IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Apaloo JJA & Masime Ag JA)

CIVIL APPEAL No. 111 OF 1986

BETWEEN

MBUTHIA..... APPELLANT

AND

JIMBA CREDIT FINANCE CORPORATION & ANOTHER..... RESPONDENT

(Appeal from a ruling of the High Court at Nairobi, Schofield J)

JUDGMENT

July 12, 1988, **Platt JA** delivered the following Judgment.

The Appellant, Mr. Mbuthia appeared for himself and raised a number of grounds of appeal against the order of Schofield J who refused a temporary injunction pending the hearing of the suit. Mr. Kembi who appeared for the respondents answered the Appellant's complaints in such a way that wide ranging and interesting considerations arose. Apaloo JA has set out a good deal of the way decisions have been made concerning this branch of the law. But it is right at the beginning of this discussion to ascertain precisely what suit the Appellant has brought.

The plaint of the Plaintiff Mbuthia reveals that in the month of February 1986 the Plaintiff borrowed Kenya Shillings 210,000/- to develop his house Nairobi/Block 73/225, the interest of the loan being the high sum of 19%. The loan was to be paid by monthly instalments. But although the Plaintiff had been repaying this debt, due to the high interest rate, the amount outstanding on 25th March, 1986 when the plaint was filed, was about Ksh. 350,000/-. Of this sum, the Plaintiff contended that the Jimba Credit Corporation Ltd., the 1st defendant had not credited all the money outstanding. The position was that Kshs. 350,000/- was too high. The property was worth Kshs. 400,000/-. Yet inspite of the fact of the value of the property, Jimba Credit Corporation had sold the property to the second defendant at Kshs. 200,000/-. Paragraph 10 of the plaint states as follows:-

> "That the said sale is unfair especially taking into account the first Defendant would claim the balance from the Plaintiff."

As a result, the Plaintiff claimed nullification of the alleged sale held on the 13th February 1986 and secondly an order restricting the first Defendant from transferring the suit premises to the second Defendant.

It would seem therefore that the issue for trial will be whether the suit premises was sold for such an

under-value, as would entitle the Court to set the sale aside, and hence prevent the transfer and registration of the land in the name of the second defendant. That would depend on the terms of sec. 77 of the Registered Land Act, (Cap 300) which provides that the Mortgagee is bound to act in good faith, and have regard to the interests of the Mortgagor. What is meant by having "regard to the interests of the Mortgagor"? There is similar legislation in England (see Section 101 of the Law of Property Act (1925)). In *Halsbury's Laws of England,* 4th ed. vol. 32 para. 276 it is stated:-

> "If the Mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the grounds of undervalue alone, and still less if the Mortgagor has in some degree sanctioned the proceedings leading up to the sale."

When the plaintiff alleges that the sale was unfair, no more. The issue arising from the plaint therefore, is whether the sale was unfair in the context of it being a fraud at least impliedly so, from the allegedly low price itself.

There have recently been a number of cases in England, refining the relation between a mortgagee and mortgagor. In *Standard Chartered Bank vs Walker* [1982] 3 All ER 938 Lord Denning M.R. explained his views as follows:-

> "So far a mortgagees are concerned the law is set out in *Cuckmere Brick Co. Ltd. vs Mutual Finance Ltd.* [1972] 2 ALL E.R. 633, [1971] Ch. 939. If a mortgagee enters into possession and realises a mortgaged property it is his duty to use reasonable care to obtain the best possibleprice which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible …….. There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care."

In the *Cuckmere* case the head note of the Court of Appeal decision reads as follows:-

> "A mortgagee was not a trustee of the power of sale for the Mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the Mortgagor, in particular in deciding on the timing of the sale; in exercising the power of sale, however, the Mortgagee was not merely under a duty to act in good faith i.e. honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it."

The present state of the English Law, therefore, has placed a higher duty on the mortgagee than had been placed by a first instance Court in *Reliance Permanent Building Society vs Harwood Stamper* in [1944] 3 Ch. 362. It would seem that this Court has approved the *Cuckmere* case in *Kenya Commercial Bank Ltd. vs. James Osebe* Civil Appeal No. 60 of 1982, although it might be objected that the passage in particular was *obiter dicta*. At any rate, the test would appear to be that set out in the *Cuckmere* case as explained in the *Standard Chartered Bank* case.

In those circumstances, the question for the trial would be whether the plaintiff could show that the defendant had exercised his powers in fraudulent way. He could rely on the price alone if he thought that at a little over half the true value, it was evidence in itself of fraud. It would be a matter of evidence whether the sale price of Kshs. 200,000/- was in fact a little over half of the true value of Kshs. 375,000- as recently valued by the Valuer relied on by the Plaintiff. The price fetched was not very different from the valuation of the Valuers relied on by the Defendant.

There was a dispute of fact to be resolved.

In the course of hearing this appeal, various other aspects of the case came up for consideration. There was the question whether the Defendant had given notice. That depends on whether the Bank in giving indulgences to the plaintiff, had in law entered into a new agreement, despite a statement in the first notice that such indulgences would operate in that way. This is not a matter which is raised in the plaint, but it may have been intended to reflect the unfairness of the sale. An unrepresented litigant should of course be given some latitude in expressing himself, especially in highly technical departments of the law such as the law of mortgages. It is also a matter for the trial Court to decide whether the lack of fresh notice has any bearing on the preparing of the sale.

Next there was the consideration of the scope of the equity of redemption. It is now clear that the English notions apply that the equity is lost on the completion of a valid agreement for a valid sale. It is not allowed to continue until conveyance nor until registration. In comparison with the old law associated with the Indian Transfer of Property Act, the equity of redemption was not lost until registration. (see *Industrial and Commercial Development Corporation vs. Kariuki & Gatheca Resources Ltd*. [1977] Kenya L.R. 52. This balance between mortgagee and mortgagor had served in this country from before the First World War and had continued until after Second World War when it was challenged in 1963. In the Registered Land Act (Cap. 300) the Indian Transfer of Property Act ceased to apply to any land upon first registration of such land under Cap. 300.

In lieu thereof the principles of common law, and equity were applied – see sections 163 and 164 of Cap. 300. Then in 1985 the Transfer of Property Act was amended so that in section 60 the equity of redemption was extinguished by act of the parties or by order of the Court so that it would cease at the time of a valid contract of sale. The property in question in this case is land registered under the Registered Land Act.

It follows that the equity of redemption was lost on the fall of the hammer at the auction sale, unless the Mortgagee wished to set aside the sale for non-payment of the price. It had been a condition of the contract that time was of the essence; yet the purchaser, the Second Defendant, was late in paying. The purchaser had, in fact, to start to raise finance after he had bought the land and paid the deposit. The purchaser did raise the finance; but before he paid, this Court had imposed an injunction. The purchaser was therefore unable to complete, although the Mortgagee was prepared to accept payment late.

According to the views expressed in *Bloodstock Ltd v Emerton* [1967] 3 All ER 321, even if time is of the essence for completion of the contract, which includes payment of the price, late payment would not matter were the vendor and purchaser do not insist on strict compliance with the time fixed for completion. It is still the case that the equity of redemption is extinguished when a binding contract of sale has been entered into before completion, despite the necessity for consent of other parties or authorities.

Yet the essence of the equity of redemption is to give a mortgagor a reasonable chance to redeem and thus save his land. At times, equity treated the borrower with tenderness (see page 329 in the case above.) That was overtaken by the statutory remedy of sale.

At present in Kenya, in relation to the sale of property by Court execution, there are administrative provisions for saving the debtor from losing his land. It would not be surprising if in the next phase in adjusting the balance between a mortgagor and a mortgagee, some greater consideration is permitted in favour of the mortgagor in order to save his home, than is provided by current English law. It is a matter for cool deliberation to decide in the public interest at which point the equity of redemption should be lost. As more family land is mortgaged, the problem will become more acute. The banks after all earn their profits from the interest paid by borrowers. (They do not appear to have experienced great difficulty under the Transfer of Property Act.) Disadvantageous Court sales must eventually prejudice the banks; while more generous terms to the borrower must enhance their position.

To answer the Appellant’s submissions, it must be said that the equity of redemption is extinguished when the contract is validly concluded, while the conditions of the contract may be adjusted between the mortgagee and purchaser as they agree, leaving the mortgagor no ground upon which to intervene.

Fortunately, however, that is not the end of the story. Sec.77 (4) of the Registered Land Act provides that the title of the mortgagor does not pass until registration. Bare title though it may be, it aids the mortgagor in his quest for a sale at a true market value. Once he has lost his title, it may be more difficult to set aside the sale. He must act promptly. The Appellant has done so in this case before innocent purchasers for value have been involved, and this Court has preserved the status quo. The sale cannot be registered without leave.

The questions now are whether the High Court exercised its discretion properly in refusing to grant a temporary injunction before trial, and secondly whether this Court on this interlocutory appeal should interfere.

It would appear that the learned Judge considered that the test to be employed was whether the plaintiff had made out a *prima facie* case with a probability of success. He concluded his reasoning by saying:-

> "In the circumstances I do not consider that the plaintiff has a possibility of success in the main suit, let alone a probability of success. Nor do I consider there is any merit in the application for temporary injunction."

In saying so, the learned Judge no doubt had the principles laid down in *Giella vs Casman Brown* [1973] E.A. 358 in mind. These principles followed on from *East African Industries vs. Trufoods Ltd* [1972] E.A. 420 where the more correct statement is to be found, namely, that the Applicant for an injunction should show a *prima facie* case with a probability of success, but in case of doubt, the balance of convenience must be sought. It would have been interesting to know whether the learned Judge had excluded the proviso in case of doubt. I presume he had done so, because of the emphatic nature of his findings on the question of the auction price:-

> "The plaintiff avers in his plaint that the property was worth over Shs. 400,000/-. However, the first defendants have submitted three such reports, all from different valuers showing the value in 1981 as Shs. 200,000/-, in 1985 as Shs. 225,000/- and in April 1986 as Shs. 260,000/-. Given the prevailing financial climate and the conditions at a public auction it cannot be said that a sale for Shs. 200,000/- was inconsiderably low or in any way surprising. The sale was properly conducted and advertised. There is no evidence of bad faith or fraud, on the part of the defendants or that the power of sale was not exercised regularly."

The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits. Supposing that the valuation of the plaintiff's Valuer were to be accepted as showing the true market value of the land in question, after evidence *viva voce* under cross-examination, how then could the Judge find that the sale at a price of Kshs. 200,000/- was not inconsiderably low? At roughly half the price, how could that be maintained as such an obvious situation, that the plaintiff's chances of success were found to have less than a possibility of success?

There are other indications of the learned Judge's approach concerning other facts. It is possible to argue that the power of sale was not exercised regularly. But the clearest indication was the comment of the Judge that he needed valuation, because his decision might determine the trial. In fact the valuations confirmed the area of dispute, and necessitated a hearing of the evidence.

The Judge having misdirected himself in his approach to the issues before him, this Court is entitled to reconsider the exercise of the discretion in this matter. It is a case where the disputed facts allow a doubt as to which party will be proved right at the trial. It is a question of seeking the balance of convenience. The subject matter of the suit is land, in fact the Appellant's home at Buru Buru. In disputes concerning land it is usual to grant an injunction. It would be right to grant an injunction on terms in this case.

The second respondent complains that he has been kept out of his property for a long time. He is not

involved, he says, in the difficulties between the Mortgagor and Mortgagee as to whether proper notice was given or as to what sum is actually owing. He relies on the statute which provides that he does not need to inquire into these matters, and that irregularities in the sale, sound only in damages. He is right. But the mortgagor is entitled to defend himself in order to see that the sale is at a true market value. Auction purchasers are of course looking for a bargain. Mortagees are still able to sue for the shortfall. Lord Denning has taken all this into account in the *Standard Chartered* case above where the Bank organised a wholly unsatisfactory sale. The facts in *Osebe's* case illustrate the great need for caution; indeed they illustrate the unacceptable face of capitalism.

Had the learned Judge simply attended to his duty in the application before him, he would have saved the parties a great deal of time and expense. Ideas of finalising disputes at the interlocutory stage should never come to mind, unless the parties, by agreement, have asked the Court to treat the application as the hearing of the suit. That is not often the case when the facts are disputed.

I would allow the appeal, set aside the orders of the High Court, and substitute therefor an order granting the injunction as prayed, on the conditions that this Court ordered in its order dated 27th June 1986. That is to say that the written undertaking in damages will be filed by Thursday noon of next week and monthly instalments of Shs. 8,000/- or more will continue to be paid as from 21st day of July 1988. In the event of noncompliance with either condition the injunction will be discharged, unless otherwise ordered. I would order that the costs of the appeal be the Appellant's costs. It is hoped that the High Court can arrange an early hearing of this suit.

Masime Ag JA. The facts of this appeal, which are not in dispute are clearly set out in the judgement of Apaloo JA which I have had the advantage of reading in draft. This case illustrates vividly but sadly, if any illustrations were needed, the need for parties who obtain interlocutory stay or injunctions to take steps to prosecute their suits to completion as expeditiously as possible. As a result of the delay that has occurred since the stay herein was granted the appellant has paid out a sum of Shs. 160,000/- which on the result of his appeal has gone down the drain. The other sad aspect of the appeal is that it brings out the suicidal consequences that can befall our people when they borrow money at rates of interest that are so exorbitant that they end up being unable to repay the loan. Be that as it may this appeal raises serious and important legal issues as regards the exercise of a chargee's statutory power of sale.

The appellant who had charged his property known as Nairobi Block/73/225 sued the 1st respondent (the chargee) seeking a nullification of a public auction sale of his said property and an order to restrain it from transferring the property to the second respondent. The appellant relies on the ground that the property was sold at a grossly unfair value and consequently that the first respondent was in the breach of the requirements of section 77(1) of the Registered Land Act Cap. 300. Simultaneously with the filing of the plaint the Appellant filed an application under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for an injunction to restrain the respondents from interfering with the Appellant's quiet possession of the premises. That injunction was granted ex parte but refused following the inter partes hearing. The learned Judge found on the affidavit evidence before him that the appellant had not shown that the power of sale was exercised irregularly nor that the 1st Respondent did not act in good faith having regard to the Plaintiff's interests. He held therefore that the sale was advertised and properly conducted. In any case he held, that in view of section 77(3) even if the power has been irregularly exercised the appellant's only remedy is in damages.

The appellant's complaint however is that the learned Judge was not entitled on an interlocutory matter to come to these findings: he should have given an appellant a full opportunity at a hearing to show that the sale was bad for fraud. He argued that if he did that then he could exercise his equity of redemption. In this regard I respectfully agree with Platt and Apaloo JJ.A. that the effect of the long line of English authorities and decisions of this Court in respect of mortgages under the Indian Transfer of Property Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale.

However, section 163 of the Registered land Act provides:

> 163. "Subject to this Act and except as may be provided by any written law for the time being in force, the common law of England as modified by the doctrines of Equity, shall extend and apply to Kenya in relation to land leases and charges registered under this Act and interests therein but without prejudice to the rights, liabilities and remedies of the parties under any instruments subsisting immediately before the application".

In view of this provision it is my view that the legislature must have meant to delay the extinction of the equity of redemption by the provision in section 77(4) of the Registered Land Act. If that is so then the appellant is entitled to an opportunity to be heard fully on that objection to the sale based on fraud rather than to be put out by and interlocutory decision.

For this reason I would agree with Platt JA. that this appeal should be allowed with costs to the appellant. I would agree with the orders proposed by Platt JA granting interim injunction pending the hearing of the matter in the High Court.

Apaloo JA (Dissenting). The relevant facts of this case are not in dispute. What we have listened to for three successive days between 9th March and 11th March 1988 inclusive, were serious rival arguments on whether on those facts, the Judge below was right or wrong in declining to grant the appellant temporary injunction. A number of legal submissions were made to the Judge below and in refusing the interim relief sought the Judge pronounced on those issues of law. The appellant says, he was in error and invited us to put him right by granting the relief sought.

What then are those facts? In February 1982, the appellant borrowed the sum of Kshs. 21,000/- from the 1st respondent which is a financial institution. To secure the repayment of the loan, he charged his leasehold premises known as No. L.R. Nairobi/Block 73/25 to the corporation.

According to the appellant's own plaint, this loan was repayable by monthly instalments with interest at 19% and as at the date of the plaint, the appellant was indebted to the Corporation in the sum of "about Kshs. 350,000/-."

It is clear the appellant defaulted in making repayments and the Corporation were minded of realizing the security. Accordingly, on the 15th June 1984, it gave notice to the appellant requesting him to pay the sum due within three months or in default, the Corporation would exercise its power of sale. This notice was professedly given in compliance with section 74 of the Registered Land Act. The Corporation also said in that notice, quite unnecessarily, that their legal right would not be affected by any "indulgence" it may extend to him. Perhaps, as a matter of language, it would have been more accurate to say "accommodation" but nothing of consequence turned upon the word used.

According to the strict terms of the notice, the Corporation would have been within its rights if it sold the charged property on the 15th September 1984. But it did not do so. It appears that on the receipt of the statutory notice, the appellant sought accommodation from the Corporation and made certain promises of repayment which he failed to honour. So the Corporation, through its advocates, instructed Veteran Auctioneers Ltd to sell the suit premises by public auction. The firm accordingly advertised the projected sale in The Kenya Times Newspapers on three consecutive days, namely 21st, 22nd ad 23rd January 1985. the auction was to take place on 23rd January, 1985. But the Corporation by a letter dated the 21st January, 1985 called off the sale.

Whatever promises the appellant made to the Corporation to persuade it to suspend the 23rd January 1985 projected auction, cannot have been honoured. So on the 28th May 1985, the Corporation by letter dated the 28th May 1985, instructed the self same auctioneers to re-advertise the sale. It said the appellant "defaulted in the repayment of the loan account contrary to his pledges." But before action could be taken on this, the appellant again made certain promises and representations to the Corporation. On this account, the latter, by letter dated the 3rd June 1985, through its advocates, countermanded the instruction to sell. The available evidence shows that the appellant again failed to deliver on his promises.

So on the 13th December 1985, the Corporation again instructed its advocate by letter to re-advertise the

suit premises for sale. It advised that this time, the sale be entrusted to Messrs. C.B. Mistri – Licence Auctioneers. This instruction was passed on to the Auctioneers and the latter duly re-advertised the auction and scheduled the sale for February 13, 1986. In January, the appellant through his advocates, made another attempt at suspending the sale by offers which did not prove acceptable to the Corporation.

According to the affidavit evidence of the 2nd respondent, the auction took place on the 13th February 1986, as advertised.

> "It was carried out openly and properly and members of the public were allowed to make bids for the property"

The second respondent made the highest bid of 200,000/- and the property was knocked down to him for that sum. He was required to pay a deposit of 50,000/- being 25% of the purchase price. He did so and the Auctioneers, as agents of the Corporation, entered into a contract of sale with him on certain conditions which it is immaterial to set out. The only one that it is relevant to notice for present purposes, is clause 4 which obliged him to pay the balance of the purchase price to the Corporation's advocates with "30 days of the sale date" and time was said to be "of the essence of the contract."

The 2nd respondent sought assistance from the Housing Finance Company to meet payment of the balance of the purchase price of Kshs. 150,000.

The Finance Company agreed to lend him the said sum payable over a period of 10 years on the security of the suit premises. The agreement to that effect was signed between the Finance company and the respondent on the 24th March 1986. On that very day, the Finance Company instructed its advocates Messrs. Ransley & Awori to prepare a charge on that property with themselves as chargee and the 2nd respondent as chargor. Under the "contract of sale" between the Auctioneers as agents of the Jimba Credit Corporation, and the 2nd respondent, the payment of the balance of 150,000 was to have been made, by the latest, on the 13th March 1986.

The available evidence, shows that the Finance Company treated the 2nd respondent's request for the loan with urgency. This is shown by the fact that on the very day that they signed the loan agreement, they gave instructions for the charge of the suit premises to be made in favour of themselves. So, it is a fair inference that the loan of 150,000/- would have been made available to the 2nd respondent within a few days after the 24th May 1986. But that would have made the payment of the balance of the purchase price due to Jimba Credit Company from 1st respondent late by probably a few days. This fact was known to the Jimba Credit Corporation because the instruction by the Finance Company's advocates to their advocates to prepare the charge, was copied to the Corporation's advocates namely, Messrs. Kembi & Muhia.

The inference is that the 1st respondent Company was willing to accommodate the purchaser for a few days. Certainly, it took no steps to enforce its right under clause 6 of the sale contract by forfeiting the 2nd respondent's deposit nor did it initiate any steps to resell the mortgaged premises. It would hardly have made business sense for it to have done that. But the very next day after the loan contract was signed between the Finance Company and the 2nd respondent, the appellant brought this suit to set aside the auction sale with a simultaneous application for interim injunction restraining the Jimba Credit Corporation from "interfering with the Plaintiff's quiet possession" of the suit premises and for "the status quo to be maintained". It seems plain that but for this suit, the Finance Company would have put the 2nd respondent in funds to meet the payment of the balance of the purchase price. The evidence and the surrounding circumstance point to nothing else. This fact is worth bearing in mind because it was one of the appellant's pressed contentions, that if the 2nd respondent failed to meet the payment of the balance of the purchase price on the contractual date, the sale fell through and he was, in law, entitled to redeem his mortgage with Jimba Credit Corporation.

The appellant alleged in his plaint that the suit premises was only sold for 200,000/- when "it is worth over 400,000/-. The 1st respondent countered that by placing before the Court, three valuations made of the premises in 1981, 1985 and 1986 respectively. In 1981, the appellant produced to the 1st respondent, a

valuation of the property for 200,000/-. In January 1985, the property was valued at 225,000/- and when the motion was pending before the Court below, at the Judge's suggestion, the 1st respondent put before the Court a valuation of 260,000/-. This was dated 15th April 1986.

The appellant, for his part, produced to the Court a valuation by another firm for the sum of 375,000/-. This was dated 17th April 1986. Apart from the valuations made by the professional valuers, the 2nd respondent also deponed that he has been living in Nairobi for 12 years and from his reading newspapers was "fairly conversant with the prices of property containing in various estates in the city". He could not accept that a house in Buru Buru Phase one, could fetch as much as 400,000/-. So he swore that:

> "The general expected value is about 200,000/-, 240,000/-."

Having considered all these disparate valuations, the learned Judge felt that as the sale was by auction, the price was not unduly low "or in anyway surprising".

These, in a nutshell, are the relevant facts placed before the Judge on the basis of which he had to be satisfied that the appellant presented a *prima facie* case, to use the hallowed words "with a probability of success". In the context of this case, the Judge had to feel satisfied that the appellant would, in all probability, succeed in showing at the trial that the auction sale of the 13th February 1986 was invalid and ought, on that account, to be "nullified", to quote the prayer in the plaint. The Judge obviously took a poor view of the appellant's case. He felt it was wholly unmeritorious.

And in refusing to grant the interim relief, held that the appellant did not have a possibility, let alone a probability of success. Conformably with this holding, he dismissed the application to provoke this appeal.

The appellant brought a home-made appeal which he argued in depth and great earnestness. Before looking at the complaints made against the ruling, it is necessary to notice one factual matter which became the subject of conflicting legal submissions by both sides. When the appellant filed his notice of appeal to this Court, he applied to stay further proceedings in the High Court until the hearing and determination of the appeal. He was apprehensive that both the 1st and 2nd respondents would evict him from the suit premises. On the 27th June 1986, this Court acceded to the application and granted a stay of proceedings on two conditions, namely, firstly, the appellant should give "the usual undertaking in damages to both respondents" and secondly, "he must pay 8,000/- or more to his loan account with the Jimba Credit Corporation by noon on or before the 21st day of each month beginning; on or before July 21, 1986. In default of either condition, the application stands dismissed with costs from today".

It is common ground that the appellant met both conditions. So this Court's order for stay of further proceedings still stands.

It is now necessary to look at the grounds on which the ruling was contested. The appellant made complaint on both factual and legal grounds. The factual complaint can easily be disposed of. The appellant said he made a number of payments in discharge of principal and interest which the 1st respondent failed to take account of and in particular a payment of 57,000/- which was not reflected in the account. Whether or not when the credit and debit is finally struck, that complaint can be found valid or not, does not matter a bit. The real contest in this case, is between the appellant and the 2nd respondent – the purchaser. And with that contention, he is not concerned.

What seems clear, is that on the date the auction took place, he was indebted to the Jimba Credit Corporation and was unable to pay this debt notwithstanding a notice under section 74 of the Registered Land Act was served to him. At any rate in his plaint, which was drawn by his advocates, no doubt, on his instructions, it was averred that:-

"The Plaintiff has been repaying but due to the high interest rate the amount standing is about Kshs. 350,000/ -."

When this Court in course of argument, ascertained from the Corporation's advocate how the appellant's account stood at present, he said their books reflected a present indebtedness of approximately 350,000/- against the appellant. And this in spite of the 8,000/- per month he has paid in reduction of his indebtedness since this Court's interim order was made on the 27th June 1986.

At all events, a perusal of all the evidence presented to the Court below shows that the appellant owed the Corporation at the date of the auction a large amount of money which he was unable to pay. His pleas for accommodation and the various "indulgence" granted him point to nothing else. In my opinion, even if upon taking full accounts, it is shown that the appellant owed less than 350,000/- he admitted owing at the time of the auction, this, as a matter of law, can have no impact on the validity of the sale to a bona fide purchaser.

However, the more serious points the appellant made are points of law and are worthy of serious consideration. First, the appellant says, although statutory notice was given him in compliance with section 74 of the Act, since however the sale was postponed on a number of occasions, the 1st respondent incurred a legal obligation to give him fresh notices and as this obligation was not met, the sale was improper and should be set aside.

Second, the appellant contends that the auction sale of the 13th February was made on strict condition that the purchaser should pay the full purchase price within 30 days. He says, as full payment was not made on that date, the sale was of no effect and that he was entitled to redeem his property by paying the balance of his loan to the Jimba Credit Corporation. Indeed, he says, he has been making this payment of 8,000/- per month to achieve this purpose. Thirdly, the appellant contended that the 1st respondent incurred a statutory obligation to exercise his power of sale in good faith but that the purported sale was made at a gross undervalue and that this was indicative of bad faith and this vitiated the sale. All these points of law were urged before the Court below whose decision on each and every one of them was adverse to the appellant.

The appellant's not frivolous legal contentions must now be examined seriatim. On the first legal question, one must look briefly at section 74(1) which mandates the statutory notice. It is not necessary to read that section in full. It merely states, in so far as material, that if the mortgagor defaults in the periodical payment of principal or interest for a period of one month, the chargee may give him notice to make payment and if the mortgagor fails to comply with this notice within three months from the date of service, the chargee may sell the charged property. It is common ground that such notice was given to the appellant on or shortly after June 15, 1984. It is also not in dispute that the appellant made default in repayment of principal or interest for over three months. That was why the 1st respondent as chargee, instructed Veteran Auctioneers to sell by auction the charged premises on the 23rd January 1985. And it is also not disputed that the sale was suspended at the appellant's behest because he made promises of repayment which he was unable to honour.

It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting martgagor.

But in so far as the requirement of a second notice is supposed to be based on common law principles, this is less than correct. The legal position at common law is stated at page 308 of *Fisher & Lightwoods Law of Mortgages* 8th Edn. at p. 308 as follows:-

> "If after demand, the sale is stopped on receipt of a cheque for the amount due under the mortgage, but the cheque is afterwards dishonoured, the right of sale and the running of notice having been only suspended revive, and the power may be exercised without serving a new notice."

This is the legal position as Mr. Kembi for the Jimba Credit Corporation conceived it and that was his oft-reiterated submission. In my opinion, he was right. The point is actually concluded by authority. In *Wood*

v Murton 1877 LJ QB 191 or Vol. 87 LTR 788. Lush J decided that point as clearly as anything can be decided.

The headnote in that case reads:-

> "In a deed of mortgage, the mortgagor agreed that in default of payment of interest for seven days after notice, the mortgagee should have an absolute power of sale. Default was made. On the sixth day, the interest due was reduced by payment on account and bill of exchange accepted by the mortgagor was dishonoured."

The mortgagor then attempted to sell and a contention akin to the one raised before us by the appellant was made. Lush J said:-

> "The bill suspended the remedy by auction for the mortgage debt and prima facie, it suspended also the running of notice. Both revived when the bill was dishonoured, and the Plaintiff was then remitted to the position in which he stood when the bill was given. I cannot infer an agreement that if the bill was not paid, the Plaintiff should begin again and give a fresh notice which would be to place him in a worse position than he was in when he consented to give time".

Every word of that passage applies to this case, and seems to me, if I may say so, makes business sense. That was also the conclusion to which the judge below reached on this part of the argument. He was right and the appellant's contention was, I think, unsound and ought to be rejected.

The appellant next says, as the condition for payment of the price imposed on the 2nd respondent was not met, namely, full payment within 30 days, the auction was invalidated and he, as chargor, was entitled to redeem the suit premises. As I said, the Housing Finance Company contracted with the 2nd respondent to advance him a loan of 150,000/- to meet the payment of the balance of the purchase price in full. The 2nd respondent was due to receive this payment in a few days and the evidence shows that the Jimba Credit Corporation were minded to accommodate him for a short time as indeed it accommodated the appellant for the best part of two years. But the receipt by the 2nd respondent of this loan was frustrated by the appellant's suit. That being so, it sounds ill from the mouth of the appellant to say that as the 2nd respondent, made default in performing a contract with the 1st respondent to which he was not party, he was entitled to derive benefit from it.

At all events, the 1st respondent was entitled under section 77(1) of Cap. 300 to permit the purchaser to pay the purchase money by instalments. In the old case of *Davey v Durant* (26 LJ Ch 830) it was held that the property may be sold upon terms that part or even the whole of the purchase money shall remain on mortgage where the mortgagee takes the risk and charges himself in account with the mortgagor with the whole of the purchase money.

But in my opinion, as a legal argument, the appellant's position is untenable. Section 72(1) of the Registered Land Act, gave the appellant right to redeem at any time before the property was sold and "a lease or charge shall be deemed to have been sold when a bid has been accepted at an auction sale." It is an undisputed fact that the 2nd respondent's bid was accepted at the auction sale on the 13th February 1986. That is why a deposit of 50,000/- was accepted from him and the Auctioneers, as agents of the chargees entered into what they described as a contract of sale with him. That being so, the appellant's right of redemption was extinguished.

That was Mr. Kembi's earlier position but he thought on reflection, that the right of redemption survived the sale. That in my opinion, cannot be right.

The correct legal position is stated at Page 314 of *Fisher and Lightwood Law of Mortgage* in these words:-

> "A sale destroys the equity of redemption in the mortgaged property, and constitutes the

> mortgagee exercising the power of sale a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities."

The fact that some time would elapse before the conveyancing formalities are completed and the vesting of legal title in the purchaser, in no way affects the position.

A submission akin to the one made to us by the appellant was roundly rejected by Crossman J in *Waring v London and Manchester Assurance Company* [1935] Ch 310 at 317. The observation made by the learned Judge and his reasoning are so peculiarly apposite to this case, that I take the liberty of quoting them *in extenso*. The learned Judge said:-

> "Counsel for the plaintiff…….. submitted that notwithstanding that the company exercised its power of sale by entering into the contract, the plaintiff's equity of redemption has not been extinguished, as there has been no completion by conveyance and that, pending completion, the plaintiff is entitled to redeem, that is, to have the property reconveyed to him on payment of principal interest and costs ……. In my judgement, section 101 of the Law of Property Act which gives a mortgagee power to sell the mortgaged property is perfectly clear and means that the mortgagee has power to sell out and out by private contract or auction and subsequently to complete by conveyance; and the power to sell, is, I think, the power by selling to bind the mortgagor."

The Judge continued as follows;

> "If that were not so, the extraordinary result would follow that every purchaser, from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor coming and paying the principal, interest and costs.
>
> Such a result would make it impossible for a mortgagee in the ordinary course, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor……. It seems to me impossible seriously to suggest that the mortgagor's equity of redemption remains in force pending completion of sale by conveyance".

The decision of Crossman J was made in 1934, it was followed by Ungoed Thomas J. in the comparatively recent case of *Property & Bloodstock Ltd. vs Empton* [1967] 3 All E.R. 311: Its correctness was impugned in the Court of Appeal. That Court unanimously held that decision was correct. Dankwerts LJ who read the first judgement of the Court inter alia said:

> "In my opinion, Crossman J's decision in Lord Warring's case was plainly correct and cannot be successfully assailed."

The two other Lord justices agreed and Sellers LJ expressed his concurrence in these words:-

> "The law as I see it, is correctly stated in the headnote to *Lord Waring v London & Manchester Assurance Company"*

which he quoted as follows:-

> "The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith."

In the course of his judgement, Dankwerts LJ disposed of one of the contentions raised before us by the mortgagor, namely, as the purchaser failed to make payment of the purchase price on the contractual date,

the contract fell through and he was entitled to redeem. Dankwerts LJ said:

> "As I have already observed, both vendor and the purchaser are in agreement. They look forward to that happy moment, when freed from unhappy interference of the borrower at the eleventh hour of their contract which they both regard as still in force, will proceed to completion and the purchaser will get the property handed to him and the mortgagee will get the purchase price. It is immaterial to consider whether the mortgagee would be equally well-off by accepting redemption money. Certainly, the purchaser would not be so well-off and he has a binding contract."

This case is on all fours. In this appeal, the purchaser has got not a contract of sale but an actual sale had taken place which was to be perfected by registration. And the mortgagee not only kept the sale alive, but was prepared to grant and did grant the purchaser time to pay the balance of the purchase price and thereafter obtain a "transfer" in a form prescribed by the act. And this process was halted by the mortgagor who although not tendering the redemption money, was seeking what he called "Nullification of the alleged sale". To my mind, such a claim was doomed to failure.

My attention was drawn to a decision of the predecessor of this Court in *Ind. & Comm. Devpt Corpn. v Kariuki & Gatheca* 1977 KLR 52 (which I shall refer to as the *Kariuki* case). The headnote reads:-

> "the mere contract of sale between a mortgagee exercising his power of sale under section 69(1) of the Transfer of Property Act and a purchaser does not extinguish the mortgagor's equity or redemption."

The headnote then stated *Lord Waring v London & Manchester Assurance Company Ltd* explained.

Mustafa JA who delivered the leading judgment of the Court distinguished the *Waring* case in these words:

> "In England a contract of sale immediately invests the purchaser with an equitable interest in the immovable property and the beneficial ownership passes to him, only the legal estate remains with the vendor which passes on the execution of the conveyance. The Transfer of Property Act contains sections 54 and 60 and there are no equivalent provisions in the England Law of Property Act 1925. Section 54 provides *inter alia* (1) that a sale in a transfer of ownership in exchange for a price paid, and in the case of immovable property of the value of RS 100 upwards (say Shs. 100) can only be made by a registered instrument; (2) a contract of sale of immovable property does not by itself create any interest or charge on such property. Section 60 provides that the equity of redemption of a mortgagor continues until it has been extinguished by "act of the parties or by order of a Court".

The preferred basis for the exclusion of English Common Law and equity, was that the proper law to apply was the Indian Transfer of Property Act 1882 which also excluded the English Law of Property Act 1925. And that was the law that applied to the transaction in Kenya at the relevant period. At the date of the *Kariuki* decision in March 1977, the Registered Land Act was in force, it having come into force on the 16th September, 1963. It is therefore reasonable to assume that the land which was the *res litigosa* in that case, was registered under the Transfer of Property Act 1882 of India.

The Land in dispute called Buru Buru Estate Phase 1, appears to have been registered under the registered Land Act. So by what law should dealings with it be governed? Section 163 of the Registered Land Act points to the provisions of the Act itself and the English, Common law Equity. It says:

> "Subject to this Act, and except as may be provided by any written law for the time being in force, the common law of England as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges registered under this Act and interests therein……..".

The last section of the Registered Land Act, namely, section 164 forbids any further application of the Indian Transfer of Property Act 1882 in the following words:-

> "Upon the first registration of any land under this Act the Transfer of Property Act, 1882, of India, shall cease to apply to that land, except in relation to any dealing entered into before the date of registration."

The transaction which is the subject of the dispute, was entered into in February 1982 and is therefore governed not only by the Registered Land Act itself, but also by the Common Law and Equity. Under section 72(1) of that Act, the equity of redemption subsisted in the mortgagor until the Leasehold premises was sold. It was then extinguished. And the Act provides that:-

> "A charge shall be deemed to have been sold when a bid has been accepted at the auction sale".

It is common ground that an auction was held on the charged premises in February 1986 and the second respondent's bid was accepted at that auction. Indeed, the appellant accepts this because his plea to the Court below was to "nullify the auction sale".

I think therefore that *Kariuki's* case is plainly distinguishable from the instant one. It certainly does not oblige us to hold today that the equity of redemption subsists in the mortgagor until registration of the purchaser's title, any more than it is valid to hold that under the English Law of Property act 1925, the equity of redemption subsists in the mortgagor after an unconditional contract of sale until completion.

So completely did the Registered Land Act (Cap. 300) seek to break with the Indian Transfer of Property Act, that it forbids any continuation of practice and precedure under it. Thus section 4 of the Registered Land Act enacts that:

> "Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act, so far as it is inconsistent with this Act."

There can be little doubt that "written law" as mentioned by the section is the Indian Transfer of Property Act. Its application based on English Law of Property Act 1925 which, so far as I know has never been applicable to this country.

Since preparing this judgment, my attention has been drawn to the Statute Law (Miscellaneous Amendments) Act 1985 (No. 19 of 1985) which limits section 60 of the Indian Transfer of Property Act 1882, by adding to the words "a Court" in the second paragraph of the proviso to the section the following:

> "and is exercised before the mortgagee, has, under the provisions of this Act, either by public auction or private contract entered into a binding contract for the sale of the mortgaged property".

This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. The effect of this amendment is to overrule the decision of *Kariuki's* case in respect of land registered under the Indian Act and to equate the law with English Law as expounded in *Waring* and the *Bloodstock* cases.

Some doubt was expressed in argument whether subsection (1) of section 77 of the Act, which confers a power on the chargee to sell the property with an apparent immediate divesting of the chargor's title, is not in conflict with subsection (4) of the same section which transfers the chargor's interest to the purchaser only after registration. For my part, I see no such conflict. As I see it, on the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act.

The bare title only remains in the chargor and subject to the execution by the chargee of a transfer in the form prescribed by subsection (3) and its registration under subsection (4), the purchaser's title is complete. Our Registered Land Act (Cap. 300) is modelled on the English Land Registration Act 1925. The marginal note to section 23 deals with "Registration of dispositions of leaseholds". And subsection (1) of section 22 enacts that:-

> "A transfer of the registered estate in the land shall be completed by the registrar entering on the register the transferee as proprietor of the estate transferred; but until such entry is made, the transferor shall be deemed to remain the proprietor of the registered estate".

It is the same result that is achieved by the various subsections of section 74 of our Act.

With particular reference to charged land, the English Land Registration Act by section 33(1) enacts that:-

> *"(1) The proprietor of any registered charge may, in a prescribed manner, transfer the charge to another person as proprietor.*
>
> *(2) The transfer shall be completed by the registrar entering on the register the transferee as the proprietor of the charge transferred but the transferor shall be deemed to remain the proprietor of the charge until the name of the transferee is entered on the register in respect thereof.*
>
> *(3) A registered transferee for valuable consideration shall not be affected by any irregularity or invalidity in the original charge itself of which the transferee did not have notice when it was transferred* to him."

The philosophy underlying these provisions is reflected in various subsections of section 74 of our Registered Land Act and the immunity from affectation by any irregularity granted by subsection (3) of the English Act has its parallel in subsection (3) of our Act, which *inter alia*, provides that:-

> *"…….. The Registrar may accept it (i.e. the transfer) as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."*

Thus, the question of setting aside the sale against a bona fide purchaser for value, as the appellant sought in his plaint, does not arise. That disposes of the appellant's second complaint.

This leaves me with the appellant's third and last complaint. The appellant says section 77 imposes an obligation on the chargee to act in good faith and to take account of his interests when exercising his statutory power of sale. But he said in breach of the requirement of that section, the Jimba Credit Corporation acted in bad faith and "or fraud and made the sale at gross undervalue". That, in the contention of the appellant, vitiated the sale and justified its setting aside. He says, the Judge below was in error in declining to set it aside or regard it as a serious point in establishing a *prima facie* case with the probability of success of his suit.

In my opinion, on the evidence placed before the Judge, there is no basis for any ascription of bad faith to the Corporation. When the appellant made default with his repayments, it gave him not only the statutory notice, but accommodated him by suspending the sale on two occasions and was disposed to put it off for a third time, if the appellant had met its condition for so doing. It then proceeded to advertise the sale and eventually procured its sale by the method laid down by law, namely, auction. And the evidence is that the auction was open and was regularly held.

> *"The fact that a sale has been effected at a properly conducted auction, is strong prima facie evidence…….. that no unfair advantage has been taken either by the vendor or purchaser"*

(See *Herbert Hart on the Law of Auctions*, 3rd Edn, p1).

Indeed, in order to obtain a fair price, the Corporation went to the trouble and expense of obtaining valuations from no fewer than three qualified valuers. So, the appellant's allegations of fraud and undervalue, are based entirely on the fact that the auction sale did not fetch the 375,000/- which was subjective estimate of his own chosen valuers. Unlike the case of *Kenya Commercial Bank Limited v. Osebe* C.A. 60 of 1982 there is no showing that anybody has offered more than the 2nd respondent since the auction.

That being so, the question that must be addressed is, what duty is cast on a mortgagee or chargee in the exercise of his power of sale in so far as it relates to the value of the property? In *Reliance Permanent Building Society v Harwood Stamper* [1944] 3 Ch 362 at 364 Vaisy J quoting from *Halsbury's Laws of England* 2nd Edn. Vol. 23 at p. 435 said:-

> "A mortgagee is not a trustee of the mortgagor as regards the exercise of the power of sale. He has his own interest to consider as well as that of the mortgagor, and provided that he keeps within the terms of the power bona fide for the purposes of realizing the security and takes reasonable precautions to secure not the best price but proper price, the Court will not interfere nor will it inquire whether he was actuated by any further motive.
>
> A mortgagee is entitled to sell at a price just sufficient to cover the amount due t him, provided the amount is fixed with regard to the value of the property ".

The learned Judge next quotes *Coote on Mortgages* Vol. 2, 9th Edn. p. 927 as follows:-

> "The only obligation incumbent on a mortgagee selling under a power of sale in his mortgage, is that he should act in good faith. Whether selling under an express statutory power, h e may generally conduct the sale in such manner as he may think most conducive to his own benefit, unless the deed contains any restrictions as to the mode of exercising the power, provided he acts bona fide and observes reasonable precautions to obtain, not the best price, but a proper price."

The Judge then gave expression to his own views in these words:-

> "That seems to me to state the position of the mortgagee with accuracy. The mortgagee of course, sells primarily for his own benefit. The object of the sale is to realise the security and recover the money he has lent. He is entitled to think of himself first. He must not ignore the mortgagor but the whole purpose of the sale, is to get his money back……"

So the duty cast on a chargee by section 77(1) that in the exercise of his power of sale, he shall act in good faith and have regard to the interests of the chargor is no more than a codification of the equitable principles articulated in *Halsbury* and *Coote on Mortgages* and assented to by equity Judges.

In *Fisher and Lightwood on Mortgages* it was said:-

> "A sale made at fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud."

In this case, the sale was conducted by public auction as mandated by the statute after a series of newspaper advertisements. It was a forced sale and there is no evidence that any willing purchaser offered more than the 200,000/- realized. There is, accordingly, no just basis for holding that the price was so low as too be, per se, evidence of fraud. It follows that the appellant's verbal complaint (it was not pleaded) that the sale was tainted with fraud or was conducted at gross undervalue, is not well founded. The learned trial Judge found against that complaint. I respectfully agree with him. It follows that all the legal

or seemingly legal complaints raised against the validity of the sale by the appellant must be rejected.

Notwithstanding a prolonged period of doubt and hesitation, I am pleased to find that we are all unanimous on the various matters of law debated before us and in particular, we are, I think agreed, that the appellant's equity of redemption was extinguished by the auction sale of the 13th February 1986. On the material placed before him, the learned Judge held that:

> "The sale was properly conducted and advertised. There is no evidence of bad faith or fraud or that the power of sale was exercise irregularly."

That holding was not questioned before us. On the basis of that holding, the Court concluded that the appellant has not shown a *prima facie* case with a probability of success that the appellant will succeed in his claim for an order for "nullification of the sale of 13th February 1986".

Conformably with that holding, the Judge declined to exercise his discretion in granting an interim injunction. On those facts and in view of the legal position, I would have thought the decision to deny interim injunction, was right and was a perfectly proper exercise of judicial discretion.

The majority of this Court think differently and would disturb the Judge's exercise of discretion and grant an interim injunction, for the reason, as I understand it, "to enable the appellant to defend himself in order to see that the sale is at a true market value". Surely, the true market value of property is not determined by either the subjective viewpoint of a mortgagor or his chosen valuers. It is difficult to think of a better and more reliable method of determining the true and fair market value of property than by a sale at a public auction. At least, that is the view of Lord Cottenham LC, In *Adborough v Tyre* (1840) 7 Cl & Fin p 460, the learned Lord Chancellor put it in these words:-

> "A sale by auction, is a means of ascertaining what a thing is worth; or in other words, the fair market value."

Also in the Privy Council case of *Frewen v Hayes* (1912) 106 LT 516 at 518, Lord Macnaghten said this of an auction.

> "The prices which the public are asked to pay (ie at an auction) are the highest prices which those who bid can be tempted to offer by the skill and tact of the auctioneer and under the excitement of open competition".

That method of sale was the only one ordained by section 77 of the Registered Land Act for a chargee who seeks to realize his security. And when the sale was conducted by that method, the sale fetched Kshs. 200,000/=. What possible reason can be advance for suggesting that a fair market price was not realized by that sale? And on what basis can it be said *viva voce* evidence of valuers as to what the sale might fetch, is preferable to the highest bid that was actually made at an auction?

We have expended a great deal of time and energy in discussing the consequence of fraud and in the process have lost sight of the real complaint the appellant made on this part of the case. I take them from paragraphs 8, 9 and 10 of the plaint as follows:

> 8. That the said property is worth 400,000/-.
>
> 9. that in spite of the fact that the said property is over 400,000/- the 1st defendant sold the same at Kshs. 200,000/- to the 2nd defendant.
>
> 10. That the said sale is unfair and especially taking into account the 1st defendant would claim the balance from the plaintiff.

There is not one word of fraud. I cannot accept that the appellant's selfserving averment "that the property is worth 400,000/- is the same thing as saying its market value was 400,000/-. The truth of the

matter is, the price which it fetched at the auction – namely 200,000/-, was the market value. It is inaccurate to say that the 1st respondent sold the property to the 2nd respondent. This was not a sale by private treaty. What the 1st respondent did, was to sell the property, as the law required, by auction.

And it went to the 2nd respondent because he happened to be the highest bidder. The unfairness alleged in paragraph 10 was not directed at the conduct of the auction or any impropriety committed by the purchaser. It was directed at the 1st respondent as mortgagee for exercising his power of sale and disposing of the mortgaged property, when the appellant claimed he was still paying the mortgage debt. Is it conceivable that a Court of Equity, whose jurisdiction we are supposed to be exercising, would "nullify a sale" against a bona fide purchaser for value on this basis? I cannot think so. If that be right, can it be said the appellant hasshown a *prima facie* case with a probability of success? I would have thought the answer was obvious.

The learned trial Judge is criticized because of the allegedly emphatic nature of his findings and he was supposed to have misdirected himself in his approach to the issues before him as to justify the interference by this Court of the exercise of his discretion. It is also said he made findings of fact on disputed affidavits. I respectfully disagree.

As I said repeatedly, to be able to grant the interim relief of injunction, the Judge must be satisfied that the appellant presented a *prima facie* case with a probability of success. In the context of this case, this means that the appellant must show that the price the property realized at the auction, "is so low as to be itself evidence of fraud".

The evidence before the Court was that the property was sold for 200,000 at the auction. Also before the Court, were three valuations of the property for 200,000, 225,000 and 260,000 made by professional valuers. Faced with the evidence of the price obtained at the auction, and these three disparate valuations, the learned Judge observed that:-

> "Given the prevailing financial climate and the conditions at a public auction, it cannot be said 200,000 was inconsiderably low or in any way surprising".

In my humble view, that was a perfectly legitimate observation and does not justify a charge that he made emphatic findings of fact or decided issues of fact on conflicting affidavits.

One fact that must not be lost sight of, is that notwithstanding the parties the appellant jointly sued as defendants, the real issue of "nullification" is being fought between the appellant as mortgagor and the 2nd respondent as a purchaser. If the sale is held invalid, the 1st respondent as mortgagee, is not in the least affected. He is entitled to re-advertise the sale and conduct yet another sale to realize the money it has lent. The only loser is the purchaser. My limited and imperfect knowledge of equitable principles, teach me that they are designed in a large measure, to protect a bona fide purchaser for value. And in my opinion, the 2nd respondent answered that description, Yet, an injunction denied by the Court below, in my view, perfectly properly, was imposed by this Court in June 1986 and its effect was to prevent the transfer of the property to the purchaser.

That injunction, resulted in keeping a mortgagor whose equity of redemption has been extinguished, in beneficial enjoyment of the property for 2 solid years. Now that the law on which the mortgagor took his stand has been found to provide him no assistance, it is said the injunction must be re-imposed to keep the purchaser out of enjoyment for probably another 2 years so that a defaulting mortgagor may be able "to defend himself in order to see that the sale is at a true market value."

Although I may be entirely wrong on this, I cannot believe that a Court of Equity would treat its darling, as a bona fide purchaser for value is sometimes called, in that manner. The equitable and beneficient remedy of injunction is said to be a double-edged sword. It is often used to aid rights and to prevent wrongs. It may also be used, albeit unwittingly, as a vehicle of oppression. A reimposition of injunction, at this stage and on the known facts of this case, would be to use this equitable remedy in the latter manner.

I am, for my part, entirely convinced that Schofield J was right to decline the remedy of interim injunction and whatever justification this Court may have for imposing it in June 1986, none in my opinion, now exists.

I would dismiss this appeal and set aside the order of "stay of proceedings" granted by this Court in June 1986 with costs to both respondents.

Dated and delivered at Nairobi this 12th day of July , 1988

H.G. PLATT

.....

JUDGE OF APPEAL

F.K. APALOO

.....

JUDGE OF APPEAL

J.R.O MASIME

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR