



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngetich v Letshego Kenya Limited & another (Civil Case 1 of 2019)  
[2024] KEHC 11341 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL CASE 1 OF 2019  
JK SERGON, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**DANIEL NGETICH ..... PLAINTIFF**

**AND**

**LETSHEGO KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ANTIQUA AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application coming up for determination is a notice of motion dated 29th April, 2024 seeking the following orders;
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. That the dismissal orders dated 7.2.2024 be set aside and the suit reinstated for hearing.
  - v. That pending the disposal of suit a temporary injunction order be issued to restrain the intended sale of Kericho/kabartegan/97 and 1260
  - vi. Costs be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Daniel Ngetich the applicant herein.
3. The applicant avers that he sought an injunction order against the respondents vide an application dated 16.10.2017 and obtained an injunction order, as the 1st respondent had contravened the legal requirements to exercise the power of sale prescribed under the *Land Act* No. 6 of 2012.



4. The applicant avers that the instant suit was subsequently dismissed on 7.2.2024 for non-attendance on his part and the said dismissal was not communicated to him.
5. The applicant avers that even if the instant suit was dismissed, that did not give the respondent the legal right to proceed with sale of the suit property before issuing fresh notices of sale since the earlier notices were not served as per the law.
6. The applicant avers that upon discovery of the notice of intended sale vide a newspaper advertisement dated 30.4.2024 he rushed to court and was informed that the suit had been dismissed for non attendance. The applicant further avers that upon follow up with his advocates on record, he was informed that they failed to diarize the hearing date, hence forgot to attend court. The applicant was therefore adamant that the mistake of his advocate ought not to be visited on him.
7. The applicant avers that the respondents had instructed different auctioneers who were not privy to the instant suit to carry out the auction.
8. The applicant avers that the instant affidavit was sworn in support of the application to set aside the dismissal order dated 7.2.2024 and to have the injunction order dated 1.11.2017 reinstated.
9. The applicant further avers that he has proposed to settle the legal dispute with the 1st respondent out of court.
10. The respondent filed a replying affidavit in opposition to the application which was sworn by Stephen Parsimei the Legal Officer of the 1st Defendant/Respondent herein and therefore familiar with the matters that are the subject of these proceedings and duly authorised by 1st Defendant/Respondent to swear the Affidavit.
11. The respondent avers that by way of a Letter of Offer dated 3<sup>rd</sup> May 2016, the 1st Defendant/Respondent offered the Plaintiff/Applicant with a loan facility of Kshs. 4,000,000/=. The loan was guaranteed by Christine Tabelga and Safina Chepkemoi Ngetich who offered their parcels of land namely Kericho/kabartegan/97 and Kericho/kabartegan/1260 (Hereinafter the 'Suit Properties') respectively, as security for the loan. Subsequently, the loan proceeds were disbursed to the Plaintiff/Applicant sometime in May, 2016. The Plaintiff/Applicant defaulted in servicing the loan accounts and despite the 1st Defendant/Respondent having given the Plaintiff/Applicant more time to regularise his payments, his default persisted.
12. The 1st Defendant/Respondent avers that on 10<sup>th</sup> May, 2017, through its advocates issued the Plaintiff/Applicant with a statutory notice demanding the payment of the outstanding arrears within the ninety (90) day statutory period which was completely ignored. The 1st Defendant/Respondent equally served the Plaintiff/Applicant and the Guarantors with a 40 Days' Notice to Sell.
13. The 1st Defendant/Respondent avers that thereafter they instructed the 2nd Defendant/Respondent to proceed with the sale of the securities to recover the loan amount. The 2nd Defendant/Respondent acting on the said instructions issued the two guarantors with a Forty Five (45) day Redemption Notice and a Notification of Sale and that the Plaintiff/Applicant intended to use the said Redemption Notice issued in 2017 during trial which is a clear indication that he received the notice and chose to ignore it.
14. The 1st Defendant/Respondent avers that the purpose of a Forty-five (45) day Redemption Notice is to give a debtor an opportunity to salvage his property, to know the amount due and take steps to save the same from the hammer. Once still notification and opportunity is given, there is no need for a repeat. Accordingly, there was no need for a fresh notice to be issued. Nonetheless: the 1st Defendant/



- Respondent's instructed Kogo Junior Auctioneers to serve the Plaintiff/Applicant with a fresh notice which was served upon him on 27<sup>th</sup> February, 2024 but he declined to acknowledge receipt.
15. The 1st Defendant/Respondent avers that they were advised by their advocates on record, that the Plaintiff/Applicant has taken little or no steps to prosecute this suit having been filed in the year 2017. It has been over six years since the suit was filed and the same is yet to be heard and determined and as a result ends up clogging the Court system.
  16. The 1st Defendant/Respondent avers that they were advised by their advocates on record, that the instant suit had been fixed for hearing on three occasions being 3rd July, 2023, 12th October, 2023 and 7th February 2024. The said hearings did not proceed on these three occasions at the instance of the Plaintiff/Applicant as the record will bear witness. It is therefore clearly evident that the Plaintiff/Applicant is guilty of laches and has handled this case in a very casual manner.
  17. The 1st Defendant/Respondent avers that the Plaintiff/Applicant has come to Court for purposes of defeating the Defendants/Respondents statutory right to realize the security, a right which has been held in abeyance since the year 2017.
  18. The 1st Defendant/Respondent avers that there is a delay of three (3) months in bringing this application since the dismissal order was issued. The Plaintiff/Applicant went to slumber and only woke up upon realizing that the suit properties were advertised for sale. Therefore, this is a party that is guilty of laches and has disintitiled himself of the Court's discretion.
  19. The 1st Defendant/Respondent avers that they should therefore be allowed to proceed and realise the security so as to prevent it from suffering financial loss which it continues to do with every passing day that the Plaintiff/Applicant is in default.
  20. The 1st Defendant/Respondent avers that the Plaintiff/Applicant has not even taken any steps to clear the outstanding loan balance since the filing of this suit, which currently stands at Kshs. 3,662,795.83/ = and has therefore approached this Court with unclean hands. Equity demands that he who comes to equity must come with clean hands and that he who seeks equity must do equity.
  21. The 1st Defendant/Respondent avers that the assertions by the Plaintiff/Applicant are false, misleading, and unmaintainable in law and therefore the application dated 29th April 2024 is frivolous, scandalous, vexatious and a gross abuse of the court process which must not be ignored. Furthermore, the prayer for injunction is res judicata having been considered and determined by Hon. Lady Justice J.M. Onyango on 1st November, 2017.
  22. Having considered the pleadings by the respective parties, the issues for determination are whether to set aside dismissal orders dated 7.2.2024 and reinstate the suit for hearing and whether to grant a temporary injunction order restraining the intended sale of Kericho/kabartegan/97 and 1260.
  23. On the issue as to whether to set aside dismissal orders dated 7.2.2024 and reinstate the suit for hearing. This court has considered the conduct of the Plaintiff/Applicant in prosecuting this suit, the Plaintiff/Applicant has demonstrated laxity in prosecuting the suit which has been fixed for hearing on three occasions being 3rd July, 2023, 12th October, 2023 and 7th February, 2024 and the said hearings did not proceed on these three occasions at the instance of the Plaintiff/Applicant. On 7th February, 2024 this court dismissed the suit for want of prosecution. In an application for reinstatement of a dismissed suit or application, such as the one before this court, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated: "We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgement or



order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.” The circumstances of this case are sufficient to persuade the Court that the non-attendance by the Plaintiff/Applicant at the hearing is a deliberate attempt to obstruct or delay justice. Accordingly, he should be denied any further hearing. It is clear that the Plaintiff/Applicant has come to Court for purposes of defeating the Defendants/Respondents statutory right to realise the security, a right which has been held in abeyance since the year 2017.

24. On issue as to whether to grant a temporary injunction order to restrain the intended sale of Kericho/kabartegan/97 and 1260. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in the renowned cases of *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows: “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. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.” The Plaintiff/Applicant has not made out a strong and cogent case warranting this court to issue an interlocutory order to restrain the intended sale of Kericho/kabartegan/97 and 1260, in any event the Plaintiff/Applicant is indebted to the Defendant/Respondent and therefore the Defendant/Respondent’s statutory right to realise the security, should not be fettered.

25. In light of the foregoing, the notice of motion dated April 29, 2024 is found to be without merit. It is dismissed with costs being awarded to the Defendants.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 26<sup>TH</sup> DAY SEPTEMBER, 2024.**

**J.K. SERGON**

**JUDGE**

**In the Presence of:-**

C/Assistant – Rutoh

No Appearance for Plaintiff/Applicant

Mukeli for the Respondent

