



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 297 OF 2011

MAHESHKUR CHHOTABHAI PATEL

ILABEN MAHESHKUMAR CHHOTACHAI PATEL.....PLAINTIFFS

VERSUS

BANK OF INDIA.....1ST DEFENDANT

SAMUEL A. ANGWENYI.....2ND DEFENDANT

ESTHER N. ANGWENYI.....3RD DEFENDANT

MS SESA INVESTMENT LIMITED.....4TH DEFENDANT

RULING

1. The application for determination is a Notice of Motion dated 29th March, 2021, filed by the Plaintiffs. The same is brought under order 40 of Rule 1 & 2 of the Civil Procedure Rules. The main prayer sought is that, **pending the hearing and the determination of the suit, an injunction do issue restraining the first Defendant either by itself, jointly or individually or through its agents, servants, employees and/or any one else deriving Title from the First Defendant and in particular Dalali Traders or any other Auctioneer from selling, transferring wasting taking possession of, alienating or disposing of in any manner whatsoever the property known as Plot No, L. R. 209/8593/44 or any part thereof until this suit is heard and fully determined.**

2. The Applicant had also sought a prayer that an auction that was scheduled for 31st March, 2021 be postponed. However, that prayer was spent as the court, upon hearing oral arguments by the respective counsel in court, dismissed it.

3. The application is premised on the grounds that;

a) The 1st Defendant has unlawfully put in motion the process of auctioning the Plaintiffs' property without even giving the Plaintiffs the mandatory Notification of sale.

b) The Plaintiffs had already agreed with the 1st Defendant to allow the Plaintiffs sell the suit property and remit the proceeds thereof to the 1st Defendant.

c) The aforesaid process of the sale by public auction is being scheduled to be conducted at a time when due to the Covid -19 Rules put in place by the Government on Friday 26th March, 2021 and announced by the President allowing not more than 15 people to congregate, the public auction is likely to be a sham.

d) Unless restrained, the first Defendant will unlawfully dispose of the family property where the Plaintiffs and their family reside.

4. It is further supported by the Affidavit of **Ilaben Maheshkumar Chhotachai Patel**, the 2nd Plaintiff, sworn on 27th March, 2021, she deposes that the 1st Plaintiff who is her husband fell sick while in Rwanda and was unable to travel back to Kenya due to the Covid-19 restrictions imposed by the Government. She asserts that in September 2019 she and the 1st Plaintiff applied for an overdraft facility Ksh

15,000,000/- from the 1st Defendant for which they charged their property known as L. R. 209/8593/44 situated in Westlands on Waiyaki Way in Nairobi where the family lives. That they were unable to service the overdraft until September 2010 when their hardware business in Wote Makueni County went down due to financial difficulties.

5. It is averred that they approached the bank which gave them consent to look for a buyer to sell the suit property and remit the money to the bank. They were able to enter into a sale agreement with the 2nd 3rd, and 4th Defendants who agreed to buy the suit property at Ksh 21,000,000/-. However, the purchasers failed to meet the deadline of the purchase.

6. It is deposed that as a consequence, the property was advertised for sale in 2011 giving rise to the instant suit.

7. According to the applicant the 2nd 3rd and 4th Defendants have frustrated the suit on grounds that first, they failed to file a Replying Affidavit; second, the Advocate for the said Defendant failed to turn up in court indicating that the said Defendants were looking for buyers and third, that the said Defendants failed to explain to the court the reasons why they were unable to purchase the suit property.

8. It is averred that as a consequence, the court ordered that the property be revalued and as at 2020, the issue of valuation had not been concluded. That surprisingly on 15th March, 2021 the property was advertised for sale in Daily Nation newspaper at an auction that would take place on 31st March, 2021.

9. According to the Applicant, he was unaware of the auction until 23rd March, 2021 after receiving a call from auctioneers asking him to go and negotiate the matter. The Applicant was apprehensive that due to the Covid -19 restrictions imposed by the government on public gatherings, not more than 15 people would gather for the auction as such the auction would lack competitiveness leading to law bidding, more particularly because the auctioneers had not set a reserve price.

10. The Applicant was further apprehensive that the auction would be a sham because the auctioneers had set conditions of the auction whose materials were not disclosed. It was the view of the Applicant therefore, that since she had received offers from other persons who were interested in the public auction, the court should halt the auction to allow a competitive bidding.

11. Further, according to the Applicant, the suit property was their matrimonial family home which if sold would deprive the family of a shelter.

Submissions

12. The Application was canvassed before me on 17th May, 2021 by way of oral submissions. It suffices to state that learned counsel, Mr. Mutitu for the 1st Defendant, the Respondent in this application did not file a formal response to the application stating that he was only going to argue a point of law.

13. Back to the proceedings, counsel for the Applicant Mr. Mugo insisted on proceeding with the application notwithstanding that the court had declined to stop the auction that was scheduled for 31st March, 2021. Indeed, it was the view of the court that as at the date of the substantive hearing, the application had been overtaken by events, the auction having taken place.

14. It was the argument of Mr. Mugo that the auction was illegal as notification for sale was not given. He premised the argument on grounds that parties had agreed that the Applicant be given an opportunity to sell the property which as at that date was worth Ksh 35,000,000/- after which she would remit the balance due to the bank.

15. Mr. Mugo submitted that earlier, Hon. Nzioka J. had requested parties to come up with a valuation for the suit property which had not been done. It was argued therefore that the auction was premature as the value of the suit property had not been determined.

16. Counsel further posited that, with the current Covid -19 pandemic circumstances, it was not the right time to conduct the auction. Regard was had to the fact that only a few people would gather for the auction. Furthermore, counsel for the Applicant attended the auction and only two people were present leading to very low bid upon which the auctioneer called off the ceremony. It was the prayer of the counsel that the auction should only proceed when there was a proper notification. That in any case, when such a time comes the Applicant may have recovered financially to be able to pay the loan.

17. Learned counsel, Mr. Mutitu on his part submitted that the matter had been argued and determined and as such, time for redemption accrued long before the application was heard. He further submitted that it was the court that appointed a valuer and that therefore the sale should proceed based on the minimum value set at Ksh 25,000,0000/-

18. In rejoinder, Mr. Mugo insisted that the value of the property had never been agreed and the circumstances were precipitated by Covid -19 pandemic. Further that the notification for sale must be done in accordance with the law. His view was that the legal process was not followed because the Applicant was ambushed with the notification in the newspaper.

Analysis and Determination

19. I have considered the respective rival submissions. This is an application that was predicated on an auction of the suit property that was scheduled to take place on 31st March, 2021. As earlier indicated, the court delivered itself in brief on the date of the auction dismissing the application. In the court's honest view, the Applicant ought to have changed tact but instead insisted on proceeding with the application. To my mind, the application was overtaken by events the court having sanctioned the auction.

20. Nevertheless, on the other limb of the application, it was argued that the auction was improper and illegal because there were very few people who attended the auction. It was cited that only about two to three people were present. This brings me to the ultimate conclusion that the process leading to the auction is not put to test. I say so because the only challenge to it (process) was with respect to the fact that the Applicant only learnt about the auction in the newspaper as opposed to being personally served with the requisite notice under Section 90 of the Land Act. Far from this assertion as it was clear that it was not the first time that the suit property had been advertised for sale. Indeed, by her own admission, the Applicant stated that she only took issue with the fact that the 1st Defendant Bank failed to give her time to look for a buyer herself so that she could get a good bid for the property.

21. It was also undisputed that the property had been properly valued against the Applicant's assertion that a price had not been determined. The valuation was done through the assistance of the court by Sterling Valuers Limited and a market price set for Ksh. 30,000,000/. Furthermore, for all the period that the Applicant knew that the suit was up for sale, she and her husband did not look for purchasers who would have bought the property at the value that they proposed and retain the residue after paying the full loan. Clearly, the Applicant rushed to court at the last minute but this attempt could not salvage her situation.

22. Back to the site of the sale, the court entirely concurs with learned counsel, Mr. Mutitu for the 1st Defendant that a sale is not deemed valid because it is constituted by a multitude of bidders. It is valid because the process leading to the auction was proper and lawful. And therefore, even if only three persons attended the auction and one of the bidders met the conditions for sale, nothing stopped the auctioneers from proceeding with the sale.

23. I do agree with learned counsel for the Applicant, Mr. Mugo that the economic circumstances were, and still are, difficult which circumstances led to the Plaintiffs' business to go down. However, the bank has given the Applicant more than sufficient time to redeem the property. The Bank being a business entity must do what it takes to recover its debt, otherwise it would shut its doors. On this, the sale had to proceed as scheduled.

24. Whilst the application proceeded for hearing as an academic exercise, it was important that I highlighted the above brief salient issues to demonstrate that the Applicant's cry for "justice" was in vain. There is nothing more the court can write to salvage the situation. If the property was not bought, good riddance to the Applicant. If the contrast is the case, too bad.

1. I will belabor no more as anything else that was urged is not borne on the prayers sought in the application. It only behooves me to add that the Applicant did not meet the threshold for grant of an injunction as clearly enunciated in the celebrated case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself as follows:-

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

25. On the grounds summarized above, it is clear that a *prima facie* case was not established to warrant the grant of an injunction. It was also not demonstrated that if the injunction did not issued, the Applicant would suffer irreparable loss which cannot be compensated by way of damages. It follows that, the balance of convenience tilts, as rendered, in favour of the Respondent in not granting the injunction.

26. In the upshot, the Applicant's application dated 29th March, 2021 stands dismissed with costs to the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 15TH JULY, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *No appearance for the 2nd Plaintiff/Applicant.*
2. *No appearance for the 1st Defendant/ Respondent.*