



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**LAND AND ENVIRONMENT COURT**

**ELC. CASE NO. 846 OF 2015**

**JOHN MATHARA MWANGI.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

The application before the court for determination is the Notice of Motion dated 3<sup>rd</sup> September 2015 brought under **section 3A, 63(c) and (e) of the Civil Procedure Act** and **Order 40 Rule 1 (a) and Rule 4 and Order 5 Rule 1 and 3 of the Civil Procedure Rules, 2010**. The applicant has also cited **Section 97(3) and (5) of the Land Act**. The plaintiff sought for the orders that:-

1. Pending the inter parties hearing of this application the defendant, its agents, assigns and anyone claiming under it be restricted by an order of injunction from in any way dealing with, transferring, disposing of or in any other manner interfering with the title of the suit property namely L.R No. 4894/148 Nairobi;
2. Pending the hearing and determination of the suit the defendant, its agents, officers, assigns and any one claiming under it be restricted by an order of injunction from in any way dealing with or transferring the title of the suit property namely LR No 4894/148 Nairobi;
3. Pending the hearing of this suit the defendant do submit to the court the full details of the identity of the purchaser who purchased the suit property at the public auction held on 28<sup>th</sup> August 2015 and all other relevant documents pertaining to the said sale.
4. The court to order an independent valuation of the suit property be carried out to establish the true market and forced value of the property.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of John Mathara Mwangi the plaintiff herein. He deposed that in the year 2009 he took a loan of Kshs. 15,000,000/= from the defendant bank but in 2014 he faced major financial challenges and defaulted in repaying the loan and the bank threatened on several occasions to auction the security that he had offered them which was his matrimonial home LR No. 4894/148 Garden Estate, Nairobi. He averred that M/s Josrick Merchants Auctioneers advertised the said property for sale which was scheduled to be on 28<sup>th</sup> August 2015, that since the advert came out he made frantic efforts to raise the money to pay off the debt but failed to succeed, that with pressure of the impending sale, he decided to sell the property to pay off the bank loan and using the balance to purchase a small value of the property. He stated that he

found a purchaser one Leonard Githinji Mathu who had agreed to purchase the property at a depressed price of Ksh 43 Million. He further stated that the buyer would be financed by Standard Chartered Bank Limited and the buyer was advised to deal with the firm of Oraro & Company Advocates. He stated that he kept updating the defendant bank through its credit officer who was in touch with one Nelly Gitau a partner at Oraro & Company Limited and that the defendant bank officials encouraged him to hasten and close the deal and the impression he got was that the bank would postpone the sale to another date. That when he visited the bank on 27<sup>th</sup> August 2015, the defendant bank insisted on a sale agreement between himself and the purchaser and that the sale agreement was drawn and sent to them. He added that he was taken by surprise by the bank officials of the defendant bank insisting that they wanted the Ksh 6,300,000/= mentioned in the sale agreement as a deposit to be paid to them before they could postpone the sale. He stated that he later contacted another interested buyer who offered to pay a deposit of Kshs. 15 million but when the funds were wired to the defendant bank he was informed that the sale had already taken place and that the property had been sold at Ksh 34 Million at around 12 noon. He stated that he later instructed Townland Valuers to do an urgent valuation of the suit property and the valuation showed that the property had the value of Kshs 55 Million. He stated that he asked the defendant bank to give him the information for the sale of the said property but the bank declined to avail the said information. He believes that the defendant and its agents have conspired to defraud him of his property in the guise of carrying out a public auction. He alleges that the defendant bank failed to avail him the valuation report they used for the sale and that he did not understand why the bank sold the property at a lower value yet they knew that he already had buyers who were offering a higher price. He also noted that the bank credited Ksh 7,625,001 which amount was well below the 25% deposit required by the auctioneers in its advert.

This application is not opposed. This is because the defendant filed its Replying affidavit late after the required time given by the court had lapsed therefore the said affidavit was expunged from the court record following a successful application by the plaintiff.

The plaintiff filed his written submissions where he reiterated the contents of his Supporting affidavit and relied on the case of **Giella –vs.- Cassman Brown (1973) EA 258**. On whether he had a prima facie case the plaintiff stated that the property was sold at an undervalued report, that the defendant failed to accept the various offers to sell the property at Ksh 43 Million and therefore failed in its statutory duty of care to the plaintiff to obtain the best price reasonably obtained at the time of sale. That the time for the auction was altered from 2pm to 12 pm and that there was a deposit of Ksh 1,000,000/= before the date of the sale hence cementing the fact that there was collusion between the defendants agents to fix the price of the sale. On whether damages would suffice the plaintiff submitted that the mandatory provisions of **section 97 (3) (b) of the Land Act** provided that where a charged land is sold at undervalue the chargor may apply to court for an order that the sale be declared void and stated that the only remedy was for the court to declare the sale void. On the balance of convenience the plaintiff stated that he resides on the property with his family and in possession of the suit property.

I have read and considered the pleadings and the submissions filed by the plaintiff. The requirements for the grant of a temporary injunction as stated in **Giella vs. Cassman Brown & Co Ltd, (1973) EA 358** are that the applicant must establish a *prima facie* case, and that he would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 1215** as follows:

**“...a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 argued that he had established a *prima facie* case with a probability of success for reasons

that the suit property was sold at an undervalue of Ksh 34,500,000/= therefore the amount offered did not reach the threshold of 75% provided for by the Act, that the defendant declined the various offers to sell the suit property at Ksh 43 Million therefore failing in its statutory duty of care to the plaintiff to obtain the best price obtainable at the time of sale, that the plaintiff was manipulated by the defendant making him fail to attend the public auction by fraudulently telling him that the auction will take place at 2pm when the auction took place at 12pm, that the defendant accepted a deposit of Ksh 1,000,000/= before the date of the sale an indication that there was collusion between the defendant's agents and the purchaser to fix the price of the sale and that the amount deposited at the bank being Kshs 7,625,000/= was less than 25% as per the requirements of the public auction.

What is not contested is the fact that the plaintiff took a loan of Ksh 15 Million from the defendant and defaulted in repaying the loan forcing the bank to recover its moneys by selling the suit property by exercising its statutory power of sale. The plaintiff has not disputed the procedure used by the defendant in selling the said property but his contention is only that the bank did not allow him sell the suit property by private treaty which is an option the bank may take. What the court has also failed to understand is that the period culminating to the sale by auction of properties in a bid to recover monies owed by the bank is normally 90 days. The plaintiff knew this fact but only opted to attempt to sell his property by private treaty a day to the scheduled public auction. It is therefore my opinion that the Plaintiff has not established a *prima facie* case as he had no right in existence that had been infringed, as the suit property had been sold at a public auction as provided by the law.

Would an award of damages suffice to the plaintiff? The plaintiff has stated that there was no room for an alternative award of damages as the defendant had breached **section 97 (3) (b) of the Land Act**. The plaintiff further claimed that the auction was done without the defendant doing a valuation on his house. What is undisputed is that the plaintiff gave his house as security for the loan he had been given by the defendant bank. The case of **Isaac O. Litali v Ambrose W. Subai & 2 Ors HCCC No. 2092 of 2000 (unreported)** clearly state that once a property had been given as security then on failure to repay the loan the property would be sold to recover the said monies. Ringera J as he then was held that, ***"I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful. I say so for nothing is clearer in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages."***

Further I note that since the plaintiff is disputing the amount of monies deposited into his account this cannot amount to the grant of injunction. This was enunciated to in the case of **Mohammed Khaled Khashoggi v Equity Bank Limited [2013] eKLR** that: ***"..Accordingly, I agree with the Plaintiff's submissions that it is now settled law that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive Orders. To this end, I would refer to the finding of Kwach JA in the well-known Court of Appeal authority – Mrao Ltd v First American Bank of Kenya Ltd & 2 others (supra) as follows:***

***"The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th Edition) paragraph 725 as follows:- "725 when mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive." .....***

Further, even if it were to be found that the sale of the suit property was irregular, the only remedy that can be available to the Plaintiff in the circumstances is that of damages. It is my finding that the plaintiff can be adequately compensated by way of damages.

Should the court determine the issue on a balance of convenience? In the case of Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR, the Court of Appeal had this to say:

**“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”**

In this case, the court is not in doubt as to the adequacy of an award of damages.

In light of the foregoing, this Application is hereby dismissed. Costs shall be in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY 2016.**

**MARY M. GITUMBI**

**JUDGE**