



**Meru Greens Horticulture EPZ Limited & another v Equity Bank (K) Limited
(Civil Suit E006 of 2023) [2023] KEHC 25790 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT E006 OF 2023
EM MURIITHI, J
NOVEMBER 28, 2023**

BETWEEN

MERU GREENS HORTICULTURE EPZ LIMITED 1ST PLAINTIFF

MOUNT KENYA GARDENS LIMITED 2ND PLAINTIFF

AND

EQUITY BANK (K) LIMITED DEFENDANT

RULING

1. By Notice of Motion dated 27th April 2023, the plaintiff seeks an injunction against the defendant to restrain the sale of its land in exercise of the defendant's charges power of sale among other reliefs as follows:
 - “1. That this application be certified urgent, service dispensed with and heard *ex parte* in the first instance.
 2. That this honourable court be pleased to issue an order of injunction restraining the defendant through the directors, employees, servants agent and/ or anyone deriving benefits and/ or instructions from them from Advertising, seeking alienating and in any other way interfering with the quiet enjoyment of properties known as Titles Nos Abothuguchi /Kariene/2941 & 2942 Gatimbi Shopping Centre-Equator Area off Meru Nkubu Embu Road Meru County pending inter partes hearing and determination of this application and suit.
 3. That this honourable court be pleased to issue an order directed at the defendant through their Directors, employees agents and/ or servants to allow



them re-structure the said loan repayment in view of the external financing by a 3rd party.

4. That this honourable court be pleased to issue an order that the defendant.
5. That this honourable court be pleased to issue an order declare the purported sale process void.
6. That this honourable court be pleased to issue an Order directed at the respondent to have their name removed from CRB.
7. That this honourable court be pleased to issue injunctory orders and also for a declaratory orders declaring the entire process of sale pursuant to section 90, 96 and 97 of the- Land Act as non-compliant and void.”

2. The principal ground of the application is that the defendant has failed to follow the provisions of section 90 (1) and (2), 96(2) and 97 (3) of the Land Act in the grounds of the application set out as follows:

- “ 1. That the defendant through Garam Auctioneers have issued 45 days advertised for sale the plaintiffs properties being Titles Nos Abothuguchi /Kariene/2941 & 2942 Gatimbi Shopping Centre-Equator Area off Meru Nkubu Embu Road Meru County.
2. The said sale is in exercise of the defendant power of sale and is slated for 3rd May 2023 at 12 noon outstanding.
3. The defendant failed to issue Notice in accordance to section 90 (2) of the Land Act.
4. The sale by the defendant is actuated by Malice since the plaintiffs have a financier who is ready and willing to finance the business to enable the plaintiffs repay the loan.
5. In June 2022, the plaintiffs had agreed with the defendant to live a consultant by the name of Peter Nyaga who still works with the plaintiffs and paid by the defendant.
6. The Terms of reference was for the Consultant to report on the business viability and provide turn around plan. This was well done and the reports were presented where the expert advised the Lender to inject \$433,000, and the business would have been able to start repaying the defendant from the Month February 2023. The defendant never acted on trashed the Consultant’s report and went ahead to instruct auctioneers to attach the assets the premises of this suit.
7. The plaintiffs have a strong feeling that the defendant is giving an ear to the plaintiffs' shareholder who had written to them to proceed with the Auction.
8. The defendant is aware of the current shift in the World demand of processed foods that the plaintiffs business is in demand, and therefore has allowed the wishes of the Shareholder to frustrate the business from the plaintiffs



9. That the defendant is aware that the business is only one in world owned by a native supplying sterilized fruits and vegetables to European 'chain stalls
 10. That the business had secured 5yrs supply contracts worth Kshs 6,000,000,000
 11. The defendant is aware of the Shareholder intents after she sabotage the holding Company but not willing to help structure the facility so as to turnaround the business.
 12. The plaintiffs have an investor Scipion Trading Capital is unable to finance the business because defendant has issued proceeded with teh sale process
 13. The plaintiffs invited United Bank for Africa and Access bank to provide working Capital, but the defendant declined.
 14. The plaintiffs are also seeking for an Order that the defendant failed to follow the provisions of section 90 (2) and 96 (2) and 97 (3) of the Land Act.
 15. The sale valuation as set out in the Notification of sale by the defendant is far below the value of property which contravenes the provisions of section 97(3) of the Land Act.
 16. To that extent the Application are seeking for a Court Order to declare the purported sale process void.
 17. The plaintiffs and directors have been listed in the CRB which completely incapacitates them from making any alternative means of financing
 18. The plaintiffs eo-directors was never served and neither did she were signed the 45 days Notice in line with section 96(13) of the Landa Act. (*sic*)”
3. The defendant filed a replying affidavit sworn by its Legal Services manager Kariuki Kin’gori on 16/5/2023 countering the facts asserted by the Plaintiffs and alleging abuse of court process as follows:
- “ 8. In July 2021 the moratorium granted to the 1st plaintiff had lapsed and the 1st plaintiff was in default. The defendant moved to realise the charge offered over Title Numbers Abothuguchi/Kariene/2941 & 2942.
 9. By a letter dated 13th August 2021, the defendant issued the pt plaintiff with a statutory notice under section 90 of the Land Act demanding payment of Kshs 22,064,588.05 and EUR 23,010 secured by charge over Title Numbers Abothuguchi/Kariene/2941 & 2942 registered in name of the 2nd plaintiff. A copy of this letter is at pages 95 to 96 of the exhibit.
 10. The letter dated 13th August 2021 contained all the information required under section 90 (2) of the Land Act.
 11. The letter dated 13th August 2021 was sent to the plaintiffs by registered mail. A copy of the certificate of posting confirming postage is at pages 97 to 98 of the exhibit. It is not correct that the plaintiffs were not served with a notice under section 90 of the Land Act.
 12. The 1st plaintiff did not make payment within the time set out in the notice under section 90 of the Land Act, 2012.



13. By a letter dated 28th October 2022 the defendant issued the 2nd plaintiff a 40-day notice to sell required under section 96 of the Land Act relating to Title Numbers Abothuguchi/Kariene/2941 & 2942. The total outstanding amount due as at that date was Kshs 217,461,476 and EUR 2,338,431. A copy of this letter is at pages 99 to 100 of the exhibit.
14. This notice was served on the plaintiffs by registered mail. A copy of the certificate of posting is at pages 101 to 102 of the exhibit. It is not correct as alleged by the plaintiffs that the defendant 'failed to issue the statutory notices required under section 96 of the Land Act.
15. When the notice lapsed, the defendant did not take steps to advertise Title Numbers Abothuguchi/Kariene/2941 & 2942 for sale until December 2022 to give the 1st plaintiff an opportunity to settle the outstanding debt. The 1st plaintiff however failed to make any acceptable proposal to settle the outstanding sums.
16. On 10th January 2023, the defendant was approached by Gerald Muthomi, a director of both the plaintiffs, together with Peter Nyaga Munyi, a consultant engaged by the 1st plaintiff, for a meeting. It is not correct that the defendant agreed to pay Peter Nyaga as alleged. The consultancy agreement between the 1st plaintiff and Peter Nyaga Munyi is at pages 24 to 35 of the plaintiffs' bundle of documents dated 27th April 2023.
17. At the meeting of 10th January 2023, Mr Muthomi presented a proposal on how the plaintiffs business would be turned around and how it would be able to start making loan repayments. His proposal was heavily reliant on funds the 1st plaintiff expected to receive from an entity known as known as Scipion Capital. No evidence was provided that Scipion Capital had committed or disbursed funds to the 1st plaintiff. Mr. Muthomi also requested a moratorium to freeze repayments for at least 6 months. These proposals were not acceptable to the defendant. A copy of the minutes of the meeting of 10th January 2023 are at pages 103 and 104 of the exhibit.
18. The defendant appointed Garam Investments Auctioneers to carry out the sale for Title Numbers Abothuguchi/Kariene/2941 & 2942. The auctioneer prepared and served the plaintiff with a 45 day redemption notice dated 24th February 2023 together with a notification of sale. The auctioneer served the notices physically on the plaintiffs director, Gerald Muthomi, who acknowledged receipt by appending his signature. The plaintiff was notified that the charged properties would be sold by public auction on 4th May 2023. Copies of the auctioneer's service report, certificate of service, acknowledged redemption notice and notification of sale are at pages 105 to 109 of the exhibit.
19. It is therefore not correct as alleged that the plaintiffs were never served with the redemption notice as alleged."



Submissions

4. Counsel filed respective written submissions on their respective contentions in the suit. For the applicant, it is urged a breach of applicable provisions of law realisation of security on default of loan repayment, primarily as follows:

“My lord it is the contention. of the plaintiff that the 90 days redemption. Notice was never served upon them.

The Defendant contends that they served Notice upon by registered posts to the plaintiff through registered post of P.O BOX 1730-60200.

The plaintiff contends that they never received such Notice.

There. is also evidence that there was email correspondence and physical meeting between parties has been advertised the 45 days by the Auctioneers was served.

The plaintiff contends that the 90 days redemption Notice was presumed service.

The 45 days Auctioneer Rules were served upon 1 director of the plaintiff.

The spouse of the director was never served with both 90 days Notice and 45 days Notice in compliance with section 96 of the Act.

My lord evidence of service of 90 days redemption Notice has become a contempt issue.

The said post office box 1230-60200 do not belong to the plaintiff...

My lord the 2nd issue is in respect to valuation My lord 2 valuation report have given varied forward valuation from the properties in issue.

The variation of the forced value is over and incapable of being reconciled.

The variation require evidence to be reviewed by both valuers so as to ascertain and to ensure that plaintiff obtaining the best price.” (*sic*)

5. For the defendant, it was urged that the suit and the application were an abuse of process of court being filed with ulterior motive and without full disclosure of material facts as follows:

- “ 1. The defendant relies on the facts set out in the replying affidavit of Kariuki King'ori sworn on 16th May 2023 and its grounds of opposition dated 16th May 2023 to oppose the injunction application.
2. The plaintiffs' application and suit is an abuse of court process filed solely with the intention of delaying the defendant from exercising its statutory power of sale so that the plaintiffs can secure funding from another financier. This is evident from a letter dated 6th April 2023 addressed to the 1st plaintiff by Scipion Capital where Scipion Capital notes that the defendant is proceeding to sell assets belonging to the plaintiffs by public auction on 2nd May 2023. Scipion Capital guarantees that it would provide additional funding "if the Borrower is able to find a method to stop the sale and gain a further stay of proceedings". See the letter at pages 19 and 20 of the bundle of documents filed by the plaintiffs.



3. In *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, the Court of Appeal at page 11 of the judgment described abuse of process as when the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective.
4. The plaintiffs are using the court process to frustrate the defendant from exercising its power of sale pursuant to a request from a potential financier so that the plaintiffs can secure additional funding. This is the most egregious abuse of the court process and ought to be condemned. The plaintiffs' injunction application ought to be dismissed and the interim order discharged on this ground alone.
5. The plaintiffs are also guilty of material non-disclosure which disentitles them from any equitable relief. They have approached the court with unclean hands and are not deserving of any equitable orders.”

Issues for determination

6. The case rests on the court's determination on the issue of delivery of statutory notices and existence of evidence to support the claim of material non-disclosure and general abuse of court process. If the assertion of material no disclosure and abuse of process is established, the Court shall have no justification to proceed with the suit and application any further, as since the leading decision of *R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 KB 486 [not 1977, as cited by Counsel for the Defendant] it is settled that the Court should discharge any advantage gained by the applicant who obtained *ex parte* orders without full disclosure of material facts so that the court feels that it was deceived. See also *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1995] eKLR and *Fluid & Power Systems Limited v Kalsi* [1991] KLR 586
7. The test for the grant of interlocutory injunction on the formulation of *Giella v Casman Brown* (1973) EA 358 is well known. The Court shall only delve into the interrogation whether the tests for *prima facie* case, adequacy of damages and the balance of convenience if it determines that there is a proper application before it, not one tainted by non-disclosure and abuse of process of court.

Determination

8. Sections 90, 96 and 97 of the *Land Act* make provision for the giving of statutory notices before the exercise of the chargee's power of sale. The defendant indicates that it gave the statutory notices under section 90 and 96 and the Auctioneer gave a redemption notice under section 97 of the *Land Act* by way of registered post to the address given in the Charge. The Plaintiff claim that the address is wrong and it does not belong to the plaintiff.
9. On the civil standard of proof on a balance of probabilities, the court accepts it as more likely than not that the Defendant gave the appropriate notices in this matter given the conduct of the parties. Both parties refer to some negotiations towards settlement of the dispute prior to the decision to sell the charge property, in the words of the Plaintiff at paragraphs 2-10 of the supporting affidavit of 27/4/2023 went as follows:

- “2. That the defendant through Garam Auctioneers have issued 45 days advertised for sale the plaintiffs properties being Titles Nos Abothuguchi/Karienej2941 & 2942 Gatimbi Shopping Centre-Equator Area off Meru Nkubu Embu Road Meru County.



3. That the said sale is in exercise of the defendant power of sale and is slated for 3rd May 2023 at 12 noon outstanding.
 4. That the defendant failed to issue Notice in accordance to section 90 (2) of the [Land Act](#).
 5. That the sale by the defendant is actuated by Malice since the plaintiffs has a financier who is ready and willing to finance the business to enable the plaintiffs repay the loan.
 6. That In June 2022,the plaintiffs had agreed with the defendant to live a consultant by the name of Peter Nyaga who still works with the plaintiffs and paid by the defendant
 7. That the Terms of reference was for the Consultant to report on the business viability and provide turnaround plan. This was well done and the reports were presented where the expert advised the Lender to inject \$433,000, and the business would have been able to start repaying the defendant from the Month February 2023. The defendant never acted on trashed the Consultant's report and went ahead to instruct auctioneers to attach the assets the premises of this suit.
 8. That the defendant is aware of the current shift in the World demand of processed foods that the plaintiffs business is in demand, and therefore has allowed the wishes of the Shareholder to frustrate the business from the plaintiffs
 9. That the defendant is aware of the Shareholder intents after she sabotage the holding Company but not willing to help structure the facility so as to turnaround the business.
 10. That the plaintiffs have an investor Scipion Trading Capital is unable to finance the business because defendants have issued proceeded with the sale process.”
10. It is inconceivable that the parties would have been negotiating the take over of the debt by another debtor without having given the statutory notices. There would have been no impetus for such negotiations. The Court has confirmed that the address given in the registered post letter and the certificate of posting is 1730 – 60200 Nairobi, which is the same address given in the charge documents. The Court accepts the guidance of the Court of Appeal in [Nyagilo Ochieng & another v Fanuel Ochieng & 2 others](#) [1995-1998] 2 EA 260 as to certificate of posting being *prima facie* proof of service to a person's postal address. See also Order 5 Rule of the [Civil Procedure Rules](#).
 11. The court respectfully accepts the submissions by Counsel for the Defendant that there is no requirement for all directors or shareholders of a company to be served in order for service of notice of notice to a company be valid and there is no requirement for service upon the spouses of directors of a company that has charged its property to secure a debt. Such notice to a spouse is only a pre-requisite in case of individual natural person charge and not legal entity of the nature of a company.
 12. It is clear to the court that the plaintiff is seeking to delay the conclusion of this matter to enable them acquire some capital investment by prospective investors. The plaintiff's counsel in fact sent out a letter



dated 1/10/2023 to the Court seeking such an indulgence under the pretext that a consent between the parties was likely to be filed in Court, as follows:

“ 30th October 2023

To,

The Deputy Registrar,

High Court,.

Meru.

Dear Sirs,

RE: Meru Bee No EOO6 OF 2023

Meru Greens Horticulture Epz Limited & another-v-equity Bank Limited.

We refer to the above matter.

Our Client are at an advanced stage on the sale of property to Camilco.

We propose that when we appear before the Judge on the 30th October 2023, we ask the Judge to hold the Ruling in abeyance as our client concludes.

We propose a further mention in early December to confirm settlement.

You may confirm the position from your clients.

Yours faithfully,

FOR: Ojienda & co.

Seth Ojienda”

13. The Court then reset the ruling on the application to enable the parties to concluded the Consent and set the matter for directions for consent on settlement on 20/11/2023, when Counsel for the Defendant informed the court that no such discussions towards any consent were underway and she request the court to proceed to ruling in the matter. The Court then reset the ruling for delivery on 28/11/2023.
14. The court must find a case of abuse of court process by the applicant who had been duly served with the statutory notices necessary for realisation of charge security, given ample opportunity to enter into an agreement for and failed to secure the payment fo the loan amounts now due. The suit and application before the Court were filed for the sole purpose of buying time to enable the plaintiff secure alternative funding. It is an abuse of process of the Court. The Court respectfully accepts the guidance of the Court of Appeal in the decision cited by Counsel for the Respondents, *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others*, *supra*, on abuse of the process of court in suits filed for motives other than lawful pursuit of genuine grievance.
15. Moreover, the plaintiff was guilty of non-disclosure as regards the service of statutory notices and that here had been accommodation given by the defendant to settle the matter before the suit was filed. In the record of proceedings on the first appearance before the court *ex parte* on 4/5/2023, Counsel for the plaintiff submitted as follows:

“ Mr. Ojienda



The defendant has not complied with ss.90 (2), 97(3) and 96(2) of the *Land Act*. The provisions of provide for 90 days' notice to the defaulter. The Auctioneer gave 45 days' notice but the 90 days notice was not given. Section 96(2) a co-owner or shareholder ought to be served. The spouse of the director was not served. The value of the property. Section 97 (3). Sale at an under value. The property is valued at 12,000,000/- but the market value by the plaintiffs is about 25 million. The property is seriously under valued. The plaintiff is prejudiced by an under-value. The bank will get little value and still come back for the balance. We pray for interim orders. The sale is [today] at 10.30am.”

16. On the evidence given in the Replying Affidavit by the Defendant's officer, it is now clear that the applicant deceived the court that they had not been served with the statutory notices and that their effort to settle dispute had been rebuffed by the defendant, none of which is true. The Court must find the plaintiff applicant guilty of material non-disclosure.
17. Had the court been aware of the facts set out in the Replying Affidavit, it would not have granted the temporary injunction herein which must now on the authority of *ex parte* Princess Edmond de Polignac, supra, be discharged. For having been filed with the sole purpose of stalling the process of realisation of the security under the loan agreement whose chargee's power of sale had crystallized, the proceedings before the court are an abuse of the process of the court.
18. As is usual in cases of abuse of process of the court, this court will make an order that the advocate who has filed these proceedings on behalf of the plaintiff/applicant do meet the costs of the suit and application personally.

Orders

19. Accordingly, for the reasons set out above, the Court maKshs the following orders:
 1. The Plaintiffs' application for injunction dated 27/4/2023 is dismissed.
 2. The interim Injunction order made herein is discharged.
20. The Costs of the application shall be paid by the Plaintiffs' counsel to the defendant.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ojienda for Applicant.

Mr. Ondieki for the Defendant.

