



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO.50 OF 1985**  
**IN THE MATTER OF LAND TITLE NUMBERS**  
**KAJIADO/KAPUTEI-NORTH/[PARTICULARS WITHHELD]**

**BETWEEN**

**Z E O.....APPLICANT**

**VERSUS**

**J F O .....1ST RESPONDENT**

**L AUCTIONEERS.....2ND RESPONDENT**

**RULING**

1. The applicant had via the Originating Summons dated 29th November 2016 laid claim on ***Kajiado/Kaputei- North [particulars withheld]*** which he claims he was involved together with the 1st respondent in purchasing and developing their matrimonial property therein. He avers that the 1st respondent was to hold the same trust for him. However, the 1st respondent had proceeded to irregularly and without seeking his consent instructed the 2nd respondent to advertise the same for sale. The applicant in the said application sought orders that;

i. That this honorable court do issue an order inhibiting all transactions involving land title numbers ***Kajiado/Kaputei-North/[particulars withheld]*** respectively and the matrimonial home development thereon pending the hearing and determination of this originating summons.

ii. The honorable court do issue a declaration to the effect that the applicant has a right/interest of ownership in the land title number Kajiado/Kaputei-North /[particulars withheld] respectively in Machoka- [particulars withheld] Estate, Kitengela area and the matrimonial home/developments thereon.

iii. That this honorable court be pleased to issue interim injunctive orders restraining the 1st and 2nd respondent from proceeding with the sale and auction advertised for 30/11/2016 in the Daily Nation Newspaper dated 20/11/2016 of two plots being land title number Kajiado/Kaputei-North [particulars withheld] respectively in Machoka- [particulars withheld] estate, Kitengela area and the development thereon being matrimonial home of the applicant and 1st respondent pending the hearing and determination of this application.

iv. That this honorable court be pleased to issue a permanent injunctive orders restraining the 1st and 2nd respondent from proceeding with the sale and auction advertised for 30/11/2016 in the Daily Nation Newspaper dated 20/11/2016 of two plots being land title number ***Kajiado/Kaputei-***

**North [particulars withheld]** respectively in Machoka-[particulars withheld] estate, Kitengela area and the development thereon being matrimonial home of the applicant and 1st respondent pending the application inter partes hearing.

v. That the honorable court be pleased to issue permanent injunctive orders against the respondents by themselves their agents, servants or whosoever acting on their behalf from selling, alienating by way of sale, gift, lease, mortgage or otherwise the two plots being land title number **Kajiado/Kaputei-North [particulars withheld]** respectively in Machoka-[particulars withheld] Estate, Kitengela area and the development thereon pending the determination and matrimonial proceedings between the applicant and the 1st applicant.

2. The respondents in reply to the same raised a Preliminary Objection dated 9th December 2016. The same is based on grounds that;

i. The subject matter of this suit **Kajiado/Kaputei-North/[particulars withheld] & Kajiado/Kaputei-North/[particulars withheld]** are on the face of the record and on basis of the applicant's pleadings a charged property yet the charge Stanbic Bank Ltd is not sued by the Applicant hence the orders prayed for are an exercise in futility.

ii. That the honorable court has no divisional Jurisdiction to preside over a commercial dispute between the applicant, the Chargee Stanbic Bank Ltd and the 1st respondent J F O who is the Chargor and the 2n respondent, L Auctioneers who is the authorized agent of the Principal/Chargee Stanbic Bank Ltd.

iii. In respect to the 2nd respondent, in Commercial law and in Land law, the Chargee's right to dispose the charged properties is through a public auction or private treaty to recover the loan arrears owed to its principal the Chargee namely Stanbic Bank Ltd hence the Chargee's right to sell is paramount to the applicant's so called sentimental value to his former wife's properties which she single handedly bought and registered and registered in her maiden name.

iv. The applicant's suit is aimed at causing annoyance, mental anguish to the 1st respondent and to aggravate the 1st respondent's financial difficulties, which she is desperately trying to resolve with her Financier/charge Stanbic Bank Ltd.

v. The applicant has no cause of action against the respondents and his suit is already over taken by events hence the applicant's application should be struck out with costs to the respondents.

vi. That there is no proof of subsistence marriage between the applicant and respondent since they separated in July 2012.

3. Parties proceeded by way of written submissions. Only the 1st and 2nd respondents filed the same. The respondent submits that the Chargee Stanbic Bank Limited is not sued by the applicant and should the court grant temporary injunction without enjoining the charged the said orders will be in vain as the charge can easily appoint another auctioneer. It is argued that the suit was fatally defective ab initio and should be struck out with cost. That the matter in issue is a matter that lies with the Commercial division, which is competent to resolve the dispute between the Bank, charges public auction or realization of securities. Further, that the 2nd respondent is an auctioneer firm, in commercial law and in property and mortgage law, the charge property is through a public auction or private treaty to recover the Loan arrears owned to its principal charge Stanbic Bank Ltd hence the chargee's right to sell is paramount. They rely on the case of **Matex Commercial supplies Ltd & Anor –vs- Euro Bank Ltd (in liquidation), HCCC No. 82 of 2006** where it was held that, *“it is the case of the 2nd plaintiff that the suit property is the matrimonial property home of her family and if sold she would suffer irreparable loss or injury. The 2nd plaintiff is the director of the 1st plaintiff company. She offered her matrimonial property as a security to enable the 1st plaintiff to do business with funds from the bank. I have reckon again that the bank has no money to lend , the money belongs to the public and in particular depositors. The bank through its agent has a responsibility to recover all monies outstanding. It is in the interest of the public that the agent*

recovers all monies outstanding due and owing to the debtors.” Further at page 5 ... “In my view any property whether it is matrimonial or spiritual house, which is offered as security for loan /overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured. This court is concerned with the importance and the comfort such home generates but once a party feels that the property is suitable for purposes of a security, it means the party has destroyed, defaced and/or degraded the sanctity and rituality of the said matrimonial home.”

“of late there had been a tendency to enroll the Court into preposterous view point of what is commonly referred to as a matrimonial home. The rite of marriage and a place where the marriage is celebrated is us has no relation to a contractual obligation which has matured. The issue whether a party attaches special sentimental value is not an issue meant for consideration in the grant of an injunction.”

4. It was submitted further that the applicant filed suit to cause annoyance, mental anguish and to further aggravate the 1st respondent’s financial difficulties. Adding that the applicant was informed by the 2nd respondent before filing suit that it was a legal agent of Stanbic Bank Ltd. The applicant did not bother to pursue the Chargee to avoid paying the hefty loan arrears owed by the 1st respondent but instead rushed to court to ruin any prospects of negotiations between the Chargor and Chargee. That the suit is overtaken by events as the charger and Chargee have negotiated amicably and there is no pending public auction. That leaving out the Chargee who is the principal and suing the agent was incompetent and should be struck out.

5. It is submitted that there is no proof of subsisting marriage or matrimonial home since the parties divorced in July 2012 as per the decree nisi given on 16th September 2016 in Divorce Cause no. 382 of 2015 and a Decree absolute issued later. That by the time the applicant filed the suit on 30th November 2016 there was no spousal relationship between the applicant and 1st respondent. They urged the court to dismiss the suit with cost.

### **Determination**

6. The applicant seeks a temporary injunction inhibiting all transactions involving land title numbers **Kajiado/Kaputei-North/[particulars withheld]** respectively and the matrimonial home. The respondent submits that there is a misjoinder as Stanbic Bank Limited which is seeking to recover its money by realizing the mortgage. Order 1 rule 10 and 2 of the Civil Procedure Act provides that a proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A suit however cannot be defeated for mis-joinder or non-joinder of parties. Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder:- “9 No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

According to Order 1 rule 10(2) of the Civil Procedure Rules:-

I therefore find that failure to include the bank is not fatal to the applicant’s application as the same can be amended at any time before close of proceedings.

“(2). The court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party.....whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

7. The applicant seeks temporary injunction. It is trite law that for a court to grant a temporary injunction the applicant must satisfy 3 requirements as laid out in the case of **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012**, together with the mode of their application as

follows:

*“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*(a) establish his case only at a prima facie level,*

*(b) demonstrate irreparable injury if a temporary injunction is not granted, and*

*(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.*

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86.*

*If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”*

8. The applicant argues that the property in question formed part of matrimonial property. It is not in dispute that the applicant and the 1st respondent were initially married but later on divorced. The 1st respondent argues that the said property was never part of matrimonial property and she acquired the same alone. While the 2nd respondent who is the bank which had issued the 1st respondent with a loan facility on the security of the suit property argues that the applicant cannot claim to stop the statutory power of sale as he and the respondent are no longer married adding that the orders sought will serve no purpose as the sale was withdrawn. The said sale having been withdrawn there is no eminent danger on sale of the same and as such I find that the applicant in my view has not established prima facie case for this court to issue the temporary injunction sought. I therefore uphold the preliminary objection and dismiss the applicant’s application dated 29/11/2016 with costs to the respondents. It is so ordered.

Dated, signed and delivered this 23<sup>rd</sup> day of June 2017.

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Mwangi holding brief for Mr. Atong For the Applicant**

**Mr. Gitau For the Respondents**

**MS. Charity Court Clerk**