



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 29 OF 2019**

**ESTHER KEMUMA MOGAKA.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**STEPHEN KARANJA KANGETHE T/A**

**DALAI TRADERS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**ALYSSA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. What is before me is the Plaintiff's Notice of Motion dated 24<sup>th</sup> September 2019 seeking temporary orders of injunction to restrain the 3<sup>rd</sup> Defendant/Respondent from entering upon, taking possession, assuming ownership, evicting and/or removing the Plaintiff/Applicant's tenants from L.R No. KISII MUNICIPALITY/BLOCK 111/334 or in any other manner dealing with and/or interfering with the Plaintiff's possession of the suit property howsoever. In the alternative, the Plaintiff seeks an order of status quo preserving and/or conserving L.R No. KISII MUNICIPALITY/ BLOCK 111/334 pending the hearing and determination of the suit herein. The application is anchored on the grounds stated in the Notice of Motion key among them being that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the suit property without complying with the provisions of the law and in particular the provisions of the Auctioneers Rules 1997.

2. The application is supported by the Applicant's affidavit sworn on the 24<sup>th</sup> day of September 2019 in which she gives a background of the case. The long and short of it is that sometime in October 2015, M/s Ouru Power Limited (the company) where the Applicant is a co-director was advanced a sum of Kshs. 115,000,000 by the 1<sup>st</sup> Defendant. The said banking facility was secured by a charge over L.R No. KISII MUNICIPALITY/ BLOCK 111/334. The company defaulted in repayment of the loan after which the 1<sup>st</sup> Defendant issued the company with statutory notices to signify its intention to exercise its statutory power of sale. The 1<sup>st</sup> Defendant subsequently engaged the services of Garam Auctioneers who advertised the suit property for sale on 14<sup>th</sup> October 2016. However, the Plaintiff filed Kisii ELC Case No. 284 of 2016 challenging the sale. She also filed an application for injunction to restrain the 1<sup>st</sup> Defendant from realizing the security. The court granted an ex-parte injunction effectively stopping the sale but after inter partes hearing the order of injunction was discharged on 31<sup>st</sup> March 2017 paving way for the 1<sup>st</sup> Defendant to proceed with realization of the security. The 1<sup>st</sup> Defendant eventually sold the suit property by public auction on 20<sup>th</sup> December 2017. It is this sale that the Applicant is now challenging through the instant suit.

3. The Applicant deposes that even though the 1<sup>st</sup> Defendant was at liberty to engage another auctioneer to sell the suit property, it was required to re-advertise the intended auction. It is the Applicant's contention that the 1<sup>st</sup> Defendant proceeded to sell the suit property without advertising the same. The Applicant learnt of the sale on 10<sup>th</sup> September 2019 when the agents of the 3<sup>rd</sup> Defendant who claimed to have bought the suit property went to the property and threatened the tenants with eviction. The Applicant then conducted some inquiries at that the Lands office and discovered that the suit property had been sold.

4. The Applicant avers that if their tenants are evicted she will be deprived of benefits arising from her ownership of the suit property and she will suffer irreparable loss. The substratum of the suit shall also be destroyed.

5. The application is opposed by the 1<sup>st</sup> Respondent through the affidavit of Lwanga Mwangi, the 1<sup>st</sup> Defendant's Assistant Manager-legal sworn on the 22<sup>nd</sup> October 2019. He deposes that the Applicant has admitted that the borrower defaulted in its payment obligations and as a

result the 1<sup>st</sup> Defendant's statutory power of sale crystallized. He further depones that the requisite notices were served upon the borrower and the Plaintiff and as a result of non-compliance with the demand contained therein the 1<sup>st</sup> Defendant instructed auctioneers to issue a notification of sale and advertise the property for sale. The said sale was stopped when the Applicant filed Kisii ELC Case No. 284 of 2016 in which the Applicant obtained an interim injunction. The court however eventually dismissed the application for injunction after which the Applicant filed a Notice of Appeal. The said Notice of Appeal was stuck off upon the 1<sup>st</sup> Defendant's application.

6. Mr. Mwangi depones that the 1<sup>st</sup> Defendant advertised the suit property for sale in the Daily Nation of 13<sup>th</sup> November, 2017 and Standard Edition of 6<sup>th</sup> December 2017. He has annexed copies of the said advertisements to his affidavit. He depones that subsequent to the said advertisements, a public auction was conducted and the 3<sup>rd</sup> Defendant emerged the highest bidder. The property has since been transferred to the 3<sup>rd</sup> Defendant as shown in the annexed Certificate of Lease issued to the 3<sup>rd</sup> defendant on 19<sup>th</sup> August 2019.

7. The application was canvassed by way of written submissions and the Applicant filed his submissions dated 5<sup>th</sup> March 2020 while the 1<sup>st</sup> Defendant filed his submission dated 8<sup>th</sup> May 2020. Both parties relied on a number of authorities which they attached to their submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file any submissions.

#### **APPLICANT'S SUBMISSIONS.**

8. In his submissions learned counsel for the Applicant reiterated the background of the case as contained in the Applicant's affidavit and set out the following issues for determination:

- i. Whether the 2<sup>nd</sup> Defendant/Respondent herein, who was retained by the 1<sup>st</sup> Defendant/ Respondent issued and served the requisite Notification of sale.
- ii. Whether the sale of the suit property was advertised or at all.
- iii. Whether the sale and/or alienation of the suit property without compliance with the provisions of the Auctioneers Act renders the sale null and void.
- iv. Whether the Plaintiff/Applicant herein has laid out and/or established a prima facie case to warrant the grant of the orders of temporary injunction.

9. Counsel conceded that the 1<sup>st</sup> Defendant issued the Applicant with statutory notices. It is however his contention that the 2<sup>nd</sup> Defendant who was nominated by the 1<sup>st</sup> Defendant to sell the suit property did not issue a Notification of sale as required by rule 15 of the Auctioneers Rules. The said rule provides as follows:

Rule 15: *The auctioneer should:*

- a) *Record the instructions in the register;*
- b) *Prepare a Notification of Sale (Form 4)*
- c) *Locate the property and serve the Notification of Sale of the property on the registered owner*
- d) *Give in writing to the registered owner a notice of not less than forty five days within which time the owner may redeem the property by payment of the outstanding debt;*
- e) *On expiry of the 45 days without payment arrange the sale of the property not earlier than fourteen days after the first newspaper advertisement.*

10. It is counsel's contention that to the extent that no such notification of sale was served upon the Plaintiff, the public auction arising out of the said sale was in violation of the mandatory statutory prescription and was a nullity. He relied on the case of **Lakeland Motors Limited v Harbhjan Singh Sembi (1998) eKLR** where the Court of Appeal held that failure to comply with the Auctioneers Rules 1997 amounted to an irregularity which the court could not countenance.

11. Counsel submitted that the failure to serve the Plaintiff with a 45-day notification of sale amounted to breach of the Plaintiff's rights and she had therefore established a prima facie case to warrant the grant of a temporary injunction. He urged that failure to grant the orders sought would amount to sanctioning illegalities.

#### **RESPONDENT'S SUBMISSIONS**

12. On the other hand, learned counsel for the 1<sup>st</sup> Defendant submitted that the application turns on the following issues:

- i. Whether the 1<sup>st</sup> Defendant's statutory power of sale had crystallized by the time the suit property was advertised, sold and transferred

ii. Whether the 2<sup>nd</sup> Defendant issued a Notification of Sale under rule 15 of the Auctioneers rules 1997 and if non-compliance renders the sale null and void

iii. Whether the Plaintiff has met the broad requirements to entitle her to the orders sought.

iv. Whether the orders sought can be granted.

## ANALYSIS AND DETERMINATION

13. It is not in dispute that the 1<sup>st</sup> Defendant's statutory power of sale had crystallized. As correctly submitted by counsel for 1<sup>st</sup> Defendant, this issue was conclusively determined by the court in Kisii ELC Case no. 284 of 2016.

14. What is in contention is whether the 2<sup>nd</sup> Defendant issued a Notification of sale as provided under Rule 15 of the Auctioneers Rules. The Applicant denies that she was served with the said Notification and indeed none has been exhibited by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant however argues that failure to serve the said Notification of Sale does not invalidate the sale and cannot clog the chargee's statutory power of sale. It is the 1<sup>st</sup> Defendant's contention that the Court should not be too far bound by the rules which are merely intended as rules of practice as to be compelled to do so would cause injustice to the other party. Counsel cited the case of **Githere v Kimungu (1985) E.A 101**.

15. Counsel further submitted that the chargor's right of redemption is extinguished at the fall of the hammer and non-compliance with Rule 15 of the Auctioneers Rules would neither invalidate the sale nor entitle the Plaintiff to an order of injunction. He cited the case of **Franklin Gambo Mwagambo v Equity Bank Limited (2015) eKLR** where the court cited with approval the case of **Eric Odindo v National Bank of Kenya Limited & 2 Others (2008) eKLR** where the court stated that:

*“The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of the statutory power of sale by the chargee non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction.*

16. Similarly, in **Jacob Ochieng Muganda v Housing Finance Company of Kenya Limited HCCC No. 1436 of 1999 (U.R)** Ringera J held that irregularity on the part of the auctioneer could not invalidate a sale and the remedy of a person who can prove that he has been damaged by the irregularity would be damages against the auctioneer as per section 26 of the Auctioneers Act.

I concur with the reasoning in the above decisions and find that failure to comply with Rule 15 of the Auctioneers Rules alone does not render the sale null and void.

17. This being an application for injunction I am alive to the fact that what I am called to determine at this stage is whether the applicant has met the principles set out in the case of **Giella v Cassman Brown & Company Ltd (1973) E.A 358** which are as follows:

*“First, the Applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”*

18. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

*“A prima facie case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”*

19. The Applicant has admitted that the borrower is still indebted to the 1<sup>st</sup> Defendant. She has also admitted that the 1<sup>st</sup> Defendant's statutory power of sale had accrued and that the statutory notices were duly served upon them. It is not in dispute that the sale was advertised in two daily newspapers being the Daily Nation and the Standard. The only complaint is that the 2<sup>nd</sup> Defendant did not issue the Applicant with a Notification of Sale in accordance with rule 15 of the Auctioneers Rules. Having arrived at the finding that failure to comply with the Auctioneers' rules does not invalidate the sale, it goes without saying that the Plaintiff has failed to demonstrate that she has a prima facie case with a probability of success.

20. In arriving at this finding I am guided by the case of **Giro Commercial Bank Limited v Mutesi Civil Appeal No.342 of 2000 (U.R)** the Court of Appeal stated as follows:

*“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. See Halsbury's Laws of England Vol 32 paragraph 725. In view of the fact that the debt was admitted as due and further that the loan was not being serviced, the superior court should not have granted an injunction. The first principle as laid down in the **Giella V Cassman Brown & Co Ltd** was not satisfied, that is to say the Respondent has not made out a prima facie case with a probability of success”*

21. Since the Plaintiff has not satisfied the first condition in the Giella case, there is no need to examine the remaining two conditions. But even if I had arrived at different finding, the Plaintiff has not demonstrated that if the injunction is not granted, she would suffer such loss as cannot be compensated by way of damages.

22. In her application the Plaintiff seeks an alternative order for maintenance of status quo, which if granted would amount to granting an order of injunction without the Plaintiff having satisfied the conditions for injunction. Even though the Plaintiff has deponed that she is willing to give an undertaking as to damages, the elephant in the room is why she has not made any effort to settle the outstanding loan. He who comes to equity must come with clean hands. The Plaintiff has not come to equity with clean hands.

23. Taking all factors into consideration, I am not persuaded that this application has merit and I therefore dismiss it with costs to the 1<sup>st</sup> Defendant/ Respondent.

**Dated, signed and delivered at Kisii this 25<sup>th</sup> day of September 2020.**

**J.M ONYANGO**

**JUDGE**