



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.199 OF 2014

WEBWAK TRADELINK LTD.....PLAINTIFF/APPLICANT

VERSUS

1. DIAMOND TRUST BANK LTD

2. DIRECT LINE ASSURANCE CO. LTD.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. What is before me is the Application by the Plaintiff dated 30th October 2014 seeking for the following orders:

(a) **THAT the Honourable Court be pleased to issue an order of temporary injunction, restraining the Defendants either by themselves, their servants, agents and/or Auctioneers or any person(s) acting under their directions and/or authority from interfering with the Plaintiff's quiet possession and occupation of the suit properties known as subdivision No.451 (original No. 442/10), subdivision No.455 (Original No.442/14), subdivision NO.456 (Original No.442/15), Subdivision No.460 (Original No.442/19), Subdivision No. 461(Original NO.442/20), subdivision NO.462 (Original No.442/21), Section IV mainland North pending the hearing and determination of the suit herein.**

(b) **That the Honourable Court be pleased to issue a temporary injunction restraining the Defendant herein from effecting transfer of the suit properties cited in (2) above by way of conveyance and/or otherwise to the 2nd Defendant pending the hearing and determination of the suit herein.**

The Plaintiff's/Applicant's case:

2. The Plaintiff's Application is premised on the ground that although he was granted a loan facility on 7th July 2010 by the 1st Defendant, the 1st Defendant consented to have the suit properties sold by the Plaintiff by way of private treaty to offset the debt.
3. According to the Plaintiff, he entered into a sale agreement with one Benson Sande Ndete who agreed to purchase the property for Kshs.160,000,000 and that the 1st Defendant has unilaterally and without reasons purported to recant the said agreement and proceeded to advertise the sale of the suit property by way of public auction.

4. It is the 2nd Plaintiff's case that M/S Garam Investment Auctioneers proceeded to sale the suit properties by way of public auction on 22nd October 2014 to the 2nd Defendant for Kshs.135,000,000 and that the purported sale was unprocedural and premature as the Plaintiff was denied the opportunity to redeem the property.

The Respondents' Case:

5. In its response, the 1st Defendant's Company Secretary deponed that the Plaintiff failed to inform the Court that before the said public auction took place, the issue of the sale of the property was already the subject of Malindi HCC No. 5 of 2013; that the court considered the Plaintiff's Application for injunction in that suit and that the Plaintiff has not filed an appeal challenging the Ruling of the court in HCCC NO. 5 of 2013.
6. It is the 1st Defendant's case that the negotiations between the Plaintiff and Benson Ndete to have the suit property sold by way of private treaty were not conclusive; that after entertaining into a sale agreement with Benson Ndete on 7th July 2014, neither the Plaintiff nor the purchaser took any further action on the alleged sale and that on 22nd October 2014, a public auction was conducted on with the 2nd Defendant being the highest bidder of the property for Kshs.135,000,000.
7. On her part, the 2nd Defendant's Managing Director deponed that the Defendant bought the suit property for Kshs.135,000,000 on 22nd October 2014; that the 2nd Defendant is a bona fide purchaser for value and is not guilty of any malfides and that the balance of the purchase price was payable within 30 days from 22nd October, 2014.
8. The advocates of the Plaintiff and the Defendants filed their respective submissions and authorities. I have considered th said submissions and authorities.

Analysis and findings:

9. The first issue that I should consider is whether the Application before me is subjudice and or *res judicata*.
10. It is not in dispute that the Plaintiff filed in this court HCCC No. 5 of 2013 in which he sued the 1st Defendant. Contemporaneously with the Plaint, the Plaintiff filed an Application in which he was seeking for the following orders:

1 (i) THAT an order of temporary injunction do issue to restrain the Defendant whether by itself, and its servants, agents or Auctioneers or any other person acting on the authority of the Defendant from proceeding with the intended sale of public auction scheduled for 18th February 2013, from re- advertising, selling, alienating howsoever at any other time or by completing by conveyance to transfer of any sale concluded by public auction or leasing, letting, evicting or otherwise howsoever interfering with the Plaintiff's ownership of title and/or interest of the properties known as Subdivision Number 451 (Original Number 442/10), Subdivision Number 455 (Original Number 442/14), Subdivision Number 456 (Original Number 442/15), Subdivision Number 460 (Original Number 442/19), Subdivision Number 461 (Original Number 442/20), Subdivision Number 462 (Original Number 442/21) Section IV Mainland North, pending the hearing and determination of the suit herein”

11. In its Ruling on 11th April 2014, this court dismissed the Plaintiff's Application for injunctive orders. While dismissing the Application, the court held as follows:

“There is a long chain of authorities by the High Court and the Court of Appeal which have held that once a property is offered by the chargor as security, the same becomes a commodity whose value is ascertainable. The chargor's loss is ascertainable even if it is proved at the hearing of the suit that the sale was improper or irregular.”

In view of the fact that the Plaintiff has a recourse under section 97 (1) (b) of the Land Act to apply to the court for an order that the sale is void, this court cannot at this stage stop the said sale.”

- 12.The issue of whether the sale of the suit property by way of public auction is lawful was dealt with conclusively by this court on 11th April 2014.
- 13.The Plaintiff in this matter has relied on the same grounds that it relied on when it sought to have the sale of the suit property stopped. Indeed, on the basis of the Ruling of this court of 11th April 2014, the Plaintiff proceeded to sell the suit property to the 2nd Defendant at a consideration of Kshs.135,000,000 on 22nd October 2014.
- 14.Having ordered that the Plaintiff's recourse, if at all, lies in damages, the Plaintiff cannot file another suit seeking for an order of injunction to stop the 1st Defendant from selling the suit property by way of public auction. That is an issue which is *res judicata* and an abuse of the court process.
- 15.If the Plaintiff proves at the hearing of this suit and Malindi ELC No. 5 of 2013 that the sale of the suit property was illegal or unprocedural, then he will be entitled to damages which in this case are ascertainable. He cannot stop an auction that was conducted on 22nd October 2014 on the basis of the Ruling of this court, which Ruling the Plaintiff has never appealed against.
- 16.For those reasons, I dismiss the Application dated 30th October 2014 with costs.

Dated and delivered in Malindi this **9th** day of **October** 2015.

O. A. Angote

Judge