



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 180 OF 2016

KAMULU ACADEMY LIMITED.....1ST PLAINTIFF

LUZIKI HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

BRITISH AMERICAN INSURANCE (K) LIMITE.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO

T/A GARAM INVESTMENTS.....2ND DEFENDANT

DR. PATRICK KARANJA NGUGI.....3RD DEFENDANT

RULING

1. Before me are two applications dated 16th May 2016 and 9th June 2016; which application I have directed to be heard together.
2. The Applicant's application dated 16th May 2016, before it could be heard, the Applicant was on 18th May 2016 granted leave to join the auctioneer and intended purchasers as interested parties at that stage; consequently the Applicant filed the application dated 8th June 2016. The orders sought in the application dated 16th May 2016, the Applicant argued are all spent save the issue of costs.
3. The Applicant's main application is therefore the application dated 8th June 2016 in which the Applicants seek the following orders:-
 - 1) THAT the Honourable Court be and hereby pleased to certify the instant application as urgent and the same be heard *ex-parte* in the first instance.
 - 2) THAT the Honourable Court be and hereby pleased to issue an order of temporary injunction restraining the Defendants or their agents Garam Investments Auctioneers, or any other agent, servant or employee claiming under them from advertising for sale, alienating, selling, offering for sale either by public auction or private treaty, transferring, charging, mortgaging the 1st Plaintiff's parcel of land known as **MAVOKO TOWN/BLOCK 12/326 KAMULU AREA** together with the improvement thereon, taking over the management of the 1st plaintiff's academy or in any other manner whatsoever interfering with the plaintiff's quiet use and enjoyment of the said parcel of land or its school erected thereon pending the hearing and determination of this instant application or further orders of the court.
 - 3) THAT this Honourable Court be and hereby pleased to issue an order of temporary injunction restraining the Defendant or their agents Garam Investments Auctioneers, or any other agent, servant or employee claiming under them from advertising for sale, alienating, selling, offering for sale either by public auction or private treaty, transferring, charging, mortgaging the 1st Plaintiff's parcel of Land known as **MAVOKO TOWN/BLOCK 12/326 KAMULU AREA** together with the improvement thereon, taking over the management of the 1st Plaintiff's academy or in any other manner whatsoever interfering with the Plaintiff's quiet use and enjoyment of the said parcel of land or its school erected thereon pending the hearing and determination of this suit or further orders of the Court.
 - 4) THAT the Honourable Court be and is hereby pleased to issue other further orders that it may deem just and fit to grant and restrain the Defendants from transferring or any further dealing in the property known as **MAVOKO TOWN/BLOCK 12/326 KAMULU AREA** until the hearing and determination of the suit.

4A) THAT the Honourable Court be and is hereby pleased to vary its orders issued on the 18th May 2016 and grant leave to the Plaintiff to amend its Notice of Motion application and Plaint both dated 16th May 2016 and order that the Amended Application and Plaint filed herein be deemed as duly filed and served.

5) THAT the costs of this application be borne by the Defendants.

4. The application is premised on the grounds on the face of the application being as follows:-

i) THAT the 1st Plaintiff is the registered proprietor of Land Parcel Number **MAVOKO TOWN/BLOCK 12/326 KAMULU AREA** (*herein after referred to as the "suit property"*).

ii) THAT the 1st Plaintiff has established an academy in the suit property known as Kamulu Academy.

iii) THAT the 1st Plaintiff obtained a financial facility for the 1st Plaintiff to improve the infrastructure of the school.

iv) THAT the 1st Plaintiff due to financial constraints had brought on board another company [**Luziki Holdings Limited**] the 2nd Plaintiff herein to assist in repaying the loan.

v) The 1st Plaintiff gave an offer through letter dated 13th January 2015 to pay all-inclusive sum off Kenya Shillings 20 Twenty Million (Kshs.20, 000,000/-) to redeem the property which offer was declined by the 1st Defendant.

vi) THAT the 1st Plaintiff gave another fresh offer through its letter dated 2nd April 2015 to redeem the suit property at Kenya Shillings Twenty Five Million [Ksh.25, 000.00].

vii) THAT the 1st Defendant has not proposed any counter offer but has now through its agents Garam Investments Auctioneers the 2nd Defendant advertised the suit property for sale on 17th May 2016.

viii) THAT the 1st and 2nd Defendants have not issued the 1st Plaintiff with a requisite statutory notice of sale of the property.

ix) THAT the 1st Defendant's right to exercise power sale has not crystallized.

x) THAT the 1st Plaintiff stands to suffer irreparable loss and damage if the suit property is sold through public auction.

xi) THAT the 1st Plaintiff is willing to redeem the suit property as indicated on its offer letter dated 2nd April 2015.

xii) THAT it is a mete and just to grant the orders sought.

xiii) THAT the Plaintiffs are willing to offer an undertaking as to damages.

xiv) THAT the 1st Defendant did not undertake a current valuation of the suit property before offering the same but purported to use the joint Valuation done on 21st May 2015 when the 1st Plaintiff commenced efforts to redeem the suit property.

xv) THAT the 2nd Plaintiff did participate and was declared the highest bidder in the public auction conducted on 17th May 2016 and the 2nd Defendant's agents fraudulently colluded with the 3rd Defendant to re-open the auction in the absence of the 2nd Plaintiff who had gone to collect a cheque in favour of the 2nd Defendant and purported to declare the 3rd Defendants as the highest bidder against the law.

5. The application is supported by an affidavit of Richard Kamutu Kariuki dated 9th June 2016 who has reiterated the grounds relied upon on the face of the application and attached several annexures thereto in support of the averments. He has attached **RKK 1A**, a certificate of incorporation of a company; "**RKK-2**" a copy of the title deed of the suit property Mavoko **Town/Block 12/326 Kamulu area**; **RKK-3** a tenancy Agreement over part of the property **L.R. No.9042/587** Embakasi; which property the Applicant avers that in July 2013 he came to know was to be auctioned for non-payment of loan following posting of notice of sale by public auction; **RKK- 4** a sale agreement between the 1st Applicant and the 2nd Applicant; **RKK-5** a letter in which the Applicant gave an offer to settle the 1st Respondent's claim at Kshs. 20 million; **RKK-6** a copy of a letter offering Kshs.25 Million in full and final settlement; **RKK-7** a copy of e-mail from the Respondent acknowledging receipt of the Applicant's offer; **RKK-8** A and B copies of letter of instruction from the Respondent and a copy of Valuation Report, and **RKK-9** a copy of proclamation.

6. The Applicants application is opposed. The 1st Respondent/Defendant and 2nd Respondent/Defendant filed grounds of opposition dated 21st November 2016 to Applicant's Notice of Motion dated 9th June 2016.

7. The 3rd Respondent/Defendant filed Replying affidavit sworn on 4th August 2016 and grounds of objection.

8. At the hearing of the application dated 8th May 2016 and 9th June 2016 respectively, Mr. Muriu, learned Advocate, appeared for the 1st

Applicant, whereas Mr. Oonge, learned Advocate, appeared for the 2nd Applicant. Mr. Ayota, learned Advocate, on the other hand appeared for the 1st and 2nd Respondents/Defendants and Miss Kyalo, learned Advocate, appeared for the 3rd Respondent/Defendant. The counsel highlighted on their respective written submissions. The submissions for the 1st Applicant are dated 18th November 2016, for the 2nd Applicant/Plaintiff are dated 18th November, 2016 for the 1st and 2nd Respondents are dated 21st November 2016, whereas those for the 3rd Respondent/Defendant are dated 30th November 2016.

9. I have very carefully considered the application and the pleadings in opposition, the written submissions as well as the oral submissions by the counsel representing various interests of their respective clients. I have also noted from the 1st Applicant's Advocate, that the prayers sought in the application dated 9th May 2016 Nos. 2,3,4 are spent and the only issue remaining thereto is the issue of costs. In view of that fact, the only application pending for determination is the application dated 9th June 2016. I also note the 1st applicant's submissions deal with an application dated 27th October 2016, which was not canvassed before me and I shall ignore the submissions touching on the purported application dated 27th October 2016 as the same was not coming for hearing on 20/9/2018 nor was it urged before me.

10. The chronology of events in this matter are:-

- 1) On 23rd September 2005, the Plaintiff accepted a Mortgage Loan for Kshs.18, 900,000/- from the 1st Defendant.
- 2) On 26th October 2005, both parties executed a Legal Charge over Mavoko Town Block 12/326 Kamulu Area and a joint and several Guarantee and Indemnity was executed by Mr. Richard Kamutu Kariuki and Judith Susan Mulwa.
- 3) Following disbursement of the Mortgage facility, the Plaintiffs begun defaulting and made several letters in admission of debt. The account statements also indicate persistent default by the Plaintiffs since April 2008.
- 4) The 1st Defendant caused the necessary statutory notices to be issued and the charged property was advertised for sale.
- 5) Upon service of notifications of sale, the Plaintiff filed an injunction application dated 21st August 2009 under Hccc No. 617 of 2009 Florence Wangu Mwangi and Another Vs. British American Insurance Company (K) Limited and 3 others [See Replying affidavit pages 39 to 69].
- 6) The matter was heard and by a ruling delivered on 12th March 2010, Hon. Lady Justice M. Koome (as she then was) dismissed the application with costs to Britam.
- 7) Following the Ruling by Hon. Lady Justice M. Koome, the 1st Defendant re-advertised the charged property for sale by public auction on 17th May 2016.
- 8) On 16th May 2016, the Plaintiff filed another injunction application dated 16th May 2016. The same was heard ex-parte but no interim orders were granted.
- 9) On 17th May 2016, the charged property was sold by public auction to the highest bidder, Dr. Patrick Karanja Ngugi for Kshs.27, 000,000. As at April 2016 the total outstanding amount was Kshs.76, 595,402.90. [See pages 26-32 of the Replying affidavit of Joseph Mburu filed on 3rd June 2016].
- 10) The 1st Defendant has suffered loss as the sale proceeds from the charged property barely realized 50% of the debt.
- 11) On 18th May 2016, the application dated 16th May 2016 came for inter partes hearing before the court where the Defendant submitted that the orders being sought were all overtaken by events as the charged property was sold on 17th May 2016 by public auction to Dr. Patrick Karanja Ngugi for Kshs.27,000,000.
- 12) The court issued the following orders;
 - a) The Respondent is given leave to file and serve a Replying affidavit within 14 days,
 - b) The Plaintiff has corresponding leave to file a supplementary affidavit within 7 days,
 - c) The parties to file copies of previous proceedings,
 - d) Leave to the Plaintiff to join the auctioneer and intended purchaser as interested parties only at this stage,
 - e) Interim orders to prevent against transfer of property for 21 days.
- 13) On 23rd June 2016, the 1st Defendant filed and served their Replying affidavit together with preliminary objection and notice to cross-examine for perjury. All attempts at cross-examination failed as the director refused to attend court. It was later learned that towards the end the director succumbed to his illness.

14) On 10th June 2016, the Plaintiff, without leave of court filed an Amended Notice of Motion application dated 8th June 2016. The said application;-

a) Is in contempt of orders issued on 18th May 2016 by Lady Justice Farah Amin,

b) Enjoined Luziki Holdings Limited without leave as 2nd Plaintiff.

15) The applications were consolidated and are now scheduled for determination before this court.

11. Having gone through all the pleadings and submissions I am of the view that the issues for determination can be condensed to the following:-

a) **Whether leave was sought or granted to join Luziki Holdings as 2nd plaintiff?**

b) **Whether the suit is Res judicata?**

c) **Whether there is material non-disclosure?**

d) **Whether there was consent of the chargee to enter into an agreement with Luziki Holdings Limited?**

e) **Whether the Equity of redemption has been extinguished?**

A. Whether leave was sought or granted to join Luziki Holdings as 2nd plaintiff?

12. During the *inter partes* hearing on 18th May 2016 Hon. Lady Justice Farah Amin, issued the following orders:-

"1. The respondent is given leave to file and serve a Replying Affidavit within 14 days,

2. The plaintiff has corresponding leave to file a Supplementary Affidavit within 7 days,

3. Parties to file copies of earlier court proceedings on the same issue,

4. Leave to the Plaintiff to join the Auctioneer and Intended Purchaser as interested parties only at this stage,

5. Upon hearing counsels, the court is of the view that the property be preserved pending further clarifications. The Defendant and its agents are forbidden from taking steps that will place the property beyond the reach of the Court including but not limited to transfer and registration for a period of 21 days."

13. It is clear from the orders of Hon. Lady Justice Farah Amin, the plaintiff under prayer No.4 was granted leave to join the Auctioneer and intended purchaser as interested parties only at that stage. The plaintiff did not file subsequent application to join any of those parties or any other party as a plaintiff. The joining of **Luziki Holdings Limited** as the 2nd plaintiff in this case was not part of the Judge's order of 18th May 2016. The **Luziki Holdings Limited** has been brought into the record as 2nd plaintiff without any order of this court. It is in my view a total stranger. I therefore agree with the 1st and 2nd defendants submissions that **Luziki Holdings Limited** is a stranger and should not be given audience in this matter.

B. Whether the suit is Res judicata?

14. It is submitted by the 1st and 2nd defendants that this application is Res judicata. It is urged a similar application was filed, heard and determined. The application dated 21st August, 2009 was filed under Hccc No. 617 of 2014 **Florence Wangu Mwangi & 2 others Vs British American Co. Ltd & 3 others**. The Applicant states otherwise.

15. I have perused the pleadings exhibited at page 39 to 67 of the Replying affidavit in respect of Hccc 617 of 2009; in which **Florence Wangu Mwangi** was the 1st plaintiff; **Kamulu Academy Limited** the 2nd plaintiff and **British American Insurance Co. Ltd** as the 1st defendant and **Richard Kamutu** the 2nd defendant.

16. Section 7 of the Civil Procedure Act provides:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

17. In the application dated 21st August 2009 filed under Hccc 617 of 2009, the prayers sought in that application are similar to the prayer sought in this matter by same parties. The Applicants are trying to go round the well-settled principle of Res judicata in an attempt to hoodwink the honourable court into acceding to their undersaid prayers. I find the present application to be Res judicata by virtue of a ruling

in Hccc 617 of 2009 in which Applicant's similar application was heard and determined.

C. Whether there is material non-disclosure?

18. It is urged by the 1st and 2nd Respondents that the Applicant is guilty of non-disclosure, that the application before this court, Hon. Lady Justice M. Koome; (*as she then was*) had dismissed similar application for orders of injunction dated 25th August 2009 filed under Hccc 617 of 2009 **Florence Wangu Mwangi & another Vs British American Insurance Co. (K) Limited and 3 others.**

19. It is the duty of the litigants to make full disclosure of facts to be relied on in court. The court should be astute enough to ensure a party who obtains an order without full disclosure is deprived of all advantage he may have derived by breach of duty.

20. In the case of **James Kariuki Ng'ang'a T/A Ndarugu Merchants Vs Joseph Ngae Njuguna & another [2004] eKLR** the court held:-

"In the instant case, both the Objector and the 1st Defendant knew, and have deliberately sworn falsehoods that the household goods and motor vehicles in issue did not belong to the 1st Defendant but belonged to the objector. They refused to disclose those facts to the court and obtained ex-parte orders staying execution of those particular items and property. That was material non-disclosure. Where material non-disclosure is established like in this case, the court will be "astute enough to ensure that a Plaintiff (or Defendant or Objector) who obtains an order without full disclosure is deprived of all advantage he may have derived by breach of that duty."

21. Similarly in **Orion East Africa Ltd Vs Eco Bank Kenya Ltd & another [2015] eKLR**, D.K Musinga J, Muhammed J and E.M. Githinji J being faced with a similar case held thus:-

"He who comes to Equity must come with clean hands. The applicant, was guilty of material non-disclosure at the Trial court, since he was aware of the amended letter and had also caused the two properties to be valued by Dayton valuers Ltd for purposes of the charge. The court was right in holding that the appellant was seeking an equitable relief with unclean hands."

22. In view of the Applicant being the party who made an application before this court is under obligation to this court to make full disclosure of all material facts within his knowledge and which are relevant in this matter and if he does not make the fullest possible disclosure he cannot be allowed to obtain any advantage from the proceedings and any orders made in his favour should be deprived from him as no party should be allowed to enjoy benefits obtained through non-disclosure of material facts as is in this case for Applicant's failure to disclose that similar application was heard and determined by court of competent jurisdiction between the same parties over similar subject matter.

D. Whether there was consent of the chargee to enter into an agreement with Luziki Holdings Limited?

23. In the duly executed charge dated 26th October 2005 under clause 12 it is expressly provided as follows:-

"The Chargor shall not sell, transfer, lease, accept surrender of leases, charge or part with possession of the Premises or any part thereof without the prior written consent of the Chargee and the provisions of Section 69(f) and Section 69(g) of the Registered Land Act shall not apply to this Charge."

24. In the instant application the Chargor/Plaintiff has not demonstrated that he sought and obtained the consent of the chargee, when it purported to enter into a ternary agreement or the agreement for sale dated 29th July, 2013 as per charge dated 26th October 2005 under Clause 12 thereto. This is contrary to section 87 of the Land Act which states as follows:-

"If a charge contains a condition, express or implied that chargor prohibits the chargee from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar."

25. From the above it is clear the chargor acted contrary to section 87 of the Land Act by entering into an agreement of sale with Luziki Holdings Limited without consent of the chargee. The purported consent between the chargor and Luziki Holdings Limited is therefore null and void.

E. Whether the Equity of redemption has been extinguished?

26. It is urged by the plaintiff that the Equity of Redemption is the right to extinguish the mortgage and retain ownership of the property by paying the debt. That the 1st plaintiff gave the offer of Kshs. 25 million to redeem the property which offer has never been declined by the 1st defendant yet the 1st defendant went on to issue a statutory notice of sale. That by the 1st defendant sitting on the offer clogged the 1st plaintiff's right to redeem the property as required by law. That the fact the property was eventually sold at Kshs. 27 million is an indication that the 1st defendant deliberately refused to consider the 1st plaintiff's offer and the 1st defendant was as such in breach of the 1st plaintiff's right to extinguish the mortgage and retain ownership by paying the debt.

27. It is further urged for the plaintiff that Section 96(2) of the Land Act 2012 in **David Ngugi Ngaari Vs. Kenya Commercial Bank Limited (2015) eKLR** the court stated thus:-

"This section is slowly attracting attention from Judges, practitioners as well as scholars of multi-disciplinary fields. And I consider the debate around the subject to be of great jurisprudential value in Kenya especially in the context of the yet-to-be resolved land question; the provisions on property rights in the Constitution of Kenya, 2010, and the protections of equity of redemption in the new land law. In the cases I have handled on the section, I have seen attempts to fuse the requirement in section 96(2) of the Land Act with Rule 15 of the Auctioneers Rules, 1997. Some arguments I have encountered seem to suggest a Notice of Redemption under Rule 15 of the Auctioneers Act is sufficient for purposes of section 96(2) of the Land Act. I think, there is clear legal bifurcation between these two laws and any attempt to fuse the two only increases the confusion of the purpose of section 96(2) of the Land Act. I may speculate here. Perhaps one may think that the Redemption Notice under the Auctioneers Act is sufficient because; it comes after the Statutory Notice; it is for 45 days which is more than the 40 days under section 96(2) of the Land Act; serves the purpose of giving an opportunity to the Chargor to redeem the property; and notifies the Chargor of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice. But I should state that the requirements under section 96(2) of the Land Act are mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but it is issued separately from and after the one under section 96(2) of the Land Act; strictly in that sequence and I will cite ample reasons in support thereof.

[27] Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act."

28. It is further submitted on behalf of the 1st plaintiff that section 97(2) of the Land Act 2012, was not complied with in that the law places an obligation on a chargee under section 97(2) of the Land Act, 2012 in that a chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer. That the 1st Defendant did not cause such a valuation to be carried out before the sale. The 1st Defendant after rejecting the 1st offer by the Plaintiff to redeem the property instructed **KENVAL REALTORS (EA) LIMITED** to carry out a valuation of the property to ascertain its value and as contained in the instruction letter the purpose of the valuation was to ascertain the value of the property so that the parties can effectively engage each other on the proposed redemption of the property by the 1st Plaintiff. It is further urged that the position was buttressed by the fact that it was the Plaintiff who was to meet the cost of the valuation and it was after the valuation that the 1st Plaintiff upped its offer to Kshs. 25 million which offer was acknowledged by the 1st defendant who wrote to the 1st Plaintiff that his offer was before the 1st Defendant's mortgage committee. It is further urged that whatever transpired before the said committee after the report and the offer were tabled before it has never been communicated to the 1st Plaintiff. The next thing the 1st Plaintiff came across was an advertisement for public auction.

29. Section 99 of the Land Act provides:-

"(1) This section applies to—

(a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) Is not obliged to see to the application of the purchase price;

(c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

30. The above section protects the purchaser. The Equity of redemption is extinguished at the fall of the hammer. On 17th May 2016, the charged property was sold by public auction to the 3rd defendant being the highest bidder for Kshs.27 million. The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not. I find the applicant's application has been overtaken by the events as the sale which the 1st plaintiff sought to stay has already taken place. The 3rd defendant purchased the property at a public auction and is therefore protected by provisions of section 99 of the Land Act.

31. In the case of **Mbuthia Vs Jimba Credit Finance Corporation and another [1986-1989] 1 EA 340 (CAK)** considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second respondent. The Court of Appeal held:-

"A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee's exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.

The Court will not grant to a mortgagor tampering the moneys due under the mortgage, an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of this power of sale unless it is proved that the mortgagee entered into the contract in bad faith.

The transaction which is the subject of the dispute was entered into in February 1982 and is therefore governed not only by the Registered Land Act itself, but also by the common law and equity under section 72(1) of that Act, the equity of redemption subsisted in the mortgagor until the leasehold premises was sold. It was then extinguished and the Act provides that "a chargee shall be deemed to have been sold when a bid has been accepted at the auction sale."

This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act."

32. In the case of **Ze Yu vs Yang Nova Industrial Product Ltd [2003] 1 EA 362 (CCK)**, Justice Nyamu (*as he then was*) held as follows:-

"The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power. Mbuthia Vs Jimba Credit Corporation [1986] LLR 3292 (CAK), Grant Vs Kenya Commercial Finance Company Limited civil appeal number 227 of 1995 and Central Bank Kenya Limited Vs Trust Bank and others [1996] LLR 472 (CAK) applied."

33. In view of the above it is evident that the 1st defendant did not suppress and/or ignored the 1st Plaintiff's/Applicant's effort to try and redeem the property nor was he denied his equitable right of redemption before the auction took place. I find the 1st plaintiff has failed to demonstrate that his right of redemption was clogged by the 1st Defendant's action. The 1st Defendant in exercise of chargee's statutory power of sale acted strictly within the provisions of the Land Act. I find no basis to find otherwise. I am not persuaded by the 1st plaintiff's allegations. I do not find any justification to find that there was no forced valuation prior to the sale of the property as required by law nor lack of issuance of proper notice of sale as alleged by the 1st plaintiff.

34. The upshot is that the 1st plaintiff and 2nd plaintiff notice of motion dated 16th May 2016 and Amended notice of motion dated 8th June 2016 are without merit. I find the application have not met the threshold set out for granting an injunction. It has not been proved that the Applicants have prima facie case with probability of success nor that damages won't be sufficient compensation nor do balance of convenience tilt in their favour (see the case of **Giella Vs Casman Brown & others (1973) EA 358**).

35. I accordingly dismiss both applications with costs to the 1st, 2nd and 3rd Defendants/Respondents.

Dated, signed and delivered at Nairobi this 1st day of November, 2018.

.....

J .A. MAKAU

JUDGE