



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**  
**AT NAIROBI**

**(CORAM: GICHERU, LAKHA & PALL J.J.A)**  
**CIVIL APPEAL NO. 3 OF 1997**

**BETWEEN**

**IHENYA AGENCIES CO. LTD.....APPELLANT**

**AND**

**1.BARCLAYS BANK OF KENYA LTD.....1ST**

**2.M/sR.E SPONDEWNATTTTS ENTERPRISES.....2ND**

**3.M/sR.E SPONCDREANMT INVESTMENTS LTD.....3RD**

**4.RACRHEOSDP ONDENT MORAJARIA.....4TH**

**5.BHARVEISNP ONDENTRAMACHOD MORJARIA.....5TH**

**6.DR.R ESPOCNHDAENNDTRAKENT G. MORJARIA.....6TH**  
**RESPONDENT**

**(An appeal from the ruling/Orders of the High Court of Kenya  
at Nairobi (Hon. Mr. Justice Shah) dated 24th March, 1993**

**JUDGMENT OF THE COURT**

This is an appeal from the ruling and order dated 24th March, 1993 of the High Court of Kenya at Nairobi (Shah J as he then was) in High Court Civil Case No.5313 of 1993.

Ihenya Agencies Ltd. (the appellant) borrowed moneys from Barclays Bank of Kenya Ltd (the Bank) on the security of its three properties namely land parcel Block 6/38, L.R.453/3/11/11 and L.R.453/3/1/4 all in the Municipality of Nakuru. The appellant was unable to pay the loan and agreed with the Bank that the first named property, that is, Nakuru Block 6/38 (the suit property) be sold to the highest bidder by public auction. As a result of that agreement the Bank through its advocates, m/s Walker Kontos, instructed the 2nd respondent, Watts Enterprises (the auctioneer), to sell the suit property by public auction which took place in Nakuru on 15th September, 1993. It is not in dispute that the highest bid at the public auction was for Shs.8,450,000/= by a Mr. Maraga and the second highest bid was for Shs.8,400,000/= by a Mr. Thakar. The auctioneer by his affidavit sworn on 10th November, 1993 deponed that the sale was subject to the successful bidder paying a deposit of 25% at the fall of the hammer which the highest bidder could not pay. The second highest bidder according to the auctioneer also backed out from his bid stating that he went that high due to heat of the moment. This scenario, says

the auctioneer, prompted him to take the third highest bid of Kenya shillings six million which was still above the reserve price. That third highest bidders were the respondent No.3 to 6 (the Purchasers). The auctioneer further deponed that the purchasers paid the 25% deposit and duly signed the memorandum of sale.

By his affidavit sworn on 1st November, 1993 Justus Gacheru Karobia, the managing director of the appellant, deponed that the appellant was indebted to the bank at the date of the public auction in the sum of Shs.6,566,698/85 and that on or about 14.10.1993, he learnt from the Bank that they were considering selling the suit property for Shs.6 million to a person or persons who were alleged to be the third highest bidders but who in actual fact were not present at the auction sale and that he and several other people who were present did not notice any one bidding for the suit property for Shs.6 million.

He has further deponed that on his instructions his advocates m/s S.K. Ritho and Co. wrote a letter dated 14.10.1993 to the Banks advocates that if at all the highest bidder did not abide by the condition of the sale by failing to pay 25% deposit at the fall of the hammer, the suit property should be re-advertised for public auction. He has further complained that the Bank instead of re-advertising the suit property for public sale, proceeded to hurriedly register the transfer of the suit property in favour of the Purchasers. His complaint therefore was that the Bank had sold the suit property to the Purchasers by a private treaty between the Bank and the Purchasers. He had further deponed that there were several people who had witnessed the sale and were prepared to say on oath that there was no person who did bid for shillings six million at the said auction sale. The appellant therefore instituted the said suit against the Bank, the auctioneer and the Purchasers alleging against them collusion and fraud to deprive the appellant of a total sum of Shs.2,450,000/= by selling the suit property to the Purchasers at anB yu ndietrsv alcuhea mobfe rS hss.u m6m,o0n0s0 ,0d0a0t/e=d. 1st November 1993, the appellant applied for an interlocutory injunction seeking to restrain the Bank from disposing of the appellant's other two properties, namely; L.R.453/3/11/11 and L.R.453/3/1/4 until the final determination of the suit. The appellant also sought an interlocutory injunction by the same application to restrain the purchasers from selling transferring charging or doing anything affecting the ownership of the suit property until the determination of the suit.

The learned Judge of the superior court held that he was not satisfied that the appellant had established a prima facie case with a probability of success and that in any event he found no justification to hold that damage would not be an adequate remedy in the end if the respondents were found liable. He also held, although it was a prima facie holding, that the third highest bid was accepted properly by the Auctioneer. The learned Judge therefore dismissed the appellant's application with costs. It is from that ruling of the learned Judge that the appellant now appeals.

By a lengthy memorandum of appeal, Counsel for the appellant has criticised the ruling of the learned Judge. The main burden of the appellant's grounds of appeal in its memorandum is that the learned Judge erred both in law and fact in holding that the appellant had failed to establish a prima facie case against the respondents.

So far as the appellant's application seeks an injunction against the Purchasers, Mr. Machira for the appellant conceded that in case the appellant succeeds as a result of the trial of the suit, it would at the most be entitled to damages in the sum of Shs.2,450,000/=. There was no evidence before the learned Judge that either the Bank or the Purchaser would be unable to pay the same. We therefore agree with Mr Namachanja, Counsel for the Bank and the Auctioneer that the learned Judge quite rightly dismissed the appellant's application for an interlocutory injunction to restrain the Purchasers from selling or alienating the suit property of which they are now the registered proprietors. To that extent the appellant's appeal is hereby dismissed.

However, one of the appellant's grounds of appeal is as follows:

"The learned Judge erred in both law and fact by leaving various parts of the appellant's injunction application unattended and undetermined to the prejudice of the appellant".

We agree with Mr. Machira that the learned Judge did not advert to that part of the appellant's

application which sought an interlocutory injunction against the Bank to restrain it from disposing of the appellant's other properties known as L.R.453/3/II/11 and L.R.453/3/1/4 held by the Bank as security, until the final determination of this suit.

The learned Judge should have dealt with that part of the application before totally dismissing the application, as he did. We will now deal with it. It is not in dispute that the Appellant was indebted to the Bank as on the date of sale, namely; 15.9.1993 in the sum of Shs.6,566,698.85. The Bank has been able to recover a sum of Shillings 6 million, less, of course, the auctioneer's charges, by the sale of the suit property. For the remaining sum, the Bank has these two properties still charged with it which are both said to be substantial properties. Whereas the auctioneer maintains that the purchasers were the third highest bidders present at the auction sale and he accepted their bid in the circumstances explained by him in his aforesaid affidavit, the appellant's managing director has deponed that none of the purchasers was there at the auction sale. He has also said that there were several people present at the said sale who were prepared to say on oath that there was no bid for the sum of 6 million at the sale, as is alleged by the Auctioneer. When the two highest bidders had failed to pay the deposit, the appellant contends that the Bank should have cancelled the sale and re-advertised the suit property for sale on another date by public auction. Mr. Machira has forcefully argued that had any of the purchasers been there at the sale and in a position to pay Shs.1.5 million deposit, there was no reason why the auctioneer should not have accepted the deposit particularly when he had declared at the commencement of the sale that 25% deposit may be paid by the successful bidder either in cash or by a bankers cheque at the fall of the hammer.

The excuse that the auctioneer did not wish to receive that large amount in cash for security reasons is an unbelievable story argued Mr. Machira. It has been argued by him that after the unsuccessful sale, the Bank, the Auctioneer and the Purchaser conspired to sell the suit property by a private treaty to the Purchasers at a throw away price of 6 million thus causing the appellant a loss of Shs.2,450,000/= and that is why, submitted Mr Machira, the Purchasers entered into a memorandum of sale and placed the deposit of 1.5 million on 17.9.1993, two days after the date of the public sale. If at the conclusion of the trial the appellant successfully proves the allegations levelled by it against the Bank and the other respondents and is awarded damages jointly and severally against them, the said award can be set off by the Bank against the unpaid amount of the loan and further interest which may be due to it. If on the other hand the appellant fails or the damages awarded to the appellant, are insufficient to clear the bank loan and interest in full, the Bank can exercise its statutory rights as a chargee and sell either one or both of the said other properties which are still charged with it.

On the other hand if the Bank sells the said two properties now and as a result of the trial of the suit it is proved that the Bank sold the suit property to the Purchasers by private treaty instead of selling it by public auction and it is further proved that had the property been re-advertised and sold by public auction, the sale price would have cleared the Bank's loan, in that event the Bank would not have had any right or justification to have sold the said two properties and yet the properties would be out of the reach of the appellant.

In these circumstances we are of the view that the present status quo in respect of the said two properties should be maintained and the Bank is accordingly hereby restrained from selling by public auction or private treaty either of the said two properties, namely; L.R.453/3/11/11 and L.R.453/3/1/4 Nakuru until the final determination of the suit. To that extent we therefore allow the appeal and set aside the order of the superior court. We order that each party shall bear its own costs of the appeal

**Dated and delivered at Nairobi this 12th day of November, 1997.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.A LAKHA**

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**JUDGE OF APPEAL**

**G. S. PALL**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**