



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 348 OF 2018**

GICHOHI KINYANJUI MAGUGU.....1<sup>ST</sup> PLAINTIFF

MIRIAM SUSAN NJAMBI MAGUGU.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

MWANANCHI CREDIT LIMITED.....1<sup>ST</sup> DEFENDANT

EXCELLENCE & INTERGRITY AUCTIONEERS..2<sup>ND</sup> DEFENDANT

**RULING**

1. **Gichohi Kinyanjui Magugu** and **Miriam Susan Njambi Magugu**, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectfully, instituted this suit against **Mwanachi Credit Limited** the 1<sup>st</sup> Defendant seeking permanent injunction against the said 1<sup>st</sup> Defendant to restrain it from advertising, auctioning or offering for sale the property L. R. No. M.N/1/1 390 (the property) and a declaration that the Plaintiffs do not owe the 1<sup>st</sup> Defendant any money.

2. The Plaintiffs filed an interlocutory Notice of Motion application dated 20<sup>th</sup> August, which is under consideration after inter parties hearing. The Plaintiffs presented the said application before Court, *ex parte*, on 28<sup>th</sup> August 2018 and obtained *ex parte* injunction order stopping the auctioning of the property. In granting the *ex parte* injunction the Court in its ruling in part stated:

***“The Plaintiffs has (sic ) alleged in the Notice of Motion dated 20/8/2018 that the 1<sup>st</sup> Defendant charged their property without disbursing the agreed loan. Those allegations if true, are very serious. It is because of these matters that I certify the application as urgent.... I grant temporary injunction up and until 20/9/18.”***

3. The Court proceeded subsequently to hear the application inter parties and hence this Ruling.

4. The application under consideration is supported by the affidavit of Miriam Susan Njambi Magugu, the 2<sup>nd</sup> Plaintiff. This is what she deponed:

a) *That the Plaintiffs are the registered owners of L. R. No. M. N/1/3904*

b) *That the Plaintiffs severally demanded that he 1<sup>st</sup> Defendant release the title documents free of any encumbrances in its favor but the 1<sup>st</sup> Defendant failed to heed.*

c) *That the 1<sup>st</sup> Defendant purported to have disbursed the said loan through 3<sup>rd</sup> parties and fraudulently, recklessly and illegally decided to charge the Plaintiffs interest thereof now amounting to Kshs. 30,029,194 (Kenya Shillings Thirty Million Twenty Nine Thousand One Hundred and Ninety Four) which amount is unconscionable and illegal.*

d) *That the Plaintiffs’ property mentioned on paragraph 3 above is on the verge of being sold by the 1<sup>st</sup> Defendant and a redemption notice issued by the 2<sup>nd</sup> Defendant. Annexed and marked MSN3 is a copy of the redemption notice.*

e) *That I am informed by the Advocates on record information that I believe to be true that the 1<sup>st</sup> Defendant has flagrantly abused all the known banking regulations in purporting to disburse a loan through 3<sup>rd</sup> parties and charging interest on the Plaintiffs.*

5. The application is opposed by the 1<sup>st</sup> Defendant on the grounds that the Plaintiff, on 19<sup>th</sup> June 2017, sought and were granted a loan of Kshs. 14 million by the 1<sup>st</sup> Defendant. Prior to that facility being granted the Plaintiffs had a previous loan with the 1<sup>st</sup> Defendant. The Plaintiffs gave the 1<sup>st</sup> Defendant instruction that the second loan be used to first offset the first loan. Further that the two Plaintiffs, by their letter dated 28<sup>th</sup> April 2017 they instructed the 1<sup>st</sup> Defendant to remit their loan to their Advocate, namely Daniel Orege & Company. The said Advocate by his letter dated 21<sup>st</sup> July 2017 acknowledged receipt of the Plaintiffs loan which was remitted through him. The 1<sup>st</sup> Defendant attached the Plaintiffs statement of account reflecting the balance of the loan at Kshs. 30,024,194.00

6. The 1<sup>st</sup> Defendant's contention above, which I dare say is supported by documentations was not controverted by the Plaintiffs. It therefore follows that the Plaintiffs in obtaining the *ex parte* injunction, failed to show utmost good faith. A party who approaches the Court for *ex parte* orders does so with the burden of ensuring to put all facts before the judge. This is what was stated by the Court of appeal in the case: **UHURU HIGHWAY DEVELOPMENT LIMITED – VS- CENTRAL BANK OF KENYA & OTHERS CIVIL APPLICATION NO. 140 OF 1995**, where the justices had this to say:

*“Order 39 Rule 3 (1) of the Civil Procedure (revised) Rules (now Order 40 of the Civil Procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant material, including even material which is against his interest. The basis for this requirement is obvious. It is a universal rule of natural justice that Court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.*

*.... I would add my voice to that of my Learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of ex parte injunctions should be the exception rather than that rule. Ole Keiwua, J. found as a fact that the applicant obtained the ex parte order of injunction by concealing from Githinji J. relevant material which it could have been in a position to disclose to the later learned Judge.”*

7. The above holding was in consonance with the holding in the case: **THE KING-VS- GENERAL COMMISSIONERS FOR THE PURPOSE OF THE INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON KBD (1971)** where the Court stated:

*“That the rule of the Court requiring uberrima fides on the part of the applicant for an ex parte injunction applied equally to the case of an applicant for a rule nisi for a writ of prohibition .. that, there having been a suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case.”*

8. The Plaintiffs obviously suppressed relevant material facts, and facts that were very crucial in leading the Court, at *ex parte* stage to granting of an injunction. Having done so, and because the issues the Plaintiffs have raised have been sufficiently responded to by the 1<sup>st</sup> Defendant, and have been shown to lack truthfulness the Plaintiff is not entitled to injunction order as sought.

**9. For the above reasons the Plaintiffs Notice of Motion application dated 20<sup>th</sup> August 2018 is hereby dismissed with costs to the 1<sup>st</sup> Defendant.**

Orders accordingly

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFFS

.....FOR THE 1<sup>ST</sup> DEFENDANT

.....FOR THE 2<sup>ND</sup> DEFENDANT