



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**INSOLVENCY CAUSE NO. 6 OF 2017**

**JOYCE WANJA KIGWA**

**T/A SUMOKO DOWN TOWN ENTERPRISES.....APPLICANT**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**AGUNJA AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicant, **JOYCE WANJA KIGWA T/A SUMOKO DOWN TOWN ENTERPRISE**, has moved the Court by an application dated 14<sup>th</sup> June 2021. The said application sought the following reliefs;

***“1. THAT this application be certified urgent***

***and heard ex-parte in the first instance.***

***2. THAT this Honourable Court be pleased***

***to issue interim orders restraining the***

***Respondents from selling land parcel***

***No. L.R. NO. KITALE MUNICIPALITY***

***BLOCK 13/GATUA/633 or dealing with***

***it in any manner pending hearing and***

***determination of this application.***

***3. THAT this Honourable Court be***

***pleased to issue interim orders***

***restraining the Respondents from***

***selling the land parcel no. L.R. NO.***

***KITALE MUNICIPALITY BLOCK 13/***

*GATUA/633 or dealing with it in*

*any manner pending hearing and*

*determination of the inter-partes*

*hearing.*

**4. THAT the OCS Kitale Police Station or**

*any other Police Station ensures*

*compliance of the orders herein.*

**5. THAT the sale of land parcel no. L.R.**

**NO. KITALE MUNICIPALITY BLOCK 13/**

**GATUA/633 by the Respondent be**

**declared null and void.**

**6. THAT the Honourable Court be pleased**

*to issue an order directing that the*

*Applicant do make a monthly instalment*

*of Kshs 35,000 towards settling her*

*debt.*

**7. THAT the Respondents bear the costs**

**of this application.”**

1. It was the Applicant’s case that she had been declared bankrupt and that a receiving order had been issued against her.
2. The Applicant’s understanding was that, following the issuance of the receiving order, her estate cannot be dealt with in any manner pending the determination of the Insolvency Cause herein.
3. The Applicant expressed the view that she would suffer irreparable and irredeemable loss if the orders sought were not granted.
4. According to the Applicant, the suit property was owned jointly by her and her husband, **MORRIS GITONGA NJAGI KATHIANYU**.
5. She told this Court that her husband is also bankrupt and that his estate was under receivership. In support of that contention, the Applicant exhibited a Receiving Order issued in respect of her husband’s estate, in **INSOLVENCY CAUSE NO. 13 OF 2018**, at the High Court of Kenya, Nairobi.
6. The said Order was made on 23<sup>rd</sup> January 2020.
7. By her further affidavit, the Applicant deponed, inter alia, as follows;

**“5. THAT the law stipulates that after**

**after receiving orders, an Official**

**Receiver takes over the property**

**of the debtor which cannot be**

*attached.”*

8. On the basis of that understanding, and which the Official Receiver concurs with, the Applicant lacks the requisite locus to either commence new legal proceedings or to continue any legal proceedings which had been commenced prior to the issuance of the receiving order.
9. Secondly, it is noted that the suit property was the subject of a legal charge which was executed by the registered proprietors, in favour of the **EQUITY BANK LIMITED**.
10. In effect, the Bank was a secured creditor.
11. The intended auction, which the Applicant was seeking to have stopped, was being undertaken by a secured creditor.
12. Pursuant to **Section 226 (2) (a)** of the **Insolvency Act, 2015**, the secured creditor may choose to realize the security; or to have the property valued and prove in bankruptcy as an unsecured creditor for the balance (if any) after deducting the amount of the valuation; or surrender the Charge to the bankruptcy trustee for the general benefit of the creditors and prove in the bankruptcy as an unsecured creditor for the whole debt.
13. I find that the Bank cannot be faulted for making the choice to realize the security which is the subject matter of the Charge instrument.
14. Pursuant to **Section 228 (3)** of the **Insolvency Act**, the Bank shall be obliged to account to the Official Receiver for any surplus remaining after the debt due to the Bank is paid.
15. In any considered opinion, the Applicant failed to show any prima facie case with a probability of success. I so find because she has conceded failing to service the loan which the Bank had advanced to her and her husband.
16. She has not demonstrated to this Court that the Bank had not complied with any statutory provisions that precede the exercise of the statutory power of sale.
17. I also find that the Applicant failed to prove; on a prima facie basis, that she would suffer irreparable loss if the orders of injunction were not issued.
18. When the proprietors of the suit property offered it as security for the loan which they took from bank, they executed a legal charge, through which they committed themselves to pay the loan in the manner agreed upon.
19. The borrowers have defaulted in the repayment.
20. Provided that the bank issued all the requisite notices to the chargors, the bank would be right to exercise its statutory powers of sale; and the result cannot occasion irreparable loss to the chargors as that is the very thing which the charger consciously committed himself to when they executed the charge.
21. In the result, there is no merit in the application. It is therefore dismissed, with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF FEBRUARY 2022**

**FRED A. OCHIENG**

**JUDGE**