



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E121 OF 2021

NORBERT MUNGAI WAMBETI.....PLAINTIFF/APPLICANT

VERSUS

LEGACY AUCTIONEERING SERVICES.....1ST DEFENDANT/RESPONDENT

HFC LIMITED.....2ND DEFENDANT/RESPONDENT

JOSEPH KARIUKI IREGI T/A

HAPPYLAND TIMBER AND HARDWARE.....3RD DEFENDANT/RESPONDENT

RULING

1. On 18/5/2021, this Court made the following orders: -

- a) The auction of 2/3/2021 is hereby set aside subject to (c) hereunder.***
- b) The application dated 5/3/2021, is overtaken by events.***
- c) The 2nd defendant be at liberty to grant and give the highest bidder at the auction of 2/3/2021 the opportunity to purchase the suit property or to re-exercise its statutory power of sale as it shall deem fit and just.***
- d) Half the cost of this application are awarded to the plaintiff as the defendants are the ones who caused the filing thereof.***
- e) Mention on 23/6/2021 to see if there is any need of proceeding with the suit herein”.***

2. On the same day, the 2nd defendant wrote to the plaintiff asking him to complete the purchase by paying Kshs.13.5 million, as the 10% deposit of his bid. To the 2nd defendant, that was an opportunity to the plaintiff to purchase the suit property. The plaintiff did not respond to the said offer as a result of which, on 24/5/2021, the 2nd defendant re-advertised the sale of the suit property by public auction on 8/6/2021.

3. That advertisement provoked the filing of 2 applications dated 31/5/2021 by the plaintiff and the interested party. The said applications were brought under **sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1 of the civil procedure Rules**. They both sought a restraining order against the 2nd defendant and Garam Investment Auctioneers from proceeding with the aforesaid auction. This court heard both applications together and this is a ruling in respect of those applications.

4. The application by the plaintiff was supported by the affidavit of **Norbert Mungai Wambeti** sworn on 31/5/2021. It was contended by the plaintiff that he participated in the impugned auction on 2/3/2021 and deposited the refundable sum on Ksh 1 million. That that auction was murred with irregularities as a result of which it was set aside on 18/5/2021.

5. That now the 2nd defendant had re-advertised the property for sale. That by a letter dated 18/5/2021, which was delivered on 19/5/2021, the 2nd defendant maliciously asked the plaintiff to deposit 10% of the bid amount of Kshs. 145 million before close of business that day. He contended that there was an intention on the part of 2nd defendant to deny him an opportunity of completing the purchase. He therefore demanded the refund of his Kshs.1 million of the auction deposit.

6. As regards the Motion by the interested party, the same was supported by the affidavit of **John Kabuba Njoroge** sworn on 31/5/2021. He is the registered proprietor of the suit property. He complained that after the order of 18/3/2021, the 2nd defendant debited his account with a sum of Kshs. 507,708.80 in respect of the auction costs of 2/3/2021. That the 2nd defendant had proceeded to re-advertise the sale of the property on 8/6/2021 which is irregular as no requisite notices had been issued. For those reasons, he sought for the restraining orders aforesaid.
7. The applications were opposed vide the replying affidavits of **Patrick Wainaina** sworn on 2/6/2021 and the grounds of opposition dated 4/6/2021, respectively. It was contended that the application by the plaintiff was an abuse of the Court process as there have been a multiple filing of applications of a similar nature. That the plaintiff had been given an opportunity to purchase the suit property by completing his bid but he had failed to.
8. The deponent made other allegations regarding previous suits which are not necessary for the present determination. It was contended that the 2nd defendant had properly re-advertised the property for sale in compliance with the order of this court of 18/5/2021. That the application was meant to frustrate the 2nd defendant's exercise of its statutory power of sale.
9. It was further contended that, the failure to refund the deposit of Kshs. 1 million cannot be a basis for granting the injunction sought. As for the interested party, it was contended and submitted that it had no locus standi to lodge the application.
10. The 3rd defendant associated itself with the contentions and submissions of the 2nd defendant.
11. I have considered the depositions on record and the oral submissions by Learned Counsels. These are applications for injunction. The applicable principles were set out in the case of **Giella vs Cassman Brown [1973] E.A.** These are that; the applicant must establish a prima facie case with a probability of success. He must show that unless the orders sought are granted, he will suffer loss that cannot be compensated by an award of damages and that the event the court in doubt, it will determine the matter on a balance of convenience.
12. Prima facie case was defined in the case of **Mrao Ltd vs First American Bank Ltd [2003] eKLR** as a case in which on the material produced in court, a tribunal properly directing its mind will conclude that a legal right of a party has been breached to call for a rebuttal by the opposite party.
13. In the present case, the plaintiff's complaint is that he was not given an opportunity to exercise the right given by this Court to purchase the suit property as the highest bidder. That the letter dated 18/5/2021 by the 2nd defendant was received by him on 19/5/2021 at 9.43 am yet he was supposed to have complied with its demand to transfer the 10% deposit of Kshs.14.5 million by 5pm the previous day.
14. He further contended that it was wrong for the 2nd defendant to forfeit the bidding deposit of Ksh 1 million in the circumstances. He exhibited copies of that letter and the notice for the public auction slated for 2/3/2021 to prove that the deposit sum of Kshs.1 million was refundable.
15. It is clear that the time given to the plaintiff by the 2nd defendant for him to complete the purchase was unreasonable. Indeed, by the time he received the notice to exercise his right to purchase the suit property, the time given had already lapsed.
16. However, the question that arises is whether that *per se* infringed the plaintiff's legal right so as to entitle him to the orders sought. It is clear that the plaintiff received the notice only one day after its issuance and time lapse for compliance thereof. There is no evidence to show that he made any effort to deposit the 10% bid amount immediately he received the notice or at all.
17. Further, the plaintiff did not even suggest to this court that he was prepared to complete the purchase. This Court would have readily given him the opportunity by extending time for compliance in view of the short notice given to him by the 2nd defendant. Failure to seek extension of time to comply leaves the Court with doubt as to the plaintiff's intention. His attempts may well be meant to frustrate the 2nd defendant's realisation of its security.
18. As regards the refundable deposit of Ksh 1 million, my understanding has always been that the bidding deposit is meant to cater for any costs that may be incurred as a result of any wrongful act on the part of a bidder that leads to the collapse or failure of an auction.
19. In the present case, had the plaintiff concluded the purchase or his bid, there would be no loss on either the 2nd defendant or the plaintiff. He was given an opportunity to complete the bid, he failed. He neither sought for extension of time from the bank nor the Court. In my view, his claim for the refund of the said Kshs. 1 million cannot lie.
20. Accordingly the application by the plaintiff is dismissed with costs.
21. As regards the interested party, he is the registered owner of the property. He seeks an injunction on the basis that no fresh notices had been issued and that it was wrong for the 2nd defendant to debit his account with Ksh 507, 708.80 being the auction cost.
22. With greatest respect, the 2nd defendant cannot purport to benefit from, its own wrong. The auction of 2/3/2021 was nullified because of irregularities conducted by its agents, the auctioneer. Indeed, the 2nd defendant had colluded with the 3rd defendant to steal a march against the plaintiff. Neither the 2nd defendant nor the auctioneer can seek to benefit from their own wrongs.
23. The loss occasioned by way of auction costs or expenses for the nullified auction should fall where they lie and not with the interested party. Accordingly, that debit was unlawful, illegal and should be reversed forthwith.
24. In any event, it will be unconscionable to allow the 2nd defendant to benefit twice by way of auction expenses for the 2/3/2021 auction.

It will be recalled that the 2nd defendant has already appropriated Kshs. 1 million belonging to the plaintiff for failing to complete the auction of 2/3/2021. It will be greed of the highest order for the 2nd defendant to once again seek to recover the costs of the auction from the interested party. That won't do. It must refund the same.

25. As regards the issuance of statutory notices, the law is clear that once proper statutory notices have been issued, there is no requirement for re-issuance of fresh notices after an auction has aborted. The only requirement in a 14 day notice under the **Auctioneers Rules**. This was achieved in this case vide the advertisement of 24/5/2021.

26. In view of the foregoing, I find that the applications are without merit. They are dismissed with costs to the 2nd defendant.

27. However, the debit of Kshs 507,708.80 on the interested party's account should be reversed forthwith and any interest charged thereon for the period the said amount was in debit be accordingly credited to the interested party's account.

Orders accordingly

DATED and **DELIVERED** at Nairobi this 8th day of June, 2021.

A. MABEYA, FCI Arb

JUDGE