



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 99 OF 2016**

**DAVID MATHERI NGUGI.....PLAINTIFF**

**VERUS**

**CREDIT BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By his application dated 25<sup>th</sup> November 2016 the plaintiff David Matheri Ngugi sought orders that:

***“pending the hearing and determination of this application interpartes this Honourable court did issue an order of stay of sale restraining the Defendants by themselves, their servants, agents from selling, disposing and/or auctioning the plaintiffs property known as NJORO/NGATA BLOCK 3/312 (NGECHA) by public Auction on 31<sup>st</sup> January 2017 and or otherwise howsoever as threatened or at any other time thereafter ----”***

2. On the 12<sup>th</sup> January 2017, the application was argued interpartes before me, and a ruling reserved for the 28<sup>th</sup> February 2017.

An order of interim stay of the sale of the property was issued but upon conditions that:

***1. The applicant would forward to the 1<sup>st</sup> respondents advocates four cheques that the applicant had in court for the sum of Kshs.1.2 Million.***

***2. That the four cheques would be banked on the 17<sup>th</sup> January 2017.***

***3. That upon the said cheques being paid, the interim order of stay of sale of the property would be extended to the 28<sup>th</sup> February 2017.***

The above orders were agreed upon by both counsel for the parties.

3. On the 19<sup>th</sup> January 2017 upon a certificate of urgency, the applicant filed a Notice of Motion of even date seeking an order that the sale of the property scheduled for the 31<sup>st</sup> January 2017 be stayed pending ruling of the former application on the 28<sup>th</sup> February 2017.

It is based on grounds that the applicant managed to pay Kshs.110,000/= and is in the process of

depositing the rest and that if the sale proceeds he would suffer irreparable loss. He has made fresh proposals to pay Kshs.80,000/= per week.

In his supporting affidavit, it is stated that the applicant was unable to raise the balance due to undisclosed circumstances.

4. In opposing the application the respondents Advocate Mr. Mugisha confirmed to the court that the applicant has not complied with the court orders issued by agreement of both parties on the 12<sup>th</sup> January 2017, that no cheques were forwarded to them nor paid to the bank, and that therefore the interim orders restraining the sale of the property on 31<sup>st</sup> January 2017 have since expired, that the applicant has come to court with unclean hands and the court should not come to his aid.

It was stated that the outstanding arrears stand at Kshs.6,694,732/= while the loan balance stands at Kshs.17,868,719/= as at 27<sup>th</sup> January 2017. He found no plausible reasons for grounds to stop the sale.

5. I have considered the oral arguments by both counsel.

It is evident that the applicant has failed to meet the conditions and terms of the Interim Order of injunction issued on the 12<sup>th</sup> January 2017, which orders were crafted by the two parties. Out of the sum of Kshs.1,200,000/= cheques that he undertook to pay, he has only managed to pay Kshs.110,000/=.

He did not forward the cheques that were indeed shown to the court nor did he pay the said money into his loan account with the bank. I have also considered the fresh proposals aforesaid.

6. I fully agree with the defendants advocates that the applicant has come to court with unclean hands.

An order of injunction is an equitable remedy and if not complied with and no good reasons are shown or demonstrated for the default the courts hands are tied. The loan outstanding amount of over Kshs.17 Million is a substantive amount. Clearly no payments have been made interms of the Letter of Offer.

It is instructive to note that since November 2016 when the suit was filed, no serious attempt has been made to pay the loan or even the arrears. The proposals made to pay Kshs.80,000/= per week is far below expectations *vis-a-viz* the outstanding sum.

7. The principals stated in **Cassman -vs- Brown** case have not been demonstrated. The applicant has not shown what irreparable loss he would suffer if the property is sold. He has not demonstrated any *prima facie* case at all. It has not been shown that the defendant may not be able to compensate the applicant if the property is sold and the case upon completion is successful.

The only issue raised in the claim is on interest rates that are said to be over and above the agreed rates and in contravention of the Banking Act (Amended).

This issue has been decided in numerous decisions and all are to the effect that a dispute on interest rates will not be sufficient to persuade a court to stop a sale of a charged property if there are arrears outstanding.

8. The applicant has not denied the outstanding loan arrears. The balance of convenience tilts in favour of the Respondents.

I am satisfied that there are no plausible grounds upon which I can order a stay of the sale of the charged property in the public auction scheduled for the 31<sup>st</sup> January 2017. The interim order of injunction restraining the sale of the charged property on the 31<sup>st</sup> January 2017 is hereby discharged.

For those reasons, the applicant's application dated 19<sup>th</sup> January 2017 is therefore dismissed with costs.

**Dated, Signed and Delivered this 30<sup>th</sup> Day of January 2017.**

**JANET MULWA**

**JUDGE**