



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL CASE 438 OF 2008**

**OMAR SALIM SWEDI.....  
.....PLAINTIFF**

**VERSUS**

**K-REP BANK LIMITED .....1<sup>ST</sup>  
DEFENDANT**

**STEPHEN K. KANG'ETHE  
T/A**

**DALALI TRADERS.....2<sup>ND</sup>  
DEFENDANT**

**R U L I N G**

The Applicant Omar Salim Swedi, has filed this suit against the Chargor of the suit property LR. No. 22587/2 GEDE located in Kilifi District K-Rep Bank Limited and the STEPHEN K. KANG'ETHE t/a DALALI TRADERS, the auctioneers who sold the suit property as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In the suit, the Plaintiff seeks two prayers. The first prayer sought is a permanent injunction restraining the Defendants whether themselves or through their servants or agents from selling and or transferring the suit property to any purchaser other than the Plaintiff. The second prayer sought is duplex. It seeks a declaration that the Plaintiff was the highest bidder and purchaser of the suit property and in the alternative that the auction be declared null and void owing to the illegality.

Simultaneous with the filing of the suit the Plaintiff filed a Chamber Summons application invoking Order XXXIX rule 1, 2 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiff/Applicant seeks two substantive prayers in the application as follows:

2. THAT the Honourable Court be pleased to grant a temporary injunction restraining the Defendants their employees, servants agents and/or assigns or any other person claiming through them from transferring L.R. No. 22587/2 GEDE located in Kilifi District or in any other manner dealing with the same pending the determination of this application.

3. THAT the Honourable Court be pleased to grant a temporary injunction restraining the Defendants their employees, servants agents and/or assigns or any other person claiming through them from selling or transferring the parcel L.R. No. 22587/25 GEDE located in Kilifi District or in any other manner dealing with the same pending the determination of this suit.

Prayer 2 is moot.

There are two grounds cited on the face of the application.

1. That the Defendants their employees, servants, agents and/or assigns intend to sell and transfer the parcel L.R. No. 2258/2 GEDE located in Kilifi District to a third party despite having a higher bid from the Plaintiff contrary to S.21 of the Auctioneers Act (Act No. 5, 1996).
2. That the Plaintiff stands to suffer irreparable loss unless the Defendants are restrained from selling or transferring the aforesaid property.

The application is supported by an affidavit sworn by the Plaintiff in which he sets out the facts of the case. In the affidavit, the Plaintiff avers that the 2<sup>nd</sup> Defendant advertised the suit property for sale which was to be conducted at 11.00 a.m. on 15<sup>th</sup> day of August, 2008 at Kilifi. The Plaintiff deposes that he attended the auction and that the bidding begun at 10.45 a.m. The Plaintiff avers that he gave the highest bid of Kshs.2 million, behind a lower bid of Kshs.1.65 million given by a person who had travelled to the auction venue in the auctioneer's vehicle. The Plaintiff deposes that his bid was rejected without any explanations. The Plaintiff annexes his bank statement to show he had sufficient funds to pay the required deposit of 25%. There is a second supporting affidavit sworn by Peter Ponda another unsuccessful bidder at the same auction. Peter deposes that he arrived at the auction site at 10.57 a.m. and found the auction complete.

The application is opposed. The two Defendants each filed replying affidavits. One is sworn by the 2<sup>nd</sup> Defendant in person and is dated 8<sup>th</sup> August, 2008. The second is sworn by TEDD MUNYALO the Recoveries Manager of the 1<sup>st</sup> Defendant Bank. The 2<sup>nd</sup> Defendant in his affidavit deposes that the Plaintiff did not offer a bid of Kshs. 2 million as alleged but that he bid Kshs.4 million. The 2<sup>nd</sup> Defendant deposes that before accepting the bid he asked the Plaintiff whether he had Kshs.1 million to deposit as required in order to complete the auction sale. The answer he got was that the Plaintiff could not raise the money immediately. The 2<sup>nd</sup> Defendant deposes that he did not think that the Plaintiff was a serious bidder and therefore confirmed the next highest bidder which was by MS. NEEMCO HOLDINGS LIMITED which also paid the deposit required. TEDD MUNYALO in his replying affidavit gives a brief background of the history of the case and repeats the information he received from the 2<sup>nd</sup> Defendant regarding the auction. TEDD deposes that the 2<sup>nd</sup> Defendant was given the duty to auction the suit property and was given the reserve price as Kshs.1.2 million.

I have considered the submissions by Mr. Nyaga for the Plaintiff/Applicant and Mr. Wanyama for the Respondent.

The conditions for the grant of an interlocutory injunction have long been well settled in this country. They are that:

1. An applicant must show a prima facie case with a probability of success.
2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
3. If the court is in doubt, it will decide an application on a balance of convenience.

These conditions were stated in the old case of **GIELLA -VS- CASSMAN BROWN & COMPANY LIMITED [1973] EA 358** and have since been adopted in numerous cases.

The Applicant has to show that he has a *prima facie* case and a possibility of success. In the submissions of the Applicant's Advocate, Mr. Nyaga submitted that the Applicant was ready to pay 25% of the sale as per the condition of sale as required. The Applicant has annexed a statement of bank account showing that at the time in question the account had a balance of Kshs.0.5 million which was sufficient to meet the 25% required for the auction.

The 2<sup>nd</sup> Respondent in his affidavit has deposed that the Applicant made a higher bid than he claims in his application and that he indicated to him at the auction that he did not have the 25% required to deposit with the auctioneer in order to have the bid confirmed. If indeed the Applicant gave a bid of Kshs.4 million as alleged by the Respondent, then at the time that he made that offer he did not have sufficient funds to meet the 25% deposit that is required under the Auctioneers Act and also by the 1<sup>st</sup> Respondent in order to have the bid accepted. The 2<sup>nd</sup> Respondent has specifically deposed that the Applicant made a higher bid that he now claims before this court, which if it is true, he was not able to raise the 25% deposit required, then going by the statement of account that he has annexed to the supporting affidavit. The Applicant has not replied to the allegation by the 2<sup>nd</sup> Respondent in which case he has to be assumed that he admits the facts as given by the 2<sup>nd</sup> Respondent in his affidavit.

Mr. Nyaga has invoked the provisions of **Section 21** of the **Auctioneers Act** which lays down the procedure to be followed in public auctions. Counsel submitted that since the provisions of this Act were not complied with in the sense that the auction was not conducted at the time it had been advertised, it renders the entire exercise a private treaty arrangement and not a public auction and that therefore, the sale was shrouded with illegality and should be nullified. Unfortunately for Mr. Nyaga, **Section 21(9) (b)** of the **Auctioneers Act** stands in the way of his client, the Applicant in this case, in that he has not denied that he gave a bid which he could not honour as stated by the Auctioneer who is the 2<sup>nd</sup> Respondent in this case. The Section stipulates as follows:

*“A person who, knowingly –*

*(b) makes a bid which he cannot honour or is fraudulent, or is intended to avoid a valid sale which is subject to the bid,*

*commits an offence.”*

It must be remembered that the Applicant is seeking an equitable relief and as the axiom goes, *he who comes to equity must come with clean hands, and also the court cannot aid the law breaker.* Going by these two axioms the Applicant has been shown to have broken the law specifically **Section 21(9) (b)** of the Auctioneers Act by giving a bid that he could not be able to honour. The Applicant cannot benefit from illegality.

Mr. Wanyama for the Respondent has also invoked the provisions of **Section 26** of the Auctioneers Act to submit that even if there was improper exercise of the Auctioneer’s powers the only thing that the Plaintiff would be entitled to was an award of damages from the Auctioneer. **Section 26(1)** stipulates:

*“Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the Auctioneer by action:”*

I have taken into consideration the 1<sup>st</sup> Respondent’s averment that the Applicant gave an exaggerated bid which he also specifically said he could not honour as he could not be able to raise the money required to confirm that bid. I have also considered the specific provisions of the Auctioneers Act which tie the Applicant to a claim for damages where if agreed by the exercise of the 2<sup>nd</sup> Respondent’s power during the conduct of the auction the subject matter of this suit. I am not satisfied that the Applicant has made a case that would justify this court to order an injunction in the terms sought in this application in the face of the provisions that the Applicant could only claim damages for the improper exercise of power by the Auctioneer, it would be the wrong exercise of judicial discretion to order an injunction to stay the sale and transfer of a suit property conducted by the 1<sup>st</sup> Respondent in exercise of its statutory power of sale which power is not under the scrutiny of this court as no issues have been raised touching on its legality or otherwise. Not only will the 1<sup>st</sup> Respondent who is an innocent party in this suit suffer if this court issues a restraining order on the sale, but there are other very serious ramifications of such an order that would be visited on both the debtor whose land was being auctioned and the innocent purchaser who bought the

suit property from the 2<sup>nd</sup> Respondent. Having carefully considered the facts of the case, I am not satisfied that the Plaintiff has established any *prima facie* case that would justify this court issuing the injunction sought.

The second principle upon which this application should be considered is whether the Plaintiff/Applicant has demonstrated that the loss he is likely to suffer or has suffered cannot adequately be compensated by an award of damages. I have considered the Applicant's affidavit in support of this application and there is no where he has shown that he has suffered or stands to suffer any damage or loss. In my own consideration, apart from speculative buying of the suit property, I do not see what loss the Plaintiff has or may have suffered which cannot be compensated by an award of damages. In any event, **Section 26(1)** of the **Auctioneers Act** specifically provides that any person who suffers special or general damages by the unlawful or improper exercise of any power by an auctioneer shall be entitled to recover damages directly suffered by him from the auctioneer. This section is binding on the Applicant. It gives the Applicant the right to recover damages whether special or general suffered by him due to the unlawful or improper exercise of the auctioneer's powers in an action against the auctioneer. The Plaintiff's action under this section does not include the imposition of an injunction to affect the exercise of the auctioneer's power. The reason for this must be very obvious. For instance, in the instant case, if this court were to grant the injunction sought, the order would affect persons who are not party to the instant suit and who stand to suffer the greater loss or damage if the injunction were granted. Since the law recognizes the Applicant's right to recover damages from the auctioneer I cannot find otherwise than that the Applicant can adequately be compensated by an award of damages for the injury or loss that he has suffered or stands to suffer due to the exercise of the auctioneer's power complained of in this case. For that reason also, the application cannot succeed.

The third principle applicable in this case is that where the court is in doubt regarding the first two principles it should determine the application for injunction on the balance of convenience. In the face of the provisions of section 26 of the Auctioneers Act, I do not see the need to go into the merits of the application on the basis of this last principle.

Having carefully considered the application, for the reasons that I have given in this ruling, I find no merit in the prayer for temporary injunction sought by the Applicant in the Chamber Summons dated 4<sup>th</sup> day of August, 2008. For this reason, the application stands dismissed with costs to the Respondent.

**Dated at Nairobi this 3<sup>rd</sup> day of October, 2008.**

**LESIIT, J.**

**JUDGE**

**Read, delivered and signed in presence of:**

Mr. Mungai holding brief for Mr. Nyaga for the Plaintiff/Applicant

N/A for Mr. Wanyama for the Defendant

**LESIIT, J.**

**JUDGE**