



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 34 OF 2019

1. HASINA OMAR SAID

2. ONE TWIGA ROAD LIMITED.....PLAINTIFFS

VERSUS

1. I & M BANK LIMITED

2. MY SPACE PROPERTIES LIMITED

3. MWENDA THURANIRA

4. LEAKEY AUCTIONEERS.....DEFENDANTS

RULING

1. On 7/5/2019 this file was placed before court under certificate of urgency for the court to consider the Notice of Motion dated 6/5/2019 *exparte*.

2. Having perused the file, the court observed that the sale is slated for 17/5/2019 a duration long enough for the defendant to be served from the matter to be heard *interpartes*.

3. The court then certified the matter urgent and directed that it be served for hearing on 16/5/2019.

4. When the file was called out today, there was evidence by an Affidavit of service that indeed the Defendants' were served on the 8/5/2019 and the 1st – 4th defendant had entered an appearance and indeed filed a Replying Affidavit and a bundle of authorities the same day and served other counsel in court. The court's copy was actually handed over after the matter had been called out. Counsel said he was prepared to proceed even though he had been just instructed on 13/5/2019 but had done everything to file responses.

4. For the 2nd and 3rd defendants only an appearance had been made and counsel requested for time and an adjournment to enable him file a Replying Affidavit. Counsel expressed inability to proceed with the matter stating that he was only instructed on the 14/5/2019.

5. The plaintiff on account of having been served in court with a voluminous affidavit and a bundle of authorities prayed for time to study the same and an interim order to preserve the subject of the suit by stoppage or suspension of the sale scheduled for 17/5/2019.

6. While the 2nd & 3rd defendant conceded to both requests by the plaintiff, the 1st and 4th defendant strenuously opposed the request for interim orders urging that he had availed to court decided cases to the effect that allegations of fraud alone is not, *ipso facto*, a ground to grant an injunction. He also pointed out that the property to be sold has known value and that even if the suit later succeeds, damage would be an adequate remedy. Lastly it was submitted that postponement of the sale would result in an injury to the bank because the debt had exceeded the value of security.

7. In response to the opposition, the plaintiff counsel urged the court to note that there are weighty matters of fraud alleged which may vitiate the charge; that after the sale takes place nothing would remain for the court to determine and that there is nothing to show that the debt has exceeded the value of the security.

8. This decision is not on the merits of the application for injunction

pending suit hence I would not consider the merits of the suit. Rather it must be limited to the question whether or not there is need to issue an interim order of injunction directed at the sale due tomorrow so that the substratum of the application for injunction may be preserved. I am therefore cautious not to say anything towards the ultimate merits of that application. I will only consider the effect of failure to grant the interim relief and thereby letting the sale proceed.

9. In my view, once the sale takes place there would be little for the plaintiff to pursue in the matter in that they would then have to rethink the suit and consider joining the person who would have bought.

10. In that event, I think the court shall have watched as a cause of action, yet to be evaluated, get dissipated. I do not consider that to sit well will the purpose of justice system.

11. Additionally, I would in effect be brooding a dispute between the current parties and an innocent purchaser who may attend the auction tomorrow and buy only to be dragged into court later.

12. In my view it is only just that an interim order be made so that if the court is to have the party such hearing does not turn out phantom or just academic. I therefore grant to the plaintiff an interim order in terms of prayer 2 of the Notice of Motion dated 6/5/2019 pending *interpartes* hearing or further orders of the court.

13. In granting such orders, I appreciate that an auction has been planned at some costs and give a condition that the plaintiff shall pay to the bank a sum of Kshs.5,000,000/= within 21 days to be kept by the bank as security for the payment of the costs of the aborted action if the application shall be determined in favour of the bank.

The application shall be heard on 20/6/2019.

Dated and delivered at Mombasa this 16th day of May 2019.

P.J.O. OTIENO

JUDGE