



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 37 OF 2018**

PATRICK GITHINJI NDICHU.....1<sup>ST</sup> PLAINTIFF

FLORENCE WAITHERERO MAINA.....2<sup>ND</sup> PLAINTIFF

SOLEX BUILDING CONTRACTORS LIMITED.....3<sup>RD</sup> PLAINTIFF

VERSUS

EQUITY BANK (KENYA) LIMITED.....1<sup>ST</sup> DEFENDANT

ANTIQUA AUCTIONS AGENCIES.....2<sup>ND</sup> DEFENDANT

**RULING**

1. The plaintiffs application dated 26<sup>th</sup> January 2018 is for an interlocutory injunction to restrain the defendants from selling, disposing of, or otherwise howsoever completing, by conveyance or transfer of the suit property, **TITLE No. 13868/11 KAREN.**
2. The suit property is registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, **PATRICK GITHINJI NDICHU** and **FLORENCE WAITHERERO MAINA.**
3. It is common ground that the suit property was offered to the 1<sup>st</sup> Defendant, **EQUITY BANK (KENYA) LIMITED**, as a security for financial facilities which the bank had accorded to the 3<sup>rd</sup> Defendant, **SOLEX BUILDING CONTRACTORS LIMITED.**
4. It is the plaintiffs' case that the bank had advertised the suit property for sale by public auction, but that the bank had done so without giving any of the requisite Notices to the plaintiffs.
5. The 2<sup>nd</sup> Defendant, **ANTIQUA AUCTIONS AGENCIES**, is a firm of Auctioneers, who had been instructed by the bank, to sell the suit property by public auction.
6. The plaintiffs major complaint was that the bank never served any statutory notices on either the principal borrower or the guarantors, who were also the chargors.
7. The reason why the plaintiffs did not receive any Notices from the defendants appears to be the fact that the defendants used a postal address which the plaintiffs were not using currently.
8. In relation to the 3<sup>rd</sup> plaintiff, the bank sent a Notice to;  
  
    **“P.O. Box 3825-00100**  
  
    **NAIROBI.”**
9. As far as the bank was concerned, it had duly effected service of Notices upon the plaintiffs. The said service was said to have been done in accordance with the Terms of the Instrument of Charge.
10. A perusal of the 2<sup>nd</sup> Further Charge dated 10<sup>th</sup> November 2015 shows that the Chargors postal address was;

**“Post Office Box Number 3825-00100, Nairobi.”**

11. The address for the 3<sup>rd</sup> defendant was also the same as above.

12. Therefore, the bank insisted that by sending Notices using the address on the security instruments, the said notices had been duly served upon the plaintiffs.

13. The plaintiffs drew the attention of the court to the fact that in a letter dated 29<sup>th</sup> April 2016, the bank wrote to the Directors of the 3<sup>rd</sup> defendant, using;

**“P.O. Box 155997-00509**

**NAIROBI.”**

14. The plaintiffs said that they did not know the owner of that address.

15. At any rate, the plaintiffs insisted that the bank was aware of their current postal address, as the bank had used the said address on the Statements of Account which are in the name of the 3<sup>rd</sup> plaintiff.

16. A perusal of the Statement of Account which is in the name of Solex Building Contractors Limited reveals that its postal address is;

**“P.O. Box 15997**

**NAIROBI.”**

17. The statement of account upon which that postal address was used, is for the period between 19<sup>th</sup> January 2015 and 20<sup>th</sup> January 2018.

18. I believe that that is why the plaintiffs have described that address as being current.

19. However, when the 2<sup>nd</sup> defendant issued the “45 Days Redemption Notice” the same was sent to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs at;

**“P.O. Box 68825-00622 NAIROBI.”**

20. I have noted that the bank used several postal addresses when communicating with the plaintiffs.

21. On a *prima facie* basis, I find that the postal address provided by the plaintiffs, in the instrument of Charge was;

**“P.O. Box 3825-00100**

**NAIROBI.”**

22. Therefore, the plaintiffs were wrong to have asserted that that postal address was unknown to them.

23. When the defendant was responding to the plaintiffs’ submissions, the court inquired from their advocate, Mr. Njuguna, about the postal address which the bank had used when serving notices on the plaintiffs.

24. His first answer was that it was a requirement of the law that notices be dispatched to the postal address provided in the Charge.

25. However, when the court sought to verify from the defendant about the precise law which stipulated that notices be served at the postal address provided in the Charge, the 1<sup>st</sup> defendant changed tune. It said that;

**“The address to be used is the last known address of the borrower.”**

26. Notwithstanding that position, the bank confirmed to the court that they served notices at the postal address provided in the Charge.

27. Bearing in mind the bank’s own concession, that they served notices at the postal address provided in the Charge, whilst they ought to have served the notices at the last known address of the plaintiffs, I find that the bank did not comply with the very thing which they believe to be the correct way of serving notices.

28. Meanwhile, as regards the auctioneers, I find that the Redemption Notice was served through a postal address which has no known connection with the plaintiffs.

29. Once the bank was aware of the current postal address for the plaintiffs, it was obliged to use that address when dispatching notices. I find no justification in communicating with the plaintiffs using an address known to be the one which they were using currently, but then sending statutory notices to an address which was provided for in the Charge document.
30. Accordingly, I find on a *prima facie* basis, that the defendants have failed to demonstrate that they served statutory notices upon the plaintiffs.
31. In the absence of proof of service of the statutory notices upon the plaintiffs, the defendants were wrong to have put-up the suit property for sale.
32. Meanwhile, as regards the contention that the bank did not have a current Valuation of the suit property, I find that the plaintiffs have failed to show why the Valuation Report dated 13<sup>th</sup> October 2017 was deemed to be too old, in respect of a sale scheduled for 31<sup>st</sup> January 2018.
33. Unless it can be shown by a plaintiff that the value of the security was changing rapidly, over a very short span of time, I find that it would not be unreasonable for a chargee to rely on a Valuation Report which was about 3 months old.
34. Of course, a plaintiff could engage his own valuer, with a view to ascertaining the current value of the property. However, the plaintiff does not ordinarily have any obligation to produce a Valuation Report.
35. When, however, the plaintiff asserts that a valuation report which was about 3 months old, was not indicative of the current value of the property, it was necessary for the plaintiff to do more than merely making a statement to that effect. In such circumstances, a valuation report could come in handy. I say so because it must be borne in mind that he would assert, has an obligation to tender evidence to prove his assertion, if he wishes to have the court take into account the veracity of his said assertion.
36. In this instance, the plaintiffs have not shown that there was need for the bank to conduct a valuation of the suit property much closer to the date of the scheduled auction.
37. Meanwhile, the court notes that the proceeds from the plaintiffs project, which was funded using the facilities provided by the bank, were to be received directly by the bank.
38. As far as the plaintiffs' were concerned, it was the bank which had an obligation to give an account as to how the money received from the projects was applied.
39. The plaintiffs' position was that unless the bank had shown how the proceeds were applied, it could not be said that the plaintiffs were in arrears.
40. On a *prima facie* basis, I find that the obligation to make payments was on the 3<sup>rd</sup> plaintiff.
41. It is unrealistic for the principal borrower to decide to have a hands-off approach to its obligation, which was to repay the financial facilities. It is only by ensuring that it knew the exact amounts being generated from the project, and by checking its bank accounts regularly, that the 3<sup>rd</sup> plaintiff would know whether or not its account was being credited appropriately.
42. In this case, the court sought to know from the plaintiffs, the amount of money which they had remitted to the bank.
43. The answer was that the plaintiffs were unaware of the amount of money which had been remitted.
44. In the circumstances, I find that the plaintiffs have failed to demonstrate that the repayments were not in arrears.
45. Therefore, if the defendants had served statutory notices appropriately, there would have been no basis upon which the court could have granted an injunction to restrain the defendants from realizing the security.
46. In conclusion, the plaintiffs have satisfied the court that they have a *prima facie* case with a probability of success. The said *prima facie* case is premised on the notices which were not served upon the plaintiffs.
47. If the property were sold in the circumstances, the plaintiffs might suffer irreparable loss.
48. Therefore, I do now grant an interlocutory injunction to restrain the defendants from selling the suit property, if such sale were to follow upon the impugned notices.
49. The injunction order issued herein will remain in force until the bank and the auctioneers will have served new and compliant Notices.
50. The costs of the application dated 26<sup>th</sup> January 2018 are awarded to the plaintiffs.
51. I further order that the auctioneer would not be entitled to earn any fees or costs emanating from the work, if any, that it has done so far. This order is informed by the fact that the auctioneer served the Redemption Notice at an address which has no known connection with the plaintiffs.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of March 2018.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Kariuki for the 1<sup>st</sup> Plaintiff

Kariuki for the 2<sup>nd</sup> Plaintiff

Kariuki for the 3<sup>rd</sup> Plaintiff

Njuguna for the 1<sup>st</sup> Defendant

Njuguna for the 2<sup>nd</sup> Defendant