



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CASE NO. 24 OF 2019**

**ELIZABETH WAIRIMU T/A MOMIX TRADERS AFRICA.....PLAINTIFF**

**VERSUS**

**JAMII BORA BANK LIMITED.....DEFENDANT**

**RULING**

1. The plaintiff, Elizabeth Wairimu, brought this suit on 5/2/2019 through a plaint dated 4/2/2019. Her case is that on 2/11/2018, the defendant, in exercise of the chargee's statutory power of sale, caused a public auction to be conducted in relation to Land Reference Number 209/13815, situated in Gikomba, Nairobi. She placed a successful bid and paid full purchase price which was accepted by the defendant. The defendant, in breach of the sale, has refused to take steps to discharge the suit property and transfer the same to the plaintiff and has instead purported to rescind the sale contract. She sought the following orders against the defendant:

- a) A declaration that the plaintiff become the legal owner of all the parcel of land known as LR No 209/13815 – Gikomba Area, Nairobi at the fall of the hammer and payment of the purchase price to the defendant*
- b) A permanent injunction restraining the defendant from any further dealings over the parcel of land known as LR No 209/13815 – Gikomba Area, Nairobi, save only for dealings required to transfer the said parcel of land to the plaintiff.*
- c) An order compelling the defendant to release to the plaintiff a discharge of charge, a transfer and all other relevant documents to facilitate the registration of all that parcel of land known as LR No 209/13815 – Gikomba area Nairobi in the name of the plaintiff.*
- d) Costs and interests*
- e) Such other or further reliefs as this honourable court may deem fit*

2. Simultaneous with the plaint, the plaintiff filed a notice of motion dated 4/2/2019 in which she sought interlocutory injunctive orders in the following terms:

- 1) That this application be certified urgent and service of the same be dispensed with in the 1st instance*
- 2) That pending the hearing and final determination of this application a mandatory injunction be issued directing the defendant whether by itself, its servants and/or agents to unconditionally procure and deliver to the plaintiff the discharge of charge documents in respect of LR Number 209/13815 GIKOMBA AREA, NAIROBI*
- 3) That pending the hearing and final determination of this suit a mandatory injunction be issued directing the defendant whether by itself, its servants and or/agents to unconditionally procure and deliver to the plaintiff the discharge of charge documents in respect of LR Number 209/13815 GIKOMBA AREA, NAIROBI*
- 4) That the cost of this suit be provided for*

3. That motion is the subject of this ruling. It is supported by the plaintiff's affidavit sworn on 4/2/2019 in which she has outlined her case as summarized above. Annexed to the affidavit are four exhibits: (i) Certificate of Business Name-Momix Traders Africa; (ii) Memorandum of Sale of Property by Public Auction; (iii) Funds Transfer Documents showing that Kshs 16,200,000 was transferred to Leakey's Auctioneers on 13/12/2018; and (iv) Email Correspondence.

4. The defendant opposed the application through a replying affidavit sworn on 25/3/2019 by Samuel Murimi. He deposed that subsequent to the sale, it became apparent to the defendant that completion of the sale contract would be unsuccessful because the Deed file relating to the suit property was missing from the Lands Registry and that the chargor's wife had registered a caveat against the title. He further deposed that the defendant had instructed the auctioneer to refund the plaintiff's money, contending that the sale had been frustrated by events outside the control of the defendant, particularly the missing Deed File.

5. The application was canvassed through written submissions. The plaintiff's counsel framed the following as the five issues falling for determination: (i) Whether the applicant had shown a prima facie case with a probability of success against the 1st and 4th defendants? (ii) Whether the applicant will suffer irreparable harm if the mandatory injunction is not granted? (iii) In the alternative, in whose favour does the balance of convenience lie? (iv) Whether this is a case that warrants issuance of mandatory injunction; and (v) Who should bear costs of this application?

6. Counsel for the plaintiff submitted that the terms of the contract for sale by public auction bound the defendant and the defendant did not have the liberty to purport to rescind the sale after the fall of the hammer and payment of full purchase price. Counsel added that Section 99(2) and (3) of the Land Act protects the plaintiff as a purchaser in public auction. Counsel added that the chargor's equity of redemption was extinguished at the fall of the hammer.

7. On whether the applicant would suffer irreparable harm if the injunction is not granted, counsel submitted that a party deprived of his property through an illegal process would stand to suffer irreparable loss and damage. Counsel urged the court to apply the holding in **Sharok Kher Mohamed Ali V Southern Credit Banking Corporation Limited[2008]eKIR**. Counsel added that the balance of convenience tilted in favour of the applicant because the applicant had paid full purchase price and continues to suffer deprivation.

8. Counsel added that there exists special circumstances to warrant grant of the mandatory injunction. It was argued that parties having signed the Memorandum of Sale, they were bound by the contract and there was no justification for the purported rescission or cancellation by the defendant. Counsel added that the chargor's equity of redemption expired at the fall of the hammer. It was further submitted that the defendant was attempting to steal a march on the plaintiff contrary to the terms of the contract which binds the parties. Lastly, counsel submitted that Section 99(3) of the Land Act protects the plaintiff.

9. Counsel for the defendant submitted that besides the principle in **Giella v Cassman Brown (1973) EA 358**, a party seeking a mandatory injunction is required to demonstrate existence of exceptional circumstances that would warrant the granting of a mandatory injunction at the interlocutory stage. Counsel contended that the applicant had failed to meet the stringent requirement for a mandatory injunction.

10. Counsel for the defendant added that property in land does not pass at the fall of the hammer at the auction. It was further submitted that upon registration of the caveat by the chargor's wife and the consequent loss of the Deed File at the Lands Registry, the contract was frustrated because the Bank was unable to deliver the completion documents to the plaintiff within the contractually stipulated completion date. Counsel added that the defendant was entitled to rescind the sale once the caveat was registered against the suit property since the effect of the caveat was to forbid registration of dealings on the land and it would not have been possible to register the transfer in favour of the plaintiff while the caveat was still in place.

11. Counsel for the defendant further submitted that once a property is given to a bank as security, the same becomes a commodity that can be subjected to sale; its value is ascertainable, and any loss suffered upon the sale of the same is remediable by an award of damages.

12. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The relief which the applicant seeks is that of mandatory injunction. The single question falling for determination in this application therefore is whether the applicant has satisfied the criteria upon which this court exercises jurisdiction to grant a mandatory injunction at the interlocutory stage of a suit

13. The criteria for grant of a mandatory injunction at the interlocutory stage of a suit was spelt out in the English case of **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901** as follows:

***“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff...a mandatory injunction will be granted on an interlocutory application.”***

14. The above criteria has been applied in Kenyan courts in a line of cases among them **Kamau Mucuha v the Ripples Limited ( Civil Application Number Nai 186 of 1992)**; **Jaj Super Power Cash and Carry Limited v Nairobi City Council and two others**; and **Shariff Abdi Hassan v Nadhif Jama Adan (2006) eKLR**.

15. In the present suit, it is not contested that the defendant conducted a public auction in which the plaintiff emerged as the highest bidder. Consequently, a sale by public auction contract was subsequently executed and the plaintiff paid the defendant full purchase price in tandem with the terms of the contract. The defendant contends that it was unable to complete the sale and was constrained to rescind it because, firstly, the chargor's spouse had lodged a caveat against the title and that caveat subsists to-date. The caveat was registered on 25/7/2018 as entry Number 4 and reads as follows:

***“ 4 Caveat by Esther Gathoni Muiro claiming beneficiary interest as per attached affidavit dated 3rd July 2018 absolutely subject to charges No 2 and 3 above”***

16. Secondly, the defendant contends that it was constrained to rescind the sale because the Deed File relating to the suit property went missing. Thirdly, the defendant contends that the plaintiff is not entitled to the mandatory orders because the defendant refunded the plaintiff

the entire purchase price, an assertion which the plaintiff disputes.

17. Looking at the materials presented to the court at this point, it is apparent that a number of issues arise calling for further interrogation and determination on the basis of both evidence and law. The first issue is whether the right of rescission and cancellation was available to the defendant upon fall of the hammer and payment of full purchase price by the plaintiff. The second issue that requires interrogation and determination is whether the caveat by Esther Gathoni Muiru is a bar to the registration of the plaintiff as proprietor pursuant to the public auction. The third issue is the question as to whether the unavailability of the deed file is a good basis for the purported rescission by the defendant.

18. In my view, because there are issues which require ascertainment through evidence and law, this case cannot be said to be a clear case where a mandatory order which finalizes the dispute should be issued at this interlocutory stage of the case. My finding is that although the plaintiff has demonstrated a prima facie case with a probability of success, she has not satisfied the criteria for grant of mandatory injunction as prayed in the notice of motion dated 4/2/2019.

19. Regrettably, the plaintiff did not pray for any preservatory order. The court will not *suo motto* issue one. The net result is that the notice of motion dated 4/2/2019 fails.

20. Lastly, in light of the fact that the suit property is still registered in the name of the chargor and there exists a caveat by Esther Gathoni Muiru, I direct the plaintiff to amend the plaint and join the duo as parties to this suit to enable the court completely and effectually settle this dispute.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF FEBRUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Mbaka holding brief for Ms Kinyanjui for the plaintiff

Ms Adhiambo holding brief for Mr Omusolo for the defendant

June Nafula - Court Clerk