



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 23 OF 2016**

**ALBANUS PAUL MUTISYA ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED ..... 1ST DEFENDANT**

**PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

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**RULING OF THE COURT**

1. The **Notice of Motion** application before the court is dated and filed herein on 28<sup>th</sup> January 2016 by the Plaintiff. The Applicant seeks to secure the injunctive orders against the sale of the suit property. The surviving prayers seek the said injunction pending the hearing and determination of the suit. The Applicant secured interim injunction pending the delivery of this ruling.
2. The application is opposed by both Respondents, the 1<sup>st</sup> Respondent being a bank, and the 2<sup>nd</sup> Respondent being an auctioneer.
3. The application is premised on the grounds set out therein, and is supported by Affidavit of the Plaintiff sworn on 28<sup>th</sup> January 2016.
4. In brief, the Plaintiff's/Applicant's case is that;
  1. *The Plaintiff/Applicant is the registered proprietor of properties Title NOs. NGONG/NGONG/14331*
  2. *Sometimes on or about the 16<sup>th</sup> August, 2011 the Plaintiff/Applicant applied for and obtained a facility from the 1<sup>st</sup> Defendant/Respondent of Kenya Shillings Eleven Million Six Hundred Thousand (Kshs.11,600,000/=) towards completion of the purchase of the subject properties which properties were charged in favour of the 1<sup>st</sup> Defendant/Respondent to secure the loan facility.*
  3. *The sum of Kshs.11,600,000/= (Kshs. Eleven Million Six Hundred Thousand only was repayable within a period of fifty five (55) months and at the rate of Kenya Shillings Two Hundred Eighty Nine thousand (Kshs.289,711/=) only.*
  4. *The Plaintiff has been making payments to the 1<sup>st</sup> Defendant towards the settlement of the loan facility as due and owing.*
  5. *From the date the 1<sup>st</sup> Defendant/Respondent advance to the Plaintiff/Applicant the loan, the Plaintiff/Applicant has never received any demand for unpaid monies or any document regarding the facility from the 1<sup>st</sup> Defendant or at all.*

6. ***The 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant has now advertised, on 26<sup>th</sup> January, 2016 for sale the Plaintiff/Applicant's properties namely L.R. No. Ngong/Ngong14331 and L.R. No. Ngong/Ngong/14332 allegedly due to default in repayment of the mortgage facility advance to the Plaintiff/Applicant.***
7. ***The 1<sup>st</sup> Defendant/Respondent instructed the 2<sup>nd</sup> Defendant/Respondent who served a Notification of Sale of the Plaintiff's charged properties on the 2<sup>nd</sup> December, 2015.***
5. The application is opposed by the Respondents vide Replying Affidavit sworn by Fredrick Mung'athia on 16<sup>th</sup> February 2016 for both Respondents. The Respondents deny the allegations conferred in the plaint and in this application and stated that upon default, the Plaintiff was served with all the statutory notices paving the way for the bank to release its security through sale by auction.
6. With leave of court parties filed submissions.
7. The Plaintiff/Applicant main submission are that he only owes the bank about Kshs.1,000,000/= and that, the suit property is about Shs.30,000,000/= which should not be sold to realise Shs.1,000,000/=.
8. The Plaintiff further submitted that the bank cannot sell the suit property due to the fact that no 90 days Statutory Notice was ever served upon the Plaintiff by the Defendant contrary to S. 90 (1) of the Land Act; that no Demand or Notification of Default and the default amount has ever been served upon the Plaintiff; that no account of the loan balances and amount repaid has ever been supplied to the Plaintiff; that no current valuation of the property was conducted prior to the advertisement for sale contrary to section 97 of the Land Act. The Plaintiff/Applicant submitted that the intended sale is a nullity, illegal and unlawful and should be stopped by this court.
9. On their part the Respondent rejected the Plaintiff's submission saying that the bank complied with all the requirements under the Land Act. The Respondents referred the court to the Annexures to the Replying Affidavit of Fredrick Mung'athia aforesaid. Specifically "**FM 4,**" is a demand notice dated March 18, 2013 addressed to the Plaintiff vide P.O. Box 1342 – 90100 Machakos, Annexure "**FM 5**" which is a statutory Notice dated 16<sup>th</sup> February 2015 addressed to the Plaintiff vide P.O. Box 30407 – 00100 Nairobi. There is a certificate of posting being Annexure "**FM 7**" to show that, indeed the notice was posted; there is also Annexure "**FM 6**" being a Notice of the 40 days issued pursuant to section 96 (2) (3) of the Land Act. Finally there is Annexure "**FM 8**" which is a Valuation Report by Prestige Management Valuer Ltd dated 5<sup>th</sup> June 2015 giving the market value of the suit property at Shs.23,600,000/=. Annexure "**FM 9**" are bank statements.
10. I have considered the said submissions and also the application on its entirety. I raise the following issue for determination;
  1. Whether the Applicant has met the principles established in ***Giella v Cassman Brown*** for grant of temporary injunction.
11. I will not spend much time on this issue. The Plaintiff/Applicant has admitted that he owes at bank Shs.1,000,000/= to the Defendant bank. That admission alone entitles the bank to exercise its Statutory Powers of sale of the security. That notwithstanding, I have perused the Demand Notice, the 90 days Statutory Notice, the 40 days notice, the Valuation Report and the account statements attached to the Replying Affidavit of Fredrick Mung'athia. I am satisfied that the 1<sup>st</sup> Defendant bank has fully complied with legal and procedural requirements to enable it sell the suit property. The only misgiving I find is the use of different addresses. It is clear that the Plaintiff's address is P.O. Box 30407 – 00100 Nairobi. Yet the Defendant in sending the 40 days Statutory Notice used the address of P.O. Box 30408 – 00100 Nairobi. Clearly that address does not belong to the Plaintiff. Again, in sending the Statutory Notice dated March 18 2013, the Defendant used P.O. Box 1342 – 90100 Machakos. The only time when the proper address was used is when the Defendant sent the 90 days Statutory Notice. This inconsistency brings into doubt whether or not a legally binding Statutory Notice was issued. A court of Law cannot allow a property to be sold when there is a doubt as to whether or not binding legal notices were given.
12. That however, does not mean that the Plaintiff has established a prima facie case. Far from it.

The Plaintiff admits owing at least part of the debt. There is also evidence that the 90 days Statutory Notice was properly served. The Plaintiff's case then simply rests on the issue of accounts. While the Defendant bank demands over 12,000,000/= the Plaintiff only admit owing Shs.1,000,000/=. However, it has been the standard practice of this court that injunction cannot issue just because parties do not agree on accounts. Accounts if not agreed, amounts to loss which if suffered can be compensated by damages, and so this court cannot grant injunction simply because parties disagree on accounts. Besides, the Defendant bank has given comprehensive statements of account but the Plaintiff/Applicant did not make any comments on the same. It is my view also that the Defendant bank carried out a proper valuation before advertising the suit property for sale. Therefore, the Plaintiff/Applicant has not satisfied any of the principles established under *Giella – v – Cassman Brown*. No prima facie case has been established; there is no proof that damages would be adequate remedy if the suit property is sold, and far from it, this court is not in doubt, and so the balance of convenience does not favour the Plaintiff/Applicant.

13. However, because of the lingering doubt about the service of the 40 days Statutory Notice, this court will stop the sale of the suit property to enable the 1<sup>st</sup> Defendant bank to serve fresh and proper legal notices.
14. In the upshot, the Plaintiff/Applicant application herein dated 28<sup>th</sup> January 2016 is dismissed except that the 1<sup>st</sup> Defendant Bank shall only proceed with the sale of the suit property upon serving, fresh and effective Statutory Notices.

Orders accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI**

**THIS 29<sup>th</sup> DAY OF APRIL 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

No Appearance for Plaintiff

M/s Akonga for Defendant

Teresia – Court Clerk