



REPUBLIC OF KENYA



**Samusi v Consolidated Bank Limited & another (Civil Appeal
E181 of 2024) [2024] KEHC 1768 (KLR) (Civ) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E181 OF 2024

DAS MAJANJA, J

FEBRUARY 27, 2024

BETWEEN

GEOFFREY NYANARO SAMUSI APPELLANT

AND

CONSOLIDATED BANK LIMITED 1ST RESPONDENT

REGENT AUCTIONEERS 2ND RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. P. K. Rotich, SPM dated 26th
January 2024 at the Magistrates Court at Nairobi, Milimani in CMCC No. E5987 of 2020)*

RULING

1. The Appellant filed an appeal against the ruling and order of the Subordinate Court dated 26.01.2024 (“the Ruling”) dismissing his application dated 08.10.2023 seeking to restrain the Respondents from selling or otherwise disposing of the property known as LR No. 209/8362 (LR No. 1/9826) House No. 188 Phenom Estate, Langata (“the suit property”). He also sought an alternative prayer seeking a declaration that having fully complied with the conditions of sale of auction of the suit property conducted on 19.03.2020 and having paid the entire purchase price as at 28.09.2023, he was the lawful owner of the suit property.
2. Contemporaneously with the appeal, the Appellant has also filed the Notice of Motion dated 08.02.2024 made, inter alia, under Order 42 Rule 6 and 7 of the [Civil Procedure Rules](#) seeking an injunction restraining the Respondents from selling or otherwise disposing of the suit property pending the hearing and determination of the appeal and the primary suit. The application is supported by the grounds on its face and the Appellant’s affidavit sworn on 08.02.2024. It is opposed by the 1st Respondent (“the Bank”) through the replying affidavit sworn by its Recoveries Officer,



Jacinta Omina Ochola on 13.02.2024. The parties through their respective advocates made brief submissions on the matter.

3. Order 42 Rule 6(6) of the *Civil Procedure Rules* empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from subordinate court has been complied with. Visram J, (as he was then) in *Patricia Njeri & 3 Others v National Museum of Kenya* [2004]eKLR outlined the following principles applicable in considering an application for an injunction pending appeal. That an order of injunction pending appeal is discretionary and will be exercised against an applicant whose appeal is frivolous. That the discretion should be refused where it would inflict greater hardship than it would avoid and that the applicant must show refusal of the injunction would render the appeal nugatory. The court added that the court should also be guided by the principles in *Giella v Cassman Brown [1973] EA 358*.
4. The gist of the Appellant's case is that he is the bona fide purchaser of the suit property at an auction and that he paid the full purchase price. He further contends that he was never served with requisite statutory notices by the Bank and or any other party making the entire process flawed. The Bank has rebutted this position by stating that in as much as the Appellant had purchased the suit property in an auction conducted on 19.03.2020, he failed to pay the balance of the purchase price as stipulated in the memorandum of sale of the same date and the trial court's orders of 23.04.2021. The Bank has also denied receiving the alleged payments by the Appellant for the balance of the purchase price. It further stated that it was not obligated to issue him with any statutory notices and that the application is res judicata.
5. In the application, I note that the Appellant has raised grounds faulting the Ruling of the Subordinate Court. It should not be lost that the main substance in issue will be determined at the hearing of the appeal and that at this stage, the court eschews making any determination on its merits. What I think is important at this stage it to determine whether the Appellant would suffer undue hardship if the injunction is denied and whether in fact the appeal will be rendered nugatory.
6. By a ruling dated 23.04.2021, the Appellant was given 90 days within which to pay the purchase price otherwise the contract would stand rescinded. He failed to do so and instead applied for review. The Subordinate Court dismissed the application for review on 23.01.2022. It is the application subject of this appeal that the Subordinate Court dismissed on the ground that it was res judicata and an abuse of the court process.
7. The Appellant has not denied that the cheques he presented under the pretext that they were for payment of the balance of the purchase price of the suit property, were rejected by the Bank. On a *prima facie* basis and as affirmed by the Subordinate Court in two decisions, it is clear that the Appellant has not paid the full purchase price for the suit property hence he cannot claim to be its owner. He has no right to the suit property.
8. Ultimately, any hardship the Appellant may suffer can be compensated by an award of damages equivalent to any sums paid or the value of the suit property as the Bank has already terminated the contract of sale and the Appellant's remedy, if any, is for damages for breach of contract (see *Esso Kenya Ltd v Mark Makwata Okiya* KSM CA Civil Appeal No.69 of 1991 [1992] eKLR). Further, the Bank as chargee, still owes a duty to the chargor to obtain the best possible price for the suit property and may be liable if it fails to act in the best interest of the chargor. It is not clear if at all, the Appellant is in a position to indemnify the Bank against any claim that may be made by the chargor given that he was unable to pay the purchase price. The balance of equities tilts against the Appellant.
9. The Appellant's application dated 08.02.2024 lacks merit. It is dismissed with costs to the 1st Respondent. The interim orders in force are discharged and the amount of Kshs. 400,000.00 deposited



in court shall be released to the Respondents on account of charges incurred as a result of the aborted auction and costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mr Ombati instructed by O. H. Oyugi and Company Advocates for the Appellant.

Mr Ongeru instructed by Wamae and Allen Advocates for the Respondents.

