

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC E031 OF 2025

YUSSUF SURAW ISSACK

.....**PLAINTIFF**

VERSUS

BANK OF BARODA (KENYA) LIMITED1ST

DEFENDANT

VALLEY AUCTIONEERS2ND

DEFENDANT

R U L I N G

Applicants Case

Yussuf Suraw Issack, (**hereinafter referred to as the applicant**) has come to this court against Bank of Baroda (Kenya) Ltd and Valley Auctioneer (**hereinafter referred to as the respondents**) seeking orders that pending the hearing

and determination of the suit, an order of injunction be issued restraining the defendant respondents and their agents from auctioning, alienating advertising for sale offering for sale, selling, taking possession of leasing, transferring charging or otherwise in any matter whatsoever dealing with land parcel No. Nakuru/Municipality Block5/116.

The grounds of the application are that the defendants intend to sell by way of public auction, the Plaintiffs land parcel no. Nakuru/Municipality Block 5/116. The auction is due to take place anytime. Plaintiff purchased the suit property by way of a public auction on 30th October, 2024 at a price of Kshs.116,500,000/=.

The auction was conducted by Keysian Auctioneers, under the instructions of the 1st Defendant.

The 1st Defendant, in an auction of October, 2024, was exercising its statutory power of sale against Hasmukh Raichand Shah and Sanjay Raichand Shah, the registered owners and who were the Chargors to the 1st Defendant. At the fall of the hammer, the Plaintiff paid a deposit of Kshs. 11,650,000.00. The Plaintiff has paid the balance of the purchase price to the 1st Defendant herein.

The 1st Defendant has now purported to sell the said property, yet again, by way of a public auction and has now appointed the 2nd Defendant herein.

The 1st Defendant, in an auction scheduled for 26th March, 2025, is purporting to be exercising its statutory power of sale against Hasmukh Raichand Shah and Sanjay Raichand Shah. That the said Hasmukh Raichand Shah and Sanjay Raichand Shah are not the owners of the suit property since the Plaintiff purchased it by way of an auction on 30th October 2024.

According to the plaintiff, he has not charged the suit property with the 1st Defendant and thus it is strange that the Defendants have purported to advertise for sale the suit property. Instead of the 1st Defendant performing its end of the bargain by transferring the suit property to the Plaintiff, it has instructed the 2nd Defendant to sale the property by way of an auction. In instructing the 2nd Defendant to sell the property by way of an auction, yet the suit property had been sold in a public auction on 30th October, 2024, the 1st Defendant is trying to enrich itself by

taking advantage of the Plaintiff. It is not only illegal and unlawful but very immoral and against public policy.

The Plaintiff laments that he has not been served with any notice by the Defendants, neither has the 1st Defendant cancelled the earlier auction of 30th October, 2024 in which the Plaintiff was a successful bidder. The Plaintiff is in possession of the suit property, and thus he is in danger of being evicted if the intended auction is to proceed as scheduled by the 2nd Defendant.

He states that before the auction of 30th October, 2024, he was a tenant paying monthly rent to Hasmukh Raichand Shah and Sanjay Raichand Shah. Having purchased the suit property, the Plaintiff remained in possession of the suit property as a purchaser by way of a public auction. The suit land having been knocked down and sold by the 1st Defendant to the Plaintiff in exercise of its statutory power of sale on 30th October, 2024, the same is not available for sale by way of another public auction. He states that the prejudice that he will suffer if the intended

auction was to proceed is far much greater than the prejudice the bank would suffer at the issuance of interlocutory injunction.

He maintains that he is a purchaser by way of a public auction and that he has paid the purchase price; that he is in possession of the suit property and hence he has ably demonstrated that he has a prima facie case with a likelihood of success. The balance of convenience tilts in favour of the Plaintiff since he is legal purchaser by way of a public auction. He believes that he will suffer irreparable harm since he has paid a lot of money to the 1st Defendant and is now keen on disposing of the suit property by way of an auction. The supporting affidavit of Yussuf Suraw Issack basically reiterates the grounds of the application.

RESPONDENTS CASE

The respondent filed a replying affidavit whose gist is that Pursuant to the subject Public Auction dated the 30th day of October, 2024, the applicant emerged the highest bidder and was mandated to remit a deposit sum of ten-percent (10 %) of the total purchase price of the property thus KES Eleven Million, Six-

Hundred and Fifty Thousand (KES 11,650,000.00) at the fall of the hammer. The property forced sale value had been set at One Hundred and Sixteen Million, Six Hundred and Fifty Thousand (KES 116,650,000.00

The terms of the subject Memorandum of Sale were clear and unequivocal to the extent that the Plaintiff/Applicant, having emerged as the highest bidder was expected to remit the sum of ten-percent (10%) of the total purchase price of the property i.e. KES Eleven Million, Six-Hundred and Fifty Thousand (KES 11 at the fall of the hammer after which he was required to defray the remaining sum of Ninety Nine Million, Nine-Hundred and Fifty Thousand (KES 99,950,000/=) within the stipulated timeline of Ninety (90) days failure to which the 1st Defendant was entitled to cancel the Subject Auction.

The applicant being the purchaser agreed to pay the balance of the Purchase Price to the chargee's within Ninety (90) days from the date of the sale failure to which he was to forfeit the deposit. At the fall of the hammer, the applicant deposited the sum of thus. KES Eleven Million, Six-Hundred and Fifty Thousand

(11,650,000) in compliance with the pre-eminent section of the Subject Auction's Memorandum of Sale. Contrary to the terms of the Subject Auction's Memorandum of Sale, the applicant failed to defray the remaining sum of Ninety-Nine Million, Nine-Hundred and Fifty Thousand (KES 99,950,000.00) thereby leaving the 1st Defendant/Respondent with no option except the termination/cancellation of the Auction.

The 1st Defendant/Respondent's resolve to terminate and/or cancel the Subject Auction was borne from the failure of the Plaintiff/Applicant to fully abide by the express terms of the Auction's Memorandum of Sale and the 1st Defendant/Respondent's need to realize its security with respect to the loan facility offered to Hasmukh Raichand Shah and Sanjay Raichand Shah, the property's registered owners and chargors who had since defaulted on loan repayment.

The decision to terminate and/or cancel the Subject Auction by the 1st Defendant Respondent was aptly and sufficiently communicated to the Plaintiff/Applicant vide various

correspondences and the averment by the former on the face of his Application that he was not served with the cancellation notice is untrue, false and a prime and apparent exemplification of the position that the present Application is founded upon flawed, fallacious and/or pretentious premises.

The position adopted by the Plaintiff/Applicant in the subject Application to the effect that it had paid the full sum of the Purchase Price of the Suit Property is lacks basis.

RIVAL SUBMISSIONS

Allan Kibet, learned counsel for the applicant submits that Order 40 Rule I provides for the cases in which temporary injunctions may be granted as those where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. The applicant relies on the celebrated case

of Giella v Cassman Brown & Company Limited [1973) 1 EA established the principles that guide the Court in granting injunctions as follows:

(a) "An applicant must show a prima facie case with a probability of success;

(b) 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; and

”

(c) If the court is in doubt, it will decide the application on the balance of convenience.

The applicant further relies on the case of Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) eKLR, which defined a prima facie case as:

"A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the

opposite party as to call for an explanation or rebuttal from the latter."

The Plaintiff argues that he purchased the land parcel No. Nakuru/Municipality Block 5/116 by way of Public auction on 30th October 2024 at a price of Kshs.116, 500, 000/= . At the fall of the hammer, he paid a deposit of Kshs. 11, 650, 000/= and this formed a binding contract between him and the bank. He claims a beneficial ownership of the property through purchase. He submits that the 1st Defendant failed to perform its obligation of transferring the property to the Plaintiff and instead purports to sell the property again by way of public auction despite the purchase price being fully paid by the Plaintiff who has been in occupation since. The 1st Defendant, however, has not furnished the Court with any documents such as full bank statements that would support their claim that the Plaintiff failed to remit the balance.

The plaintiff further relies in the case of Sofarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR, the Court held that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true... "

According to the plaintiff, he has never charged the property with the 1st Defendant and that there is therefore no reasonable explanation as to why it would advertise the property for sale again. The plaintiff contends that despite the lapse of the said 90 days, the 1st Defendant accepted the payment of Kshs. 30,000,000/2 on 3rd February 2025. It later advertised the property for sale on 7th March 2025. That by accepting the payment after the lapse of the 90 days period, the 1 Defendant created a legitimate expectation that the payment period had been extended.

The plaintiff contends that the 1st Defendant did not follow the proper procedure before advertising the property for sale since the cancellation notice was never served upon the Plaintiff. The cancellation notice only becomes valid upon service of the same upon the Plaintiff, thus the purchase by him remains valid as no proper cancellation was done. From the foregoing the plaintiff

believes that he has established a prima facie case with a high probability of success.

On irreparable injury, the plaintiff relies on the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR. the Court stated as follows in regards to irreparable injury:

"The injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury"

The plaintiff contends he has been in occupation of the suit property as a purchaser by way of public auction, even before then, he was in occupation as a rent paying tenant. He is however in danger of being evicted if the orders prayed are not granted and the 2nd Defendant is allowed to proceed with the auction. The

injury that he will suffer when this happens is irreversible and cannot be compensated by an award of damages.

On balance of convenience, the plaintiff relies on the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (supra) which defined the concept of balance of convenience as:

"The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be more significant than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed."

The plaintiff cites the case of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR. Where the court dealing with the issue of balance of convenience expressed itself thus:

"... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the

motion. If an Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction... "

According to the plaintiff, he stands to suffer greater prejudice if the intended auction proceeds than the Defendants because he is in occupation of the property and if this property is sold and the suit is determined in his favour, then it would be impossible for him to recover the property. The balance of convenience should therefore tilt in his favour.

Mr Kisilah, learned counsel for the the respondents submits that the plaintiff Application is bereft of merit and is a gross and blatant abuse of the sacrosanct process and flies in the face of the principles of justice and the rule of law. He cites various cases including East African Industries vs. Trufoods {19721 EA 420 and Giella vs. Cassman Brown & Co. Ltd [19731 EA 358. Restating the said principles, Ringera, J (as he then was) in Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC NO. 1234 of 2002 set them out the conditions for grant of an injunction thus:-

(i)-a prima facie case with a probability of success at the trial; (ii)
-if the Court is in doubt about the existence or otherwise of a
prima facie case it should decide the application on a balance
of convenience•

(jii)- the applicant is likely to suffer an injury, which cannot be
adequately compensated in damages;

(iv) the conduct of the applicant meets the approval of the
Court of equity.

On whether the Applicant has established a prima facie case with
probability of success at trial, the learned counsel submits that
the applicant has failed to satisfy the requirement of a prima facie
case with a probability of success and it is only fair that this
Honorable Court dismisses the instant Application with costs.

He contends that from the evidence presented before this Court,
it is not disputed that an auction was conducted by Keysian
Auctioneers on 30th October 2024 with respect to
Nakuru/Municipality Block 5/116 "the Suit Property" whence the
1st Defendant/Respondent herein contracted Keysian Auctioneers
to undertake the same in order to enable it realize its security

against Hasmukh Raichand Shah and Sanjay Raichand Shah, the property's registered owners and chargors. It is also not in contention that the applicant emerged the highest bidder and was mandated and/or constrained to remit a deposit sum of ten-percent (10%) of the total purchase price of the property i.e. KES Eleven Million, Six-Hundred and Fifty Thousand (KES 11,650,000/=) at the fall of the hammer.

The property forced sale value had been set at One Hundred and Sixteen Million, Six Hundred and Fifty Thousand (KES 116,500,000) The terms of the subject Memorandum of Sale were clear and unequivocal to the extent that the Plaintiff/Applicant, having emerged as the highest bidder was expected to remit the sum of ten-percent (10%) of the total purchase price of the property thus KES Eleven Million, Six-hundred and Fifty Thousand (KES 11,650,000) at the fall of the hammer after which he was required to defray the remaining sum of Ninety Nine Million, Nine-Hundred and Fifty Thousand (KES 99,950,000k) within the stipulated timeline of Ninety (90)

days failure to which the 1st Defendant was entitled to cancel the Subject Auction. The respondents through counsel submit that the Plaintiff/Applicant is guilty of material non-disclosure because he has not paid the balance. The Plaintiff has not led any evidence that he has paid the balance. He has failed to produce bank receipts demonstrating that he has indeed satisfied the full purchase price of the property. To the contrary, the Defendants/Respondents have led conclusive evidence of the position that the Plaintiff/Applicant only paid the deposit at the date of the Auction and failed to remit the full payment.

ANALYSIS AND DETERMINATION

The facts of this case are that the defendants sold the parcel of land in dispute herein by public auction to the plaintiff at Ksh 116,500,000 on the 30th October 2024. On the same date, the

respondents issued a certificate of sale in respect of the suit property being LR NO Nakuru Municipality Block5/116 which was in the name of Hasmukh Raichand Shah and Sanjay Raichand Shah. The memorandum of sale was signed by the auctioneers as required by law on the same date. The plaintiff has annexed documents to demonstrate that he paid Ksh4,900,000 on the 23rd January 2025 and a further 30,000,000 on 3/2/2005. It is not clear whether the applicant was served with the notice of cancellation of the sale as indicated by the applicant.

I have considered the evidence on record and rival submissions and do find that the applicant paid Kshs11,650,000 at the fall of the hammer, Ksh 4,900,000 and finally 30,000,000 and alleges to have paid the whole balance of 99,000,000. The fact that he paid ksh 30,000,000 on the 3rd of February 2025, the same date when the Keysian Auctioneers wrote to the applicant informing the latter that the sale had been cancelled. By accepting the 30,000,000 outside the 90 days the respondents were estopped from selling the property without notice and that the dispute became a contractual dispute.

The above facts depict a right enjoyed by the plaintiff which has been infringed by the defendants by attempting to sell the property despite part payment. I do echo the decision in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, defined a prima facie case as:

"A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

This court concludes that the applicant has established a prima facie with a probability of success having paid the deposit of ksh 11,650,000 and later Ksh 4,900,000 and later Ksh30,000,000.

On the second issue of irreparable loss or injury, the same was addressed in the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR, the Court stated as follows

"The injury must be one that cannot be adequately compensated for in damages and that the existence of a

prima facie case is not itself sufficient The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”

I do find that having paid the deposit and a further Ksh 4,900,000 on 23/1/2025 and Ksh 30,000,000 on 3/2/2025, and being in possession of the property, the applicant is likely to suffer irreparable loss if he is evicted from the property.

On the balance of convenience, the court in Pius Kipchirchir Kogo vs Frank Kimeli Tenai (supra) defined the concept of balance of convenience as:

"The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be more significant than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed."

In this case, the balance of convenience tilts towards giving an injunction as the plaintiff is likely to suffer greater inconvenience if the injunction is not granted and the suit succeeds. On the other hand the respondents will suffer less inconvenience if the injunction is granted but the suit does not succeed.

The upshot of the above is that the application is allowed thus pending the hearing and determination of the suit, an order of injunction be issued restraining the defendant respondents and their agents from auctioning, alienating advertising for sale offering for sale, selling, taking possession of leasing, transferring charging or otherwise in any matter whatsoever dealing with land parcel No. Nakuru/Municipality Block5/116. Costs of the application in the cause.

**RULING DATED SIGNED AND DELIVERED AT NAKURU
ELECTRONICALLY THIS 6th DAY OF OCTOBER 2025**

A. O. OMBWAYO

JUDGE