendants and this attack by them fails. However, what is clear is that the court cannot permit the Plaintiff to re-litigate the right of the Bank to exercise its statutory power of sale. That issue having been determined, constitutes an estoppel on record and the Plaintiff is debarred from re-litigating those issues that have been determined or launching a collateral attack (see *Maina & another v Equity Bank Limited & 2 others* [2023] KEHC 23538 (KLR)).

22. As such, this court declines the entreaty to deal with the issue of the suit property’s valuation and the Plaintiff’s payment of the outstanding debt as these issues were already dealt with by the court in Nairobi High Court Commercial Case No. E405 of 2023. In any event, for the Plaintiff to be granted the injunction he seeks, he admits that he ought to satisfy the conditions set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a *prima facie* case with a probability of success, that he will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if he does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR))
23. The parties agree that the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained what constitutes a *prima facie* case as follows:

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
24. The Plaintiff’s main grievance are in respect of the valuation of the suit property, payment of the loan and thus compliance with the statutory notice and illegality of the sale of the suit property. I have already stated that the issue of valuation of the suit property and payment of the loan facility were determined by the court in Nairobi High Court Commercial Case No. E405 of 2023 which allowed the sale to proceed despite these protestations and grounds being raised by the Plaintiff. The Plaintiff cannot raise the same again to impugn the sale which was okayed by the court. I will just reiterate what the late Justice Majanja stated that “that a difference or dispute in valuation is not sufficient to stop a chargee from exercising its statutory right of sale especially when damages would be an adequate remedy.” Therefore, even if it is demonstrated that the suit property was undervalued, the Plaintiff bears the burden of proving that the Bank is incapable of compensating him, which the Plaintiff has not done. Further, even if the Plaintiff claims that he has overpaid the Bank, once again, the Bank can be ordered to refund the Plaintiff this excessive sum and unless the Plaintiff demonstrates that the Bank is incapable of refunding it, no injunction can issue based on this ground.
25. On the propriety of the sale, whereas I agree with the Plaintiff’s submission that the court can void a sale for reason of fraud, misrepresentation or other dishonest conduct, the remedy available to the wronged party remains damages and not an injunction. This is because once the suit property had been knocked down and sold in a public auction by the Bank in exercise of its statutory power of sale, the Plaintiff’s



equity of redemption was extinguished and since the suit property passed at that instance, the court cannot issue an injunction completing the process of sale and transfer (see Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited [2002] KECA 109 (KLR) and Bomet Beer Distributors Ltd, Wilson Maritim Lasoi v Kenya Commercial Bank Ltd & 4 others [2005] KEHC 2932 (KLR)]. This position was fortified by the Court of Appeal in Euro Bank Limited (In Liquidation) v Twictor Investments Limited, Chamгаа Company Limited & Tesha (K) Limited [2020] KECA 516 (KLR) where it was held as follows:

The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the Amadiva case (supra), if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed.

26. Thus, even if it is found that the sale was illegal then the title of the Interested Party will not be cancelled as the recourse will still be in damages and if the court is minded to cancel his title, then the same will be restored to the position it was before the sale and not revert to the Plaintiff. It therefore follows that the issue of whether the sale and auction was illegal and fraudulent is best to be determined at trial where the court can make declaratory orders voiding the sale with the available remedy to the Plaintiff being an award for damages or a refund if the Plaintiff is successful in his suit.

### **Conclusion and Disposition**

27. The upshot is that the Plaintiff's application dated 8<sup>th</sup> March 2024 is without merit and is hereby dismissed with costs being in the cause. The interim orders in place are discharged forthwith.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024**

**J.W.W. MONGARE**

**JUDGE**

In The Presence Of

Mr. Ochieng for the Plaintiff/Applicant.

Mr. Nadio for the Defendant/Respondent.

Mr. Clapton for the Interested Party

Amos - Court Assistant

