



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO.2 OF 2019**

**JOSEPHAT MWANGI MORACHA**

**JIPA OIL COMPANY LIMITED.....PLAINTIFF/APPLICANTS**

**VERSUS**

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

**RULING**

1. The plaintiff / applicant hereinafter referred to as the applicant has filed a Notice of Motion dated the 25<sup>th</sup> November 2020. The application is brought under **Order 40 Rules 1, 2, 4 & 10 Civil Procedure Rules, 2010, Sections 1A, B, 3A & 63 (f) Civil Procedure Act, Rule 15 of the Auctioneers Rules, 1997, Articles 10(2), (a), (b) & (c), 19 (1), 23, 27 (1), 47 (1), 48, 50 (1) & 258 of the Constitution, 2010** and all enabling provisions of law. The plaintiff seeks the following orders:

1) Spent

2) **Pending the hearing and determination of the instant Application**, the Honorable Court be pleased to grant an *Interim order of injunction* restraining the Defendant/Respondent either by herself, Nominated agents, servants and/or anyone claiming and and/or acting under the said Defendant/Respondent, from exercising the statutory Power of Sale over and in respect of **LR. NO. KISII MUNICIPALITY/BLOCK III/195**, (hereinafter referred to as the suit property) and in particular, Advertising the Intended Sale and/or otherwise proceeding with the scheduled sale and/or alienation vide Public Auction on the **16<sup>th</sup> day of December 2020** and/or on such other date, whatsoever.

3) **Pending the hearing and determination of instant Application**, the Honorable 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**, (hereinafter referred to as the suit property) and in particular, barring the nominated Auctioneer, from alienating and/or disposing of same, in a manner contrary to and in violation of the Auctioneers Act, 1996 and the Rules thereunder.

4) The Honorable Court be pleased to grant an Order of Temporary Injunction restraining the Defendant/Respondent either by herself, Nominated agents, servant and/or anyone claiming and/or acting under the said Defendant/Respondent, from exercising the Statutory Power of Sale over and in respect of **LR. No.KISII MUNICIPALITY/BLOCK III/195**, (hereinafter referred to as the suit property) and in particular, Advertising the intended Sale and/or otherwise proceeding with the scheduled sale and/or alienation vide Public Auction on the 16<sup>th</sup> day of December 2020 and/or on such other Date, whatsoever, pending the hearing and determination of the Instant suit.

5) The Honorable 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**, (hereinafter referred to as the suit property) and in particular, barring the violation of the Auctioneers Act, 1996 and the Rules thereunder, pending the hearing and determination of the instant suit.

6) The Honorable Court be pleased to find and hold that the notification of Sale issued by and/or at the instance of **M/S Garam Investment Auctioneers** and in respect of the alienation and/or sale over **LR.NO. KISII MUNICIPALITY/BLOCK III/195**, (hereinafter referred to as the suit property), is illegitimate, unlawful and void ab initio for want of the requisite jurisdiction.

7) The Honorable Court be pleased to quash and/or rescind the Notification of Sale issued by and/or at the instance of **M/S Gram Investment Auctioneers** and in respect of the alienation and/or sale over **LR. NO. KISII MUNICIPALITY/BLOCK III/195**.

8) Costs of the Application be borne by the Defendant/Respondent.

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

10) The grounds stated by the plaintiff on the face of its motion sets out the facts and background of the current application as follows; The Defendant/Respondent granted to and/or in favor of the 2<sup>nd</sup> Plaintiff/Applicant a Banking facility for purposes of developing the premises situated on **LR. NO. KISII MUNICIPALITY/BLOCK 195**, (*herein referred to as the suit property*). That Pursuant to the Banking indulgence and/or accommodation, (details in terms of paragraph (a) hereof), the 1<sup>st</sup> Plaintiff/Applicant was obliged to execute the requisite Instruments and thereby charge the suit property. Subsequently, the Defendant/Respondent herein issued the Statutory Notice for purposes of exercise of her statutory power of sale. However, the Statutory Notice, in line with **Section 90(2) of the Land Act, No.6 of 2012**, was neither issued nor served in accordance of the relevant Act. Consequent to the default, failure and/or neglect, the Plaintiffs/Applicants herein were constrained to and indeed filed the subject suit. Subsequently, the Honorable Court herein rendered and/or delivered a Ruling on the **14<sup>th</sup> day of February 2020**. That pursuant to the Ruling, (details in terms of paragraph (f) hereof), the Defendant/Respondent, was ordered and/or directed to comply with and/or adhere to the provisions of the **Land Act, 2012**. That following the directions and/or orders of the Honorable Court herein, the Defendant/Respondent proceeded to and re-issued the primary Statutory Notice. On the other hand, the Defendant/Respondent proceeded to and also issued the secondary Notice. However, in the course of issuing the secondary Notice, the Defendant/Respondent yet again breached and/or violated the terms of the Land Act, 2012 as well as the tenor of the Ruling of the Honorable Court issued on the 14<sup>th</sup> day of February 2020. Owing to the foregoing, the Honorable Court herein proceeded to and issued further orders on the 22<sup>nd</sup> day of July 2020.

11) That be that as it may, the Defendant/Respondent herein has since engaged and/or retained a Nominated Auctioneer for purposes of sale, alienation and/or disposal of the suit property. That pursuant to the retention, (details in terms of *paragraph (i) hereof*), the Nominated Auctioneer has since issued and served a Notification of sale and he has since scheduled the Intended Sale *vide* Public Auction on the 16<sup>th</sup> day of December 2020. That the Nominated Auctioneer, is devoid of the requisite jurisdiction to carry out and/or undertake the intended sale and/or alienation. That the impugned Notification of sale has been issued and served by an unqualified and unauthorized person. That in the premises, the process by and/or at the instance of the Nominated Auctioneer, are *void* and/or otherwise a *nullity ab initio*.

12) That on the other hand, the intended exercise of the statutory power of sale by and/or at the instance of the Defendant/Respondent, constitutes and/or amounts to breach of the Doctrine of Estoppel. That the intended exercise of statutory power of sale and the scheduled Public Auction, are oppressive, harsh, cruel and otherwise amounts to unfair treatment against the Plaintiffs/Applicants. And that the Honorable Court ought not to allow the Defendant/Respondent to breach, violate and/or infringe upon the provisions and principles of the law. That the intended exercise of statutory power of sale, scheduled Public Auction and Sale on the 16<sup>th</sup> day of December 2020, shall occasion undue prejudice and/or irreparable loss to the Plaintiffs/Applicants. That the defendant/Respondent herein ought not to be allowed to steal a march on the Plaintiffs/Applicants. That the Intended Sale of the Charge Property is contrary to and/or in contravention of **Sections 99 & 103 of the Land Act, No.6 of 2012** and that the intended and scheduled Public Auction constitutes and/or amounts to breach of the provisions of the Auctioneers Act and the Rules. That the Intended Sale/Public Auction is pre-mature, illegal, misconceived and void. That the Intended actions by and/or at the instance of the Defendant/Respondent and her Nominated Auctioneer, are fraudulent, irregular and illegal. That the plaintiffs/Applicants have a prima facie case against the Defendant/Respondent. That, the Intended sale, alienation and/or disposal of the suit property will defeat and/or circumvent the plaintiffs'/Applicants' **Right of Redemption**. That on the other hand, the intended sale is meant to restrict and/or oust the plaintiffs'/Applicants power of Redemption. That the Plaintiffs/Applicants are disposed to suffer irreparable loss and on the other hand, the Balance of convenience tilts in favor of the Plaintiffs/Applicants. That in the premises, this is a fit and proper case to grant **Orders Temporary Injunction and/or Maintenance of Status Quo**. That the Plaintiffs/Applicants are ready and willing to provide a suitable Undertaking. That it is in the interest of justice that the Application herein be granted *Ex-Debito Justitiae*.

13) The above summarizes the applicants' supporting affidavit sworn by Joseph Mwangi Moracha the 1<sup>st</sup> plaintiff dated the 25<sup>th</sup> November 2020.

14) The application was opposed by the respondent. The respondent filed a replying affidavit dated the 2<sup>nd</sup> December 2020. In brief, the respondent avers that; the application should not be granted for reasons that the applicant still owes the sum and a huge amount, the applicant was not given a promise that the defendant would not proceed with the sale and that the applicant cannot rely on the Doctrine of Estoppel. That they have taken action as provided in the Land Act 2012 and in compliance with the law and that they have not been faulted on the same. That the scheduled public auction of the suit property is proper and legitimate exercise of a chargee's statutory power of sale which has properly accrued.

15) Upon considering the affidavits filed by the parties and the oral submissions the issue to be determined is whether the applicant is entitled to an order of injunction as sought or an order of status quo as sought.

16) From the facts as stated this court has rendered 2 rulings dated the 14<sup>th</sup> February 2020 and the 22<sup>nd</sup> of July 2020. After the ruling dated the 22/7/2020 the defendant did exercise its Statutory Power of Sale on the basis of the Charge Instrument. The statutory Notice was issued 14/2/2020 and the Notification of Sale pursuant to the terms of Section 96(2) of the Land Act 2012 over charge **Title Number: Kisii Municipality/Block 111/195** was issued on the 22/7/2020. These 2 notices have not been challenged as being illegal or irregular. It is a proper notice as set out in the provisions of the law in the Land Act 2012.

17) According to the applicant during the intervening period between the 22<sup>nd</sup> of July 2020 the defendant/respondent and the 2<sup>nd</sup> plaintiff and counsel for the applicant have engaged in various structured negotiations toward and in respect of the takeover of the facility granted by the defendant, correspondence is attached. The applicant argues that during the negotiations the defendant

promised to afford the 2<sup>nd</sup> plaintiff/applicant and himself as counsel latitude to procure an alternative financier for purposes of take over. That during the said negotiations the defendant gave an assurance to facilitate the intended take over and that the defendant was enjoined and/or obliged to observe the terms of the assurance. That the defendant having engaged in the said negotiations cannot now renege on the terms of the engagement and the assurance to facilitate the takeover and thereby commence the realization of the suit property. That the defendant is barred by the doctrine of Estoppel. That the defendant cannot be allowed to proceed and actualize the realization of the suit property. Let me pause here and ask can the applicant really rely on the doctrine of Estoppel? I have read the correspondence referred to by the applicant. The plaintiff has failed to show that the defendant gave an undertaking that it will not proceed with the sale. In the email dated the 21/9/2020 the applicant was reminded by Peter Mugeni that it was more than 2 months since they formally approached the bank for negotiated settlement terms and that they had not received any formal offer of the settlement terms as per their discussion of 20/7/2020. In the said email the applicant was advised that the bank will be proceeding with the next recovery actions, holding the applicant accountable for the recovery loss. Correspondence titled Re: Meeting for discussion over Jipa Oil Company Limited Facility held on the 14<sup>th</sup> July 2020 at HFC Head Office merely outlines the applicant's efforts to meet his obligation. There is no indication by the applicant that the defendant accepted the said proposals. The Bank's response in its email dated 20/7/2020 was very clear that the applicant should wake up and do the needful. As a prudent party the defendant was giving the applicant time for it to put its house in order bearing in mind that it had a right to exercise its right to recover the amount it is owed in line with the provisions of the law. To argue that the defendant is now estopped from exercising its Statutory Power of Sale is a submission without merit and is a misconception in law. The doctrine of Estoppel would only apply in my view if there was an undertaking on the part of the defendant that during the negotiations it would not proceed to issue the notice or even after issuing the notice it would out of goodwill, mercy or compassion not proceed with the sale. The applicant has failed to demonstrate the said doctrine applies to his circumstances. Money is owed by the applicant it has a duty to pay up or face the intended sale. Without getting into the legal principles of granting an injunction I find that on this issue, the Doctrine of Estoppel does not apply to the applicant. Further bearing in mind that a substantial amount is owed by the plaintiff, I find that the applicant has failed to establish a *prima facie* case. The applicant has failed to show that it will suffer irreparable damages for which he cannot be compensated. The balance of convenience actually lies in favor of the defendant/ respondent as the debt as of now is the tune of Kshs. 807,033,854.70, a fact the applicant does not deny.

18) On the issue of the Auctioneer's license, the applicant has chosen to mislead the court despite a clear license that has been attached by the respondent. The applicant has failed to demonstrate that the Auctioneer has no jurisdiction to carry the work it has been instructed to do within KISII County. The defendant instructed the said auctioneer to carry out the sale. Mr. Joseph Mungai Gikonyo t/a Garam Investment Auctioneers is the holder of a Class B license with jurisdiction to carry on business of: **Repossession realization of securities, sale of moveable property and immovable property by auction or any mode of sale by competition, throughout the Republic of Kenya**, Kisii county is within the Republic of Kenya. The license was issued on the 20<sup>th</sup> January 2020 and is valid upto the 31/12/2020. The auctioneer therefore has jurisdiction to conduct the Intended Public Auction. The applicant's argument that the auctioneer has no jurisdiction fails.

19) On the last issue of being issued with an order of Status quo, what is the status quo currently? A party has to clearly define the status quo. In this matter the applicant owes the defendant monies, he is a debtor and has an obligation to meet its obligation. For how long will he keep coming to Court to seek orders to stop the defendant from exercising its right as provided in law? The applicant has failed to show that he is entitled to the said order.

20) All in all, I find no merit in the application dated the 25<sup>th</sup> November 2020 and it is dismissed with costs to the defendant/ respondent.

**Dated signed and delivered at KISII this 15<sup>th</sup> day December 2020.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Oguttu For the Applicant/ Plaintiff**

**Mr. Mutua For the Respondent/ Defendant**

**Ms. Rael Court Assistant**