



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**(CORAM: A.K. NDUNG'U J.)**

**HCCC NO. 2 OF 2019**

**JOSEPHAT MWANGI MORACHA .....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JIPA OIL COMPANY LIMITED.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**HFC LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. By dint of an application dated 15<sup>th</sup> January 2021, the applicants have sought orders that:

1) Spent;

2) Spent;

3) Spent;

4) The Honorable Court be pleased to grant an Order of Temporary injunction restraining the Defendant / Respondent either by herself, nominated agents, servants and / or anyone claiming and / or acting under the said Defendant/Respondent and in particular M/s Hegeons Auctioneers, from advertising, re-advertising, selling and / or otherwise alienating LR No. Kisii Municipality / Block III / 195, (herein after referred to as the suit property), vide Public Auction or Private Treaty, whatsoever, in exercise of (sic) the Defendant's / Respondent's statutory Power of Sale, without issuance and service of the requisite Notification of Sale in line with the provisions of Rule 15 (d) of the Auctioneers Rules, 1997, pending the hearing and determination of the instant suit;

5) The Honourable Court be pleased to grant an order of Status Quo, maintaining and/or otherwise preserving the status over and in respect of LR No. Kisii Municipality/Block III/195, (herein after referred to as the suit property), and in particular, barring the Defendant / Respondent and her nominated Auctioneer, namely M/S Hegeons Auctioneers, from selling and / or otherwise alienating the suit Property vide public auction on the 19<sup>th</sup> day of February 2021, or on any other date, without extracting and/or serving the Notification of Sale as by law required, pending the hearing and determination of the instant suit;

6) The Honorable Court be pleased to find, hold and declare that the publication of the Advertisement by M/s Hegeons Auctioneers in the Standard Newspaper of the 12<sup>th</sup> day of January 2021 and whereby same scheduled Sale by public auction on the 19<sup>th</sup> day of February 2021 without first extracting and serving the requisite Notification of Sale, was/is irregular, illegal, unlawful and thus a contravention of the provisions of Rule 15 (d) of the Auctioneers Rules, 1997;

7) The Honorable Court be pleased to quash and / or rescind the Advertisement vide the Standard Newspaper of the 12<sup>th</sup> January day of 2021 and issued by and / or at the instance of M/s Hegeons Auctioneers and in respect of the alienation and/or sale over LR No. Kisii Municipality/Block III/195;

8) Costs of this application be borne by the Defendant / Respondent; and

9) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is based on the grounds set out at the foot thereof and the affidavit of Josephat Mwangi Moracha sworn on 15<sup>th</sup> January 2021. It is opposed vide an affidavit sworn by the respondent's legal manager, Christine Wahome, on 29<sup>th</sup> January 2021.

3. A summary of the protracted history of the matter giving rise to the application is as follows; sometimes in the year 2012, the respondent issued a loan facility to the applicants for development of the suit property which was offered as security for the loan.

4. Following the applicant's failure to repay the loan as agreed, the respondent, in a bid to exercise its statutory power of sale, issued a primary statutory notice of Sale on 21<sup>st</sup> November 2018 and a secondary statutory notice of Sale on 4<sup>th</sup> March 2019. Dissatisfied with the manner in which the notices had been issued, the applicants filed the instant suit together with an application for temporary injunction. On 14<sup>th</sup> February 2020, this court granted a temporary injunction restraining the respondent from exercising its statutory power of sale until such time as the respondent would have served the applicants with notices compliant with the law.

5. Following that decision, the respondent issued a primary statutory notice dated 14<sup>th</sup> February 2020 and a secondary notice dated 15<sup>th</sup> May 2020. The applicants challenged the secondary notice for being issued prematurely in contravention of the law. The court found merit in the application and expunged the secondary notice on 22<sup>nd</sup> July 2020.

6. Subsequently, the respondent issued the applicants with a fresh secondary statutory notice. The nominated auctioneers, M/s Garam Investment Auctioneers also gave a 45 days' notice dated 13<sup>th</sup> October 2020 in accordance with Rule 15 (d) of the Auctioneers Rules and proceeded to advertise the suit property for sale by public auction on 16<sup>th</sup> December 2020.

7. An application by the applicants challenging *inter alia* the jurisdiction of the nominated auctioneer and invoking the doctrine of estoppel on the basis of negotiations towards a take-over of the loan was dismissed by this court on 15<sup>th</sup> December, 2020. However, the public auction which was scheduled for 16<sup>th</sup> December 2020 did not take place as it did not attract acceptable bids.

8. What has given rise to this application is the engagement by the respondent of another auctioneer namely, M/s Hegeons Auctioneers, to pursue the sale. The newly appointed auctioneer issued the applicants with a notice dated 24<sup>th</sup> December 2020 which the applicants contend does not meet the conditions set out in the Auctioneers Rules. They are concerned that the Auctioneer will proceed to carry out a public auction which has been scheduled for 19<sup>th</sup> February 2021, without adhering to **Rule 15 (d) of the Auctioneers Rules**.

9. For its part, the respondent contends that there is no requirement in law that a notice under Rule 15 (d) be re-issued every time a charged property is scheduled for sale by public auction after a previous auction fails to take off. The respondent accuses the applicants of habitually filing applications to restrain the bank from exercising its statutory power of sale every time it seeks to realize the security. The amount due and outstanding under the secured banking facilities is said to exceed the realizable value of the suit property and continued delay will erode the value of the security in the suit property to the respondent's detriment.

## **SUBMISSIONS**

10. The application was disposed of by way of written submissions. Mr. Oguttu, learned counsel for the applicants, submitted that Rule 15 (d) applies to all auctioneers irrespective, when they receive instructions from a client. He urged this court to adopt the grammatical and plain meaning of the Rule thereby refraining from usurping the legislative authority conferred upon Parliament.

11. Mr. Mutua's understanding of Rule 15 on the other hand, was that the purpose of the 45 days' redemption notice is to give the chargor the opportunity to redeem the charged property by payment of the amount due under the security. That in this case, the notice under Rule 15 (d) was served upon the applicants but they did not settle the debt.

12. Learned counsel for the respondent submits that the cases of *Joseph Kiarie Mbugua & Another v Garam Investment Limited & Another [2006]eKLR*, *Stephen Kipkatang Kenduywa t/a Kapchebet Farm vs Sidian Bank Limited & Another [2017]eKLR*, *Murad Ebrahim Murad & Another vs Kenya Commercial Bank Limited & Another [2018]eKLR* and *Sospeter Nyakundi Nyangau vs ECO Bank Kenya Limited* all speak to the position that the chargor is not entitled to serve more than one redemption notice. He urges this court to adopt the position taken in those authorities for consistency and stability of the law.

13. Mr. Oguttu counters that the facts in this case and the facts in the case of *Joseph Kiarie Mbugua (supra)* are distinguishable in that the 1<sup>st</sup> respondent in the instant suit broke the chain by instructing a different auctioneer unlike the chargee in the case of *Joseph Kiarie Mbugua (supra)* and other similar decisions.

14. He urges this court to depart from the logical interpretation of the Rule adopted by the courts in *Stephen Kipkatam Kenduywa t/a Kapchebet Farm v Sidian Bank Limited & another [2017] eKLR*, *Murad Ebrahim Murad & Another vs Kenya Commercial Bank Limited & Another [2018]eKLR* and *Sospeter Nyakundi Nyangau vs ECO Bank Kenya Limited*. Logical thinking, it is argued must not supplant clear and unambiguous provision of the law. And that besides the immediately preceding decisions concerned a scenario where only one auctioneer was continuing with the sale.

15. The cases of *Republic v Kenya School of Law [2019]eKLR* and *David Morton Silverstein v Atsango Chesoni [2002]eKLR* were cited in support of the applicant's plea that this court adopt the golden rule of construction which espouses the plain meaning of the language in a statute as the safest guide in construing the statute. Counsel submits that circumvention of the Auctioneers Rules shall imperil the Equity of Redemption and thereby occasion grave injustice to the applicants.

## **ANALYSIS AND DETERMINATION**

16. The sole issue for determination in the application before this court is whether, on instruction of a separate and distinct auctioneer, the newly appointed auctioneer is obliged to comply with **Section 15** of the **Auctioneers Rules, 1997** (“the Rules”). Specifically, whether the 45 days’ redemption notice should be issued by the newly appointed auctioneer.

17. Rule 15 of the Auctioneers Rules reads as follows:

**15. Immovable property**

*Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—*

*(a) record the court warrant or letter of instruction in the register;*

*(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;*

*(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;*

*(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;*

*(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.*

18. What meaning should be given to the above Rule? The applicants have urged this court to give the Rule its literal and ordinary meaning. They have referred this court to the decision of the court in **Republic v Kenya School of Law (supra)** where the court held thus:

*“29. It is correct to say that the touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[19] Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.[20] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.*

*30. While the object is to determine the meaning to be given to the words used, it remains the primary function of the court to gather the intention of the legislature by reference to those words. This can only occur if the object and purpose of the legislation (in which case it would include the mischief sought to be remedied) are brought into consideration when examining the words used in the context of both the document as a whole and the context or factual matrix in which the document came to be produced.”*

19. The wording of Rule 15 is clear, explicit and couched in peremptory terms. It makes it mandatory for an auctioneer to adhere to the steps enumerated therein once he receives letters of instructions or a court order for sale of immovable property.

20. Counsel for the applicants rightly argues that the facts in the case of **Joseph Kiarie Mbugua (supra)** are distinguishable from the facts in this case. In the present suit, another auctioneer was appointed after the first attempt to sell the suit property failed. In **Joseph Kiarie Mbugua (supra)**, the auctioneer had issued a 45 days’ notice after he had received letters of instructions. The court held that it would be improper to insist that the same auctioneer get another letter instructing him to proceed with the sale and issue a fresh 45 days’ notice after the initial sale of the property was suspended.

21. In **Murad Ebrahim Murad (supra)** the court followed the decision in **Joseph Kiarie Mbugua (supra)** and held thus:

*41. Before considering whether that Notice was in conformity with the law, I would observe that the Auctioneer was correct in his view that having issued the first Notice, it was unnecessary to re-issue another 45 days’ Notice. Rule 15(d) of the Auctioneers Rules does not impose an obligation on the Auctioneer to issue fresh Notices each time before putting up a charged property for Sale (see for example the decision of Hon. Ochieng J. in Joseph Kiarie Mbugua & Another vs. Garam Investment Limited & Another [2006] eKRL.)*

22. In the case of **Studertek Power System (EA) & another v Housing Finance Co. Ltd Civil Suit No. 6 of 2019 [2019] eKLR** where the applicant had brought a similar application for a temporary injunction and a declaration that a scheduled sale was a nullity *ab initio* for lack of mandatory notice under rule 15(d) of the Auctioneers Rules, 1997, Gikonyo J. held:

*In this case, the chargee issued relevant statutory notices in exercise of chargor’s statutory power of sale; that fact has not been challenged or disputed. Again, the Applicant denies neither indebtedness nor default on court orders. The auctioneer gave redemption notice for aborted public auction of the charged property. I note they also gave a 14 days’ notice before the advertisement in issue which scheduled sale of the charged property by public auction for 3<sup>rd</sup> December 2019. This is not the first public auction scheduled for the charged property by the auctioneer. The auction was scheduled after the earlier one aborted. The Applicant has come to court before and he failed to abide by the court orders. The Applicant did not disclose that he had applied in September 2019 and the court declined to stop exercise of chargor’s statutory power of sale or sale of the charged property after it became clear that the Applicant has defaulted to pay the debt despite reprieve by the court. **He who comes to equity must come with clean hands. From the circumstances and facts of this case, it is clear that the Applicant is also abusing the process of the court.***

**Therefore, the applicant has not come to equity with clean hands. To such suitor equity and law shall deny relief. Accordingly, I decline to stop the sale scheduled for tomorrow.** [Emphasis added]

23. An interlocutory injunction is a discretionary relief based on principles of equity. Where the conduct of an applicant does not meet the approval of a court of equity, the injunction will not be granted. (See *Tende Drive Villas Limited v David Kamau & 4 others CA NRB Civil App. No. 279 of 2005 [2005]eKLR*)

24. It is common ground that M/s Hegeons Auctioneers received instructions from the respondent but did not issue the 45 days' notice as required under Rule 15. They simply picked up from where the previous auctioneers had left off seemingly oblivious of their duty under the Rule. However, the auctioneers issued the applicants with a "courtesy notice" dated 24<sup>th</sup> December 2020 informing them of a sale by public auction scheduled for 19<sup>th</sup> February 2021. They referred the applicants to the 45 days' notice given to the applicants on 13<sup>th</sup> October 2020 by the previous auctioneer.

25. The applicants have not denied that they received the 45 days' redemption notice dated 13<sup>th</sup> October 2020 issued by M/s Garam Investment Auctioneers. Since they were issued with that notice they have not made any significant move to redeem their property. Their right of redemption must be weighed against the respondent's right to exercise its statutory power of sale which has accrued.

26. The respondent claims that continued delay in realization of its security will be unjust as the amount due under the facility far exceeds the realizable value of the suit property. The applicants have not demonstrated that they are capable of or have made arrangements to settle the colossal sums owed to the respondent if given another 45 days' notice.

27. My considered view is that no rule of procedure exists to stifle the flow of justice and any rule so inclined would run counter Article 159 of the Constitution. Any interpretation to a rule must be focused on its objectives and must ultimately be geared towards fairness and justice to the parties.

28. There is no prejudice occasioned to the applicant given that the requisite notice had already been issued to them. There is evidence of the necessary notice of 45 days, albeit by another auctioneer. That notice is referred to by the notice issued by the current auctioneer. The objective of the notice is to give the applicant a chance to redeem the property by paying up the sums (which are not disputed) owing.

29. Allowing the applicant to hang onto the straw of non-reissue of the notice, is in the circumstances of this case untenable. This court declines the invite to adopt an interpretation of Rule 15 that would aid a miscarriage of justice. The history of this matter certainly militates against such an interpretation.

30. The facts demonstrate that the applicants are belligerent defaulters bent on hindering the respondents' right to realize its security at all costs, unsympathetic of the consequences of their actions. He who seeks equity must do equity. I find that the inequitable conduct of the applicants makes them undeserving of the orders sought.

31. Accordingly, the application dated 15<sup>th</sup> January 2021 is dismissed with no orders as to costs.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of February, 2021.**

**A. K. NDUNG'U**

**JUDGE**