



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 465 of 2012**

**LN PROPERTY DEVELOPMENT CO. LIMITED .....1<sup>ST</sup> PLAINTIFF**

**LUORE NYOIRE COMPANY LIMITED .....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**FIDELITY BANK LIMITED .....DEFENDANT**

**R U L I N G**

**1.** The **Notice of Motion** dated **18<sup>th</sup> July 2012** is filed under **Section 1A, 1B, 3A** of the **Civil Procedure Act, Order 40, Rule 1 (a), Order 51 Rule 1** of the Civil Procedure Rules. The motion seeks orders as follows:-

- 1.** That this application be certified urgent, be heard *ex-parte* and service thereof be dispensed with in the first instance.
- 2.** That pending the hearing and determination of this application, this honourable court be pleased to grant an interim injunction restraining the Defendant its agents, assigns, representatives, employees or otherwise howsoever from interfering with or alienating, disposing of, selling, transferring or advertising for sale that portion of land known as land Reference Kajiado/Kisaju 1189 – Kisaju.
- 3.** That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an interim injunction restraining the Defendant it agents, assigns, representatives, employees or otherwise howsoever from interfering with or alienating, disposing of, selling, transferring or advertng for sale that portion of land known as land Reference Kajiado/Kisaju 1189 – Kisaju.
- 4.** Any other or further relief.

**2.** The motion is premised on several grounds set out in the application, and is supported by affidavit of **IAN OKUNDI** dated **18<sup>th</sup> July 2012** with its annextures.

**3.** The application is opposed vide a replying affidavit by Georgina Muthama dated **24<sup>th</sup> July 2012** with its annextures.

**4.** The brief history of the application is that the Plaintiffs are both limited liability companies while the Defendant is a bank. On or about **April 22, 2010**, the 1<sup>st</sup> Plaintiff and the Defendant entered into an agreement for the provision of a loan facility for the amount of **US \$ 125,000.00** secured by a legal charge over the property Land Reference Kajiado/Kisaju 1189 – Kisaju (hereinafter referred to as '**the property**') which was at all times registered in the name of the 2<sup>nd</sup> Plaintiff.

The 1<sup>st</sup> Plaintiff serviced the facility as pledged until **December 2011** when owing to an unavoidable and unforeseen dip in the value of shares in the securities market, a default occurred. On or about **December 1, 2011**, the 1<sup>st</sup> Plaintiff received a notification of sale of the property sent care of Keysian Auctioneers, indicating that the amount owing as at that date was the sum of **Kshs.10,454,420.80**, and that sale would be by public auction and would take place on **March 9, 2012**.

On or about **January 25, 2012**, the 1<sup>st</sup> Plaintiff presented the Defendant with a proposal for settlement the details of which were as follows:-

- a) A payment of **Kshs.1,080,000.00** at end of **February 2012**.
- b) A further payment of **Kshs.7,000,000.00** on **March 29, 2012** and
- c) Assignment on mutual agreement of a treasury bill issue number **1936/031** of CDS account number **09-30-20661-8** of L.N. Property Development Company Limited of value **Kshs.5,000,000.00** to the Defendant.

5. For reasons given in the supporting affidavit by **MR. IAN OKUNDI**, a director of the 1<sup>st</sup> Plaintiff Company, the above proposals in settlement were never honoured to the letter, leading to the auction of the suit property on **10<sup>th</sup> July 2012**. The Plaintiffs have now come to court to stop the sale process and to stop the transfer of the property to the purchaser in the event that the property has indeed been sold.

6. When the application first came to court *ex-parte*, I did not issue any interim orders and I directed that the application be served upon the Respondent for hearing *inter-partes* on **26<sup>th</sup> January 2012**. On that day, upon hearing the parties, I granted an interim injunction in terms of prayer 2 pending the delivery of this Ruling. Mr. Mogere for the Applicant based his submissions on four grounds, namely:-

a) That the Notice to the Plaintiff about the intended auction on **10<sup>th</sup> July** was never served, as the Applicant had used a non-existent address of P.O. Box November 25707 and not 25207. In response to this Mr. Kosgei for the Respondent submitted that the issue of Notice was overtaken by events as the Applicants had admitted in paragraph 5 of the supporting affidavit the receipt of the Notice sent in **December 2011** using the same address. In any event, Mr. Kosgei submitted, the fresh notices issued after the **December 2011** notice were not mandatory and were purely based on good will.

7. I have considered the application, the opposing affidavits and submissions of the parties. For me the issues are:-

- (i) Whether or not the auction which was carried out on **10<sup>th</sup> July 2012** can be reversed and/or if this court can stop the transfer of the property to the Purchaser.
- (ii) Whether or not damages would be adequate remedy to the Applicant.

8. I am convinced that the auction which took place on **10<sup>th</sup> July 2012** was valid and that proper notices were given to the Applicant. I am also satisfied that the Plaintiff owes the said debt to the Respondent. I am unable to reverse the said auction which was properly conducted, and after which a deposit of **25%** was paid to the Respondent.

9. I believe that it would be unjust to stop the transfer of the suit property to the Purchaser. This is so because under the principles established under the **Giella – Vs – Cassman Brown**, damages are adequate remedy for the Applicant should it transpire that the said auction was illegal. However, I am not satisfied that the Plaintiff has established a case with a probability of success in this particular instance. But should the Plaintiff succeed in its case, the Plaintiff will be properly compensated by way of damages.

**10.** In the upshot I herewith dismiss with costs the **Notice of Motion** dated **18<sup>th</sup> July 2012**.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 6<sup>TH</sup> DAY OF NOVEMBER 2012**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mogere for the Plaintiffs

Kosgei for the Defendant

Teresia – Court Clerk