



IN THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC NO. 711 OF 2017

JAMES MUNGAI GACUCU.....1ST PLAINTIFF

REMA ENTERPRISES LTD.....2ND PLAINTIFF

= VERSUS =

STANDARD CHARTERED BANK OF KENYA.....DEFENDANT

MARY WANGARI GACUCU.....INTERESTED PARTY

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated 15th November 2017, in which they sought the following orders.

1) *Spent*

2) *Spent*

3) *Spent*

4) *That pending the hearing and determination of the suit, the respondent be and is hereby restrained whether by itself its officers, employees, agents, servants and/or any other person whomsoever from taking and/or vesting possession, taking over the management, assuming control and/or in any other way interfering with the 1st applicant's possession, management, control and use of the property i.e LR No.209/11095/57 (I.R No. 79385),209/11095/58(I.R No.79386) and 209 11095/59 (I.R No.79387) Rangers Court, South "C" Estate, Nairobi.*

5) *That pending the hearing and determination of the suit, The Honourable Court does hereby retrain the Respondent by its officers, employees, agents, servants and/or any other person whomsoever from proceeding with, completing or in any other manner whatsoever acting on the purported sale of the 1st applicant's property i.e LR No.209/11095/57 (I.R No. 79385),209/11095/58(I.R No.79386) and 209 11095/59 (I.R No.79387) Rangers Court, South "C" Estate, Nairobi conducted by the Respondent's agents Garam Investments Auctioneers conducted on 14/11/2017.*

6) That the Respondent be compelled to produce the proceedings of the purported sale of the suit property, conducted on 14/11/2017, including details of the purchaser, time of the sale, the amount realized, place of purported sale of the suit property and all other pertinent particulars.

7) That cost of this application be provided for.

2. The applicants contend that on 14th November 2017 they obtained orders stopping a scheduled auction of LR No.209/11095/57 (I.R No. 79385) LR No. 209/11095/IR No.79386) and LR No.209/11095/59 I.R No.79387 (suit properties) which are situate at South "C" Nairobi. The orders were granted by Justice Tuiyott in the Commercial and Admiralty Division of the High Court in Civil case No. 645 of 2015. The order was conditional upon the applicants depositing kshs.750,000/= into the respondents' account within a given time. The applicants contend that they made arrangements to transfer the sum of Kshs.750,000/= to the respondent's account which was actually made but after the auction had taken place and the suit properties sold. The applicants blame the auctioneers who delayed in giving them the account particulars.

3. The applicants now want to stop the completion of sale and transfer to the purchaser. They contend that the sale was done contrary to the orders of Justice Tuiyott; that there was no service of notice of sale upon the interested party who is a spouse of the first applicant; that interest applied on the loan was irregular; and that there was no service of notices upon the tenants on the suit properties before the sale could proceed.

4. The applicants' application is opposed by the respondent based on a replying affidavit sworn on 29th November 2017. The respondent contends that the present application is an abuse of the process of the court. That the applicants were given time to repay the loan as stipulated in a ruling delivered on 22nd April 2016 but they failed to comply forcing the respondent to reinstate its exercise of its statutory power of sale. The applicants once more moved back to court in the aforesaid case where they obtained conditional orders. They were to deposit Kshs.750,000/= by a given time which they failed to do hence the auction.

5. The Respondent further contends that the issues being raised by the applicants were raised before Justice Kariuki who fully addressed them in his ruling of 22nd April 2016. That the applicants have failed to disclose to this court that there are other proceedings in the Chief Magistrates Court regarding the suit properties and that there were ex-parte orders of injunction obtained in the Chief Magistrate's Court. The respondent further states that the applicants are doing forum shopping in the hope that they will get favourable orders. That it is apparent that the applicants are unable to pay the loan and the respondent should be left to carry on the sale process to completion. That the applicants have not come to court with clean hands and as such no equitable relief can be granted to them.

6. I have considered the applicants' application as well as the opposition to the same by the respondent. The applicants are seeking injunctive orders and certain disclosures regarding the auction, the place where it occurred and the amount which was realised as well as the parties involved. This being an application for injunctive reliefs, the applicants are expected to demonstrate that they have a prima facie case with probability of success. As was clearly stated in the case of **Mrao Vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125.**

"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".

7. In the instant case the applicants are claiming that the sale was done contrary to the orders of Justice Tuiyott. It is admitted that the deposit of Ksh.750,000 was made after the auction had already been conducted. The delay in compliance with the Court's orders cannot be blamed on either the respondent or the auctioneer. The Judge must have had a good reason why he ordered that the sale was to be stopped on condition that a deposit of Kshs.750,000/= was made.

8. The applicants had been indulged since 2015 but they could not comply with the conditions given by Justice Kariuki who having found no merit in their application nevertheless went ahead to issue an injunction on conditions. The respondent had deponed that the applicants did not meet the conditions as stipulated in the Ruling on 22nd April 2016. The applicants were granted leave to file a further affidavit but they did not. The applicants lawyer stated from the bar that the applicants had made a payment of ksh.10,000,000/=. Even if this was the case, there were other conditions given on how the applicants were to pay the balance. They did not.

9. The applicants are raising the issue of the auction not having been conducted in accordance with the law. They are even raising the issue of irregular interest applied on the loan. All these issues cannot be raised now. They were addressed by Justice Kariuku who found that the applicants were not disputing the amount owed to the respondent. If the auction was conducted contrary to justice Tuiyott's order, they should have gone there not to file a fresh suit to raise similar issues while the case before Justice Tuiyott is still pending.

10. It is clear from the pleadings in the case before the Commercial Division as well as this case that the applicants had no intention of repaying the loan but were instead preparing ground for claim for damages. In the case before the Commercial Division of the High Court, they are claiming special damages in excess of Kshs.100,000,000/= as well as damages for breach of contract . In the current suit they have quantified their loss at Kshs.60,000,000 for value of the lost property . They are also claiming back 750,000 deposited in compliance of the Court Order.

11. The properties have already been sold and the details of whom they were sold to has been disclosed in the memorandum of sale. This therefore has answered the applicants' prayers in prayer (6). The timing of Milimani Chief Magistrate's Court Civil case No. 8034 of 2017 brought by Site Forwarders Ltd against the first applicant herein and **Garam Investments Auctioneers** is suspect. This case was filed a day before the scheduled auction. Its sole purpose was to obtain orders stopping the sale on the pretext that the first applicant owed the Plaintiff therein Kshs.20,000,000 which was allegedly given to him on 1st March 2016 to which he made an acknowledgment by hand. The purported loan agreement was not executed before an advocate. The said agreement was done in hurry that on the second page it is shown that it was prepared in 2017. If the first applicant wanted the Court to believe that he took that loan in 2016, what then prevented him to apply the loan to salvage the suit properties"

12. There is no allegation that there was collusion between the respondent and the buyer of the house. As the suit properties have already been sold and the applicants having failed to demonstrate a prima facie case, their remedy if they will proof that there was irregularity in the manner the auction was conducted lies in damages. There is absolutely no merit in this application which is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **19th day of December 2017.**

E.O.OBAGA

JUDGE

In the presence of;-

Mr Kiarie for Mr Kiprotich for applicants

M/s Njeri Mucheru for respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE



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