



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, TUNOI & SHAH, J.J.A
CIVIL APPLICATION NO. NAI. 218 OF 1998 (UR.88/98)
BETWEEN

CARLOS SANTOSAPPLICANT
AND
NDAMPER ENTERPRISES1ST
RHOEUSSPIONNGD ENTFINANCE CO. OF KENYA LTD2ND
RDOEMSIPZOINADNEON T KABURU NJERU3RD
RHAERSUPNO NDENWTANANENE MBUTHIA4TH RESPONDENT

**(An application for an interlocutory injunction in the
intended appeal from a judgment of the High Court of
Kenya at Nairobi (Mr. Justice G. Mbiti) dated 10th
September, 1998**

in

H.C.C.C NO. 298 OF 1994)

RULING OF THE COURT

This is an application under rule 5 (2)(b) of the Court of Appeal Rules in which Carlos Santos Lozano, the applicant (hereinafter called "the plaintiff") seeks an interlocutory injunction restraining Ndamper Enterprises (the first defendant) , Housing Finance Company of Kenya Limited (the second defendant), Domiziano Kaburu Njeru (the third defendant) and Harun Wakanene Mbuthia (the fourth defendant) jointly and severally their servants and agents from transferring, alienating, charging, disposing of or in any other way dealing with two parcels of land, namely, Plot L.R. No. 1160/290 and Plot L.R. No.13080 Karen, Nairobi, pending the hearing and final determination of an intended appeal.

The third defendant bought property L.R. No. 13080 Karen on 9th December, 1993 at a public auction conducted by the first defendant on behalf of the second defendant who was selling the property in exercise of its statutory power of sale. Similarly, the fourth defendant bought property L.R. No. 1060/290 Karen on 24th November, 1993 at a public auction also conducted by the first defendant on behalf of the second defendant in exercise of its statutory power of sale. The third defendant became registered as proprietor of L.R. No. 13080 on 12th January, 1994, some two weeks before the plaintiff filed proceedings in the superior court. The fourth defendant procured the registration of L.R. No.1160/290 in his name on 22nd September, 1998 when the present application had been filed and served on him. Of course, there was no legal impediment to this, but, as we shall shortly demonstrate, this registration was procured by deception.

The plaintiff's case before the Judge was that he attended both auctions and that at each one of them he was the highest bidder but the first defendant unlawfully rejected his bids. The first defendant's response to this allegation was that, on the first occasion, the plaintiff made a bid but he rejected it because the plaintiff wanted to pay the deposit in US dollars as opposed to payment in Kenya currency either in cash or by a banker's cheque. On the second occasion, the plaintiff was excluded because he had

apparently committed a breach of the peace when his bid was rejected during the first auction on 24th November, 1993. Both the third and fourth defendants denied the allegations made by the plaintiff and maintained that the sales were regularly conducted and their titles cannot therefore be impeached.

Mbito J heard the case and upheld the sale of the properties to the third and fourth defendants, and it is against that decision that the plaintiff now intends to appeal to this Court, and for the time being he seeks a temporary injunction to safeguard his interest.

Mr. Oyatsi, for the plaintiff, submitted that the plaintiff's bids were the highest and the first defendant was bound to accept them and sell both properties to him. The Judge rejected that submission and gave his reasons among them being that the bids were subject to acceptance, and also that in relation to the first auction, the plaintiff did not satisfy the financial criteria stipulated under the conditions of sale. With regard to the second sale on 9th December, 1993 the plaintiff, according to the first defendant, did not bid because he was excluded from participation and this particular property went to the third defendant. And the third defendant, as we have already said, secured registration before the plaintiff started proceedings.

The evidence which the learned Judge accepted established that the plaintiff did not make a valid bid because he was told by the first defendant that his bid would not be accepted because of his behaviour at the previous auction held on 24th November, 1993. We are accordingly satisfied that if the plaintiff felt aggrieved by what happened on 9th December, 1993, his remedy lies only in damages against the party whom he alleges exercised the power of sale to his detriment. The legal position is clear and one need not look beyond section 69B or the Transfer of Property Act, 1882. The plaintiff has no cause of action against the third defendant in relation to the sale to the third defendant of L.R. No. 13080. Although the original plaint did not contain a prayer for damages, we note that it was subsequently amended to include that relief and we agree with Mr. Ougo, for the third defendant, that the plaintiff's claim for specific performance has no chance of success. In relation to the sale to the third defendant therefore, the plaintiff has not made out a case to entitle him to an order for a temporary injunction. His application in relation to L.R. No.13080 accordingly fails and is dismissed with costs.

We now consider the application in relation to L.R. No. 1160/290 alleged to have been sold to the fourth defendant on 24th November, 1993. The plaintiff says he bid for the property and that although his bid was the highest, the first defendant refused to sell the property to him. The first defendant admitted that the plaintiff's bid was the highest but he declined to accept it because the plaintiff wanted to pay the deposit in U.S dollars as opposed to Kenya currency either in cash or by banker's cheque. The first defendant attempted to defend his action by saying that he could not be certain that the dollars the plaintiff carried were not fake or counterfeit. And having rejected the plaintiff's bid, which on the face of it complied with the stated terms and conditions of sale, the first defendant then proceeded to sell the property to the fourth defendant at a price far below the reserve price in flagrant breach of the duty of care owed by the second defendant, as chargee, to the registered owner of the property.

There is also the issue of the manner in which the fourth defendant got the property registered in his name on 22nd September, 1998 after the judgment in his favour. Judgment was delivered 10th September, 1998. On the following day, the fourth defendant submitted a draft decree to the superior court and had it signed by Deputy Registrar Peter Mugo. He did not pay the requisite fee and, it was not sealed. So it was not a decree properly issued by the superior court, and was at that stage just a worthless piece of paper signed by Deputy Registrar Peter Mugo. But that did not deter the fourth defendant. He rushed to the Department of Lands and armed with this useless piece of paper, purporting it to be a decree issued by the superior court, amongst other documents, had himself registered as proprietor on 22nd September, 1998. On that date the present application had already been filed and served. In the fourth defendant's indecent haste to steal a march on the plaintiff, he completely disregarded the mandatory provisions of Order XX rule 7(2) of the Civil Procedure Rules which states:-

"7(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if he is satisfied that it is drawn in

accordance with the judgment, shall sign and seal the decree accordingly" (emphasis added)

The fourth defendant did not submit a draft decree to the plaintiff's Advocates. And although it was signed by the Deputy Registrar, he did not seal it. In the case of Provincial Insurance Company East Africa Limited v. Mordekai Mwangi Nandwa (Civil Appeal No. 179 of 1995) (Unreported) this Court had this to say in relation Order XX rule 7 :-

"We must mention yet another matter. Judgment in this case was delivered on March 7, 1995 and the decree was signed on March 8, 1995 in violation of the provisions of Order 20 rule 7 of the Civil Procedure Rules. Execution of the decree took place on March 9, 1995. The alacrity and speed with which that was achieved leaves plenty to be desired. This Court held in Mwangi Mbothu and Others v Gachira Waitamu and Others (Civil Application No. NAI.233 of 1993) (Unreported), that "this Court will not allow any party to flout the rules of procedure. " "

Mr Kariuki, for the fourth defendant, disowned the "decree" and in our view rightly so having regard to his duty to the Court as an officer of the Court. This is a violation we cannot condone and we are under a duty to deal with it at once so that the authority of the courts is not undermined by anyone. We have received confirmation from the Principal Registrar of Titles that the fourth defendant presented to her the document he purported to be a decree issued by the superior court, but which was not, and procured registration of **L.R. No.1160/290** in his name. The superior court has yet to issue a proper decree in this matter.

We direct Deputy Registrar Njai to investigate the circumstances in which this bogus document was processed in the registry and report back to the Court within seven days.

For these reasons, the plaintiff's application against the first, second and fourth defendants in relation to L.R. No. 1160/290 succeeds and a temporary injunction is hereby issued in terms of prayer 1 of the Notice of Motion dated 16th September, 1998, to remain in force until the hearing and final determination of the intended appeal or further order. The Principal Registrar of Titles is hereby ordered not to register any transfer or any other document against the title of Plot **L.R. No. 1160/290** until further orders. The costs of this application, as between the applicant and the fourth respondent will be costs in the intended appeal.

Dated and delivered at Nairobi this 9th day of October,

1998.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

DEPUTY REGISTRAR