



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 426 OF 2013**

**MOSES KIBIEGO YATOR.....PLAINTIFF**

**VERSUS**

**ECO BANK KENYA LIMITED.....DEFENDANT**

**RULING**

The plaintiff/applicant came to court on 21.5.2015 for orders that service of this application be dispensed with in the first instance and that Valley Auctioneers and Stephen Kipchirchir Melly be enjoined in this suit as 2nd and 3rd defendants. The plaintiff be granted leave to amend the plaint to incorporate the new parties and that an interlocutory injunction do issue against Stephen Kipchirchir Melly restraining him whether by himself, his servants and/or agents from evicting the plaintiff from the land parcel known as Kiplombe/Kiplombe Block 6 (Kutsi)/42 or dealing with the same pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit. He further prays for costs of the application. The application is based on grounds that the plaintiff has a *prima facie* case with a probability of success. That damages shall not be an adequate remedy. That the balance of convenience tilts in favour of maintaining the status quo. That amendments are necessary to plead the case clearly.

The application is supported by the affidavit of Moses Kibiego Yator who states that on the 20th March 2014, this Honourable Court delivered a ruling in this suit wherein the defendant bank was restrained from selling the land parcel known as Kiplombe/Kiplombe Block 6(Kutsi)/42 based on the statutory notice dated 6th July, 2012 and the notification of sale dated 18th June, 2013. That since the date of the ruling, no communication has been received by him from the defendant bank and he knew his suit is scheduled for mention on 4th June, 2015 for pre-trials. That on 15th May 2015, he found a letter from Kimaru Kiplagat and Company Advocates dated 8th May, 2015 who indicated that they were acting for the Stephen Kipchirchir Melly, the purchaser of his land at an alleged public auction of 26th February, 2015. That the letter also contained a title deed dated 29th April, 2015 indicating that the said Stephen Kipchirchir Melly was the registered proprietor of his land. That he immediately proceeded to the Lands Office and carried out a search to verify the information and was issued with a certificate of official search. That the certificate indicated Stephen Kipchirchir Melly as the proprietor registered on 29th April, 2015 and a charge for Kshs.6,000,000/= by Eco Bank Kenya Ltd was indicated as subsisting and registered on 2nd February, 2010. That it became clear to him that serious fraud had been perpetrated in surreptitiously conveying his land as between Eco Bank (K) Ltd, Valley Auctioneers and Stephen Kipchirchir Melly. That it is necessary that Valley Auctioneers and Stephen Kipchirchir Melly be enjoined into this suit urgently in order for them to answer to the dire allegations of fraud. That it is necessary that an interim injunction be issued against Stephen Kipchirchir Melly to restrain him from unlawfully evicting him or dealing with the land. According to the plaintiff, the sale and the transfer of

his land is unlawful and a nullity for the reasons:

- (a) The chargee bank has never issued and served a valid statutory notice as required by section 90 of the Land Act, 2012.***
- (b) The chargee bank has acted in blatant and flagrant breach of the orders made by the court on 20th March, 2014.***
- (c) No valid notification of sale has been issued and served upon him as required by the Auctioneers rules, 1997.***
- (d) No redemption notice has been issued and served upon him and the sale is a clear clog on the statutory right of redemption contained in section 89 of the Land Act, 2012.***
- (e) The sale fails to comply with the 40 days notice requirements in section 96(2) of the Land Act, 2012.***
- (f) No notice was served upon his spouse as required by section 96(3)(c) of the Land Act, 2012.***
- (g) No notice was served upon the guarantor as required by section 96(3)(b) of the Land Act, 2012.***
- (h) No valuation was carried out as required by section 97(2) of the Land Act, 2012.***
- (i) No reserve price was set for the sale of the property as required by section 98(2) of the Land Act, 2012.***
- (j) The chargee failed in its duty to advertise the property as required by section 98(2) of the Land Act, 2012.***
- (k) the property was sold at a gross under value contrary to section 97(3) of the Land Act, 2012.***
- (l) The conveyance has not been duly done as no consent of the Land Control Board was issued under section 6 of Land Control Act, Cap. 302.***
- (m) The requisite stamp duty has not been paid.***
- (n) The transfer by chargee is invalid for want of due execution and attestation.***
- (o) The transfer was registered without any discharge of charge of the incumbent encumbrance dated 2.2.2010.***
- (p) The certificate of sale is a nullity as it fails to disclose the purchase price.***
- (q) The title deed was obtained fraudulently and corruptly, illegally, unprocedurally and by misrepresentation as provided for in section 26(1) of the Land registration Act, 2012.***
- (r) No valid sale agreement was concluded.***

The 1st respondent filed a replying affidavit stating inter-alia that despite the fact that the Honourable Court restrained the 1st defendant from auctioning the suit property based on the statutory notice of 6th July, 2012 and the notification of sale dated 18th June, 2013, the same court allowed the 1st defendant to proceed with the recovery process provided proper notices are issued in accordance with the law. That following the aforesaid ruling, the 1st defendant instructed the 2nd defendant M/s Valley Auctioneers to undertake the recovery process afresh and issue the required Notices to the Chargor as directed by the

court before perfecting the auction and which instructions were effected by the Auctioneers.

From the date the ruling of the court was delivered on 20th March, 2014, which is more than a year down the line, the plaintiff has never taken any appropriate steps towards prosecution of the entire suit and it is only after learning about the sale of the suit property by public auction is when he has now decided to rush before this Honourable court which in itself discloses ill motives and bad intention on the plaintiff's part and that the 3rd defendant is a *bonafide* purchaser of the suit property for value after emerging the highest bidder and as such, the issue of fraud should not arise at all. That the entire conveyance exercise leading to extraction of the title deed in favour of the 3rd defendant was carried out with all due diligence and after the property had been discharged and that in any event if at all there were any acts of fraud as alleged, then it would have been property to enjoin the County Land Registrar to the suit herein which the plaintiff has failed to do so and that the entire process of auctioning the suit property was undertaken diligently and in accordance with the relevant provisions of the law and as such, the 1st defendant reiterates that a valid statutory notice was issued to the plaintiff in accordance with the relevant provision of the law and that the chargee bank has not in any manner acted in breach and/or contravention of any court orders issued on 20th March, 2014 and/or any other court orders as alleged in paragraph 13(b) of the supporting affidavit.

Accordingly, the entire process of sale was valid and sanctioned by the law and that the statutory power of sale has since crystallized as the plaintiff and the borrower have wantonly defaulted in repaying the monies the defendant advanced to them despite numerous reminders to them to repay the loan balance. The plaintiff has also acknowledged that there exists a registered charge over the suit property in favour of the defendant which clearly provides for the right of the defendant to sell the property in default of repayment of the loan. The plaintiff/applicant has come before this court with unclean hands and since the orders sought are discretionary and equitable, they ought not to be granted. The 3rd respondent filed a replying affidavit stating that he is a *bonafide* purchaser having purchased the property at an auction on 6.2.2015. He learnt of the sale vide an advertisement in one of the daily newspapers. He was declared the highest bidder at the fall of the hammer and a certificate of sale issued. He denies any fraud.

In the supplementary affidavit, the plaintiff reiterates that no valid sale took place on 26.2.2015 as it is confirmed that the sale took place on 6.2.2015. Moreover, that there is no evidence of payment of full purchase price. He reiterates that no statutory notice was issued. Moreover, that no valid contract for sale of property was entered into as the Memorandum of Sale fails to comply with the requirements of the Auctioneers Rules, 1997 and the Law of Contract Act, Cap. 23 and that the Memorandum of Sale was contrary to the terms and conditions stipulated in the newspaper's advertisement thus, void as the advertisement provided for the payment of the balance of the purchase price within 30 days while the Memorandum contains a period of 60 days.

The gravamen of the plaintiff's submission is that the sale and transfer of the plaintiff's land is unlawful and a nullity as the chargee never issued and served a valid statutory notice as required by section 90 of the Land Act, 2012. Moreover, that the chargee never followed the direction of the court as ordered on 20.3.2014 and that no valid notification of sale was issued and served. Furthermore, that no valuation was carried out as required by law. Lastly, that the chargee failed to advertise the property as required by law.

In a nutshell, the 1st respondent submits that the application herein was never amended to include the 2nd and 3rd defendants and therefore, the application seeks orders against persons who are not respondents. Moreover, that the applicant is a guarantor of a loan granted to Stephen K. Kotut who is indebted to the 1st defendant. In essence, the 1st defendant argues that she complied with the right procedure in view of the sale of the property and therefore, the 3rd defendant is a *bonafide* purchaser of the suit property for value. The 3rd defendant argues that he has a valid title and that there is no evidence of fraud to which he is a party. He claims to have had no notice of any irregularity.

I have considered the applications and supporting affidavit together with the supplementary affidavit on one hand and the replying affidavits on the other hand and do find that the undisputed facts are that the plaintiff commenced this suit in the year 2013 by plaint dated 2.2.2013. The plaintiff prayed for a

declaration that the acts of the defendant in seeking to exercise the chargee's statutory power of sale are unlawful and also prayed for a perpetual injunction seeking to restrain the defendant whether by itself, its servants and agents from selling or transferring the land parcel known as Kiplombe/Kiplombe Block 6(Kutsi)/42. The plaint was filed with Notice of Motion under certificate of urgency seeking for temporary orders of injunction. The honourable court granted orders on condition that the 1st defendant follows the due process to recover the property. The issue for determination is whether due process for recovery was followed. The process of recovery commences with a valid notice under section 90 of the Land Act, Section 90 provides that: **If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**

***Subsection (2) provides that the notice required by subsection (1) shall adequately inform the recipient of the following matters—***

***(a) the nature and extent of the default by the chargor;***

***(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;***

***(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;***

***the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.***

***(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—***

***(a) sue the chargor for any money due and owing under the charge;***

***(b) appoint a receiver of the income of the charged land;***

***(c) lease the charged land, or if the charge is of a lease, sublease the land;***

***(d) enter into possession of the charged land; or***

***(e) sell the charged land;***

I have perused the affidavit of Peter Kipngetich and do not see a Notice envisaged by section 90 of the Land Act but I can see a notice to redeem the property which is not a notice under section 90 of the Act. The notification of sale issued on 3.12.2015 on the same date of the alleged statutory notice and therefore, reducing the days meant for the exercise of the equity of redemption. Moreover, I do find that the list of registered postal parcels posted by Valley Auctioneers produced as PK5(c) is not dated and that there is no certificate of postage.

The application herein is to be considered in reference to the principles set out in the celebrated case of ***Giella Vs Cassman Brown*** thus, for this court to grant a preliminary injunction which is not as a matter of right, the applicant ought to demonstrate a likelihood of Success on the Merits, a plaintiff must first prove that he is likely to succeed on the merits. Courts have recast the likely “to succeed” factor in a variety of ways, including requiring a plaintiff to demonstrate that there is a “reasonable certainty” or

“strong probability” that he will prevail on the merits or that there is a “reasonable probability of success.” While courts differ on their exact formulations of what is required to “succeed on the merits,” they agree that a plaintiff must at least present a prima facie case to satisfy this factor. The second factor that a plaintiff must establish is that he is likely to suffer irreparable harm in the absence of an injunction. “Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant and that a “mere possibility” of irreparable harm is insufficient to warrant a preliminary injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with the characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. The court must also balance the equities of the case. This involves balancing the harm to the defendant if an injunction is granted with the harm to plaintiff if an injunction is denied.

I have considered this principles and do find that the applicant has *prima facie* case with a likelihood of success as the process was not duly followed, however, the applicant has not demonstrated to the court that he is likely to suffer irreparable harm that can not be compensated in damages if a temporary injunction is not granted and that the respondent cannot pay damages if he succeeds in the suit. It is the applicants burden to prove that he is likely to suffer irreparable harm which he has not discharged. On the balance of convenience, it tilts towards dismissing the application as the debt has already outstripped the borrowed sum. Application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET ON 4TH DAY OF NOVEMBER, 2016.**

**ANTONY OMBWAYO**

**JUDGE**