



**Innercity Properties Limited v Housing Finance & another (Commercial Case E030 of 2020)
[2024] KEHC 3866 (KLR) (Commercial & Admiralty) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E030 OF 2020
JWW MONG'ARE, J
APRIL 22, 2024**

BETWEEN

INNERCITY PROPERTIES LIMITED PLAINTIFF

AND

HOUSING FINANCE 1ST DEFENDANT

GARAM INVESTMENTS LIMITED 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant has filed a Notice of Motion application dated 17th October 2023 pursuant to the provisions of Order 40 Rule 1 & Order 51 Rule 4 of the [Civil Procedure Rules](#), and Section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 - i. Spent;
 - ii. Spent;
 - iii. That a temporary injunction be issued restraining the 1st and 2nd Defendants whether by themselves, their agents and their servants from dealing, interfering, altering or alienating Title Number Dagoretti/Riruta/1807 situated along Ngong Road, Nairobi pending the issuance of fresh notices in accordance with the provisions of the [Land Act](#) and the Auctioneers Acts and Rules; and
 - iv. That the costs of the Application be provided for.
2. The application is premised on the grounds set on the face of the motion and is supported by affidavits sworn by Wilson Kirungie Gachanja, one of the Plaintiff's Directors on 17th October 2023 & 21st



November 2023. In opposition thereto, the 1st Defendant filed a replying affidavit sworn on 30th October 2023, by Hedaya Malesi its Legal Counsel.

3. In a nutshell, the Plaintiff's case emanates from a dispute relating to the purported exercise of the 1st Defendant's statutory power of sale over the suit properties, namely; Title Number; Dagoretti/Riruta/1807, after the collapse of a previous sale or sales by public auction, without reissuing fresh and new statutory notices and affording the Plaintiff a fresh opportunity to exercise its right of redemption under the charge.
4. It is the Plaintiff's allegation that upon failing to stop the Defendant from selling the suit property by public auction in exercise of its statutory power of sale, the 1st Defendant instructed the 2nd Defendant to advertise the sale of 14 Apartments for sale by Public Auction on 26th May 2020. Subsequently and through a letter dated 4th June 2020, the 1st Defendant wrote to the Plaintiff advising it that the sold the Apartments in the suit property, successfully, to a third party, Fairlake Limited, who emerged as the successful bidder at the said auction, for a total consideration of Kshs.96,430,000/= . The 1st Defendant further advised the Plaintiff that at the fall of the hammer, the successful purchaser had paid the requisite 10% being Kshs.9,643,000/= to the Plaintiff's mortgage account with the 1st Defendant and that the balance of Kshs.86,787,000/= was to be paid within 90 days from the date of the auction sale, that is on or about 26th August 2020.
5. The Applicant further stated that by a letter dated 29th September 2020, the 1st Defendant's Advocates informed it that the said sale was now complete and the 1st Defendant no longer had a financier's interest in the 14 Apartments. As a result, the Plaintiff sought to have from the 1st Defendant a statement of accounts indicating how the sale proceeds had been applied and a payment of any balances due to it. Having resigned itself to the sale, the Plaintiff moved to have its pleadings amended to reflect the new reality and was surprised to learn from the 1st Defendant that it was forced to refund the sale proceeds pursuant to a court case filed by the buyer, and was now looking to resale the property again.
6. The Plaintiff further claims to have learnt that, new sectional titles to the separate apartments in the suit premises had been processed in its name without its involvement. The Plaintiff takes issue with the failure to be kept abreast of the issues affecting the suit premises and argues that the 1st Defendant's action purporting to exercise its statutory power of sale, yet again, without offering it an opportunity to redeem its property was prejudicial to it and urges the court to stop the same through an order of injunction. The Plaintiff takes the position that a new sale cannot be conducted without issuance of fresh notices under the law as to do so denies the Plaintiff the opportunity to exercise its equity of redemption.
7. The Plaintiff further contended that failure by the Defendant to disclose to it the existence of the suits surrounding the failed sale by public auction between the purported successful purchaser, Fairlake Limited and the 1st Defendant was suspicious and argues that the same reeked of collusion as it emerged that FAIRLAKE move to convert the suit property into several titles before acquiring legal title which was irregular and unprocedural, since under clause 17 of the Charge, conversion was not an act required for perfecting the Chargee's title or for vesting the charged property in the Chargee's nominees or in any purchaser.
8. The Plaintiff argues that the actions of the 1st Defendant have occasioned him loss that cannot be compensated by an award of damages as it stands to lose its legal right of redemption if the new auction is allowed to go on without notice to allow it exercise its right of redemption and may be forced to a scenario where they are forced to pay costs which they had not anticipated. The Plaintiff urges the



Court to restrain the Defendants from proceeding with the sale of the suit property until fresh notices are issued.

9. The Defendants opposed the Application and filed a replying affidavit sworn by the 1st Defendant's legal officer Ms. Hedaya Malesi. The 1st Defendant argues that it is within its rights as a Chargee to proceed and exercise its statutory power of sale and find a buyer for the suit property.
10. The Defendant argue that the Plaintiff having been duly issued with the 90-days, 40-days & 45-days statutory notices by the Defendants when the property was first sold does not require any new notices despite that sale having collapsed and that the 2nd Defendant did serve it with a "Courtesy 14-day Notice" before commencing the preparation for the sale by public auction.
11. The Defendant argue that there is no law that requires them to issue fresh notices even where an auction having been completed fails. The Defendant further argue that Plaintiff has all along been aware of its indebtedness and has not made any tangible proposals to redeem the loan. They urge the court to dismiss the application and allow the auction to go on as planned.
12. The application herein was canvassed by way of written submissions which I have carefully considered.

Analysis And Determination

13. Having carefully considered all the pleadings filed in this matter, I note that the only issue that arises for determination by the court is "whether the Plaintiff's application has met the threshold for grant of an order of injunction."
14. The Plaintiff reiterated that the Defendant's present actions of advertising for sale the suit property was illegal, unprocedural and against the law and equity, since the said notices were extinguished once the 1st Defendant confirmed to the Plaintiff that the sale of the suit property to Fairlake Limited had been completed.
15. The principles upon which a court can grant an order of injunction are well settled in the locus classica case of *Giella v Cassman Brown Company Limited*, (1973) E.A at page 353 and elaborated in the Court of Appeal case of *Nguruman Limited v. Jan Bode Nielsen & 2 others*, (2014) eKLR, the court stated that "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-
 - (a) Establish his case only at a prima facie level,
 - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour."
16. In a matter such as the present suit, the Court is called upon to determine these principles in a sequential manner. Once the three principles have been established, the court can proceed to issue an order restraining the Defendant from carrying out its intended actions, until the matter is heard between the parties and the issues therein settled on merit or the requisite steps are taken to comply with the law.
17. As regards whether the Plaintiff has established a prima facie case, the court notes the Defendants have not disputed that the 1st Defendant is in the process of exercising its statutory power of sale through a public auction, as advertised by the second Defendant over the suit property, without issuing it with fresh statutory notices and hence this application is necessary.
18. In its defence, the 1st Defendant argues that there is no law that requires it to issue fresh notices where the public auction once conducted, has collapsed.



19. In the case before this court, the facts are to the effect that the 1st Defendant did indeed issue the requisite Statutory notices upon which it conducted a successful sale by public auction of the suit property and was paid in full for the suit property. Having so been paid, what then remained was rendering of accounts and the plaintiff at the time having accepted its fate, proceeded to amend its pleadings to demand accounts from the Defendant. The said accounts were not forthcoming from the 1st Defendant. The court notes that it took the Plaintiff to move the court for the orders, for the Defendant to disclose to it that the sale had collapsed. The Plaintiff argues, and the same is not controverted, that it waited for three years before this information was disclosed.
20. The Plaintiff further argued that the Defendant proceeded to interfere with the nature and form of the title to the suit property without its involvement and upon obtaining fresh sectional title, proceeded to have the charge endorsed on the same. While the Defendant argues that it was under no obligation to notify the Plaintiff of these changes, the fact that the new titles were issued without the involvement of the Plaintiff in the Plaintiff's name raises issues that require to be ventilated by way of evidence.
21. The Defendants have argued that there is no law that requires them to issue fresh Statutory notices to the Plaintiff before re-selling the property. To buttress this point, the 1st Defendant cited several cases inter alia *Norbert Mungai Wambeti v Legacy Auctioneering Services & 2 others* [2021] eKLR, *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] eKLR, and the Court of Appeal case of *Mbuthia v Jimba Credit Finance Corporation & another* [1988] eKLR.
22. The Court in the case of *Norbert Mungai Wambeti v Legacy Auctioneering Services & 2 others (supra)*, *& Executive Curtains and Furnishings Limited v Family Finance Building Society* [2007] eKLR where Warsame J. (as he then was) held that:-

“...I am not aware of any law requiring the Defendant to repeat or re-issue the statutory notices once it is issued and served upon the borrower...”
23. While the above position may be the prevailing position where a public auction realizes no sale in the first instance, it is important to note that in the present case, the public auction was successful and the sale completed and purchase funds paid in full and hence the 1st Defendant's statutory power of sale at that point was extinguished. In my view, once the sale was cancelled and funds refunded, the prevailing situation required the involvement of the Plaintiff since despite the sale, title had not passed and the Plaintiff remained the registered proprietor of the suit property. For this reason, the Plaintiff's right to exercise its equity of redemption was rekindled and it is my considered view that the same required that the process be commenced a fresh. The court finds that failure to do was prejudicial to the rights of the Plaintiff.
24. Based on the facts herein and the plaintiff's averments I am satisfied that the Plaintiff has successfully established that it has a prima facie case against the Defendants, with high chances of success, to warrant grant of the orders sought herein.
25. The second principle under *Giella* case(supra) is whether damages would be enough to compensate the Plaintiff for its loss. The court notes that while the Defendant proceeded with the sale, the Plaintiff had legitimate expectation that its indebtedness to the Defendant would be settled upon application of the sale proceeds to the loan. It was incumbent upon the Defendant to notify the Plaintiff within a reasonable period, once the sale fell through, to allow it to either find resources to satisfy the debt or come up with proposals on how the property could be salvaged. To my mind, the Defendant's failure to re-issue fresh notices to the Plaintiff or re-engage them, denied the Plaintiff the opportunity to exercise its right of redemption and which right, in my view, accrued once there was no sale. This being a legal



right, it would be right to say that a denial of a legal right to a deserving party cannot be commensurate with compensation in damages. I am therefore satisfied that this second principle was established.

26. Finally, on the issue on the balance of convenience, the property is still charged to the Defendant and if the proper laid down procedures are followed, the Defendant's rights under the charge are still in place. If, however, the Plaintiff is locked out of the opportunity to redeem the property, then the Plaintiff will be greatly prejudiced. I am therefore persuaded that the balance of convenience tilts in favour of the Plaintiff as it continues to be the registered proprietor of the suit property and responsible for the outstanding loan which remains unpaid and outstanding.
27. Secondly, the Plaintiff submitted that the conversion of its title over the suit property into sectional titles without its knowledge, consent or participation is illegal and against the provisions of either the Land Act and/or the Sectional Properties Act. Thus, it is my considered view that the potential illegality ought to be investigated and determined at the hearing of the main suit. If the property is sold, then this will be defeated as there will be no longer any property to interrogate.
28. In sum, I am satisfied that the Application has met the threshold set out under the Giella(supra) decision and will allow the same. The Defendants are hereby restrained from proceeding with the sale of the suit property by public auction or otherwise until matter is heard and finalized. The Application is therefore allowed with costs to the Plaintiff/Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF APRIL, 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Gachanja for the Plaintiff.

Mr. Kimani for the Defendants.

Amos - Court Assistant

