



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

**AT MACHAKOS**

**ELC CASE NO.227 OF 2011**

**JOHN KENNEDY MITAMBO KING'OO ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH KAMAU *t/a* PHTUMA AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a **Plaint** dated **21.8.2011** the Plaintiff initiated the instant suit seeking declaration orders over sale of suit land **Kajiado/Kitengela/6585**; General damages; permanent injunction and costs. Later a Motion dated 21.8.2012 was filed on 8.2.2013 seeking injunctive reliefs against Defendant to stop among other things sale of the suit land pending hearing and determination of the suit. The Motion is based on grounds on the face of the Motion and supported by the Affidavit of Applicant sworn on 21.8.2012. The 1<sup>st</sup> Defendant filed defence on 2.7.2012 plus a bundle of documents with 14 components in the list to support its case.
2. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Kennedy Kasamba on 23.10.2014. The parties thereafter agreed to canvass the Motion by way of the submissions which were filed. The Plaintiff/Applicant challenged sale on the ground that the mandatory notice of exercise of statutory power of sale was not served.
3. Further the Applicant avers that there is no evidence the suit land has been transferred to the buyer. Applicant alleges that there are no documents supporting all the averment made by the replying Affidavit. The Applicant thus submits that he has met the threshold under **GIELLA Authority** for grants of interim orders of injunctions as prayed. The 1<sup>st</sup> Respondent responds by first alluding to the admission by the Applicant that he avers the 1<sup>st</sup> Defendant money was secured by the suit land. He also acknowledges the same was sold to recover the same money owed. The Applicant is also accused of delay in lodging and prosecuting the Motion.
4. The suit was filed on 29.8.2011. Application was filed on 8.2.2013 i.e. 1½ years since filing suit. This demonstrates lack of urgency and thus need to hear the suit instead of the Motion. The Respondent (No.1) states that the statutory notice was issued on 2.10.07 and served as required by law. However, Defendant discovered the Plaintiff to live in Denmark who contacted bank and sought to negotiate on saving his property. The agreed terms were violated by the Applicant and thus eviction dead line drew. The auction never took place.
5. The Applicant paid KShs.50,000/- deposit in a bid to reduce the debt. On 20.3.09, the Applicant agreed to redeem the suit land by paying lump sum KShs.236,040/- within 14 days. Thereafter, the Applicant issued KShs.50,000/- cheque which was dishonoured and thus on 24.4.09, the 1<sup>st</sup> Respondent instructed 2<sup>nd</sup> Respondent to re-advertise the land and on 26.5.09 a highest bidder of

KShs.1,125,000/- was accepted who deposited 25% of the sale price and the balance to be paid later. The application is thus sought to be dismissed as it lacks merit.

6. After going through the parties averments and their submissions, I make the following findings:

The Plaintiff was granted loan facility of KShs.250,000/- by the 1<sup>st</sup> Defendant on 1.11.02 and collateral of the suit land was charged.

The Applicant defaulted payment of the loan prompting the 1<sup>st</sup> Defendant to issue statutory notice on 2.10.07.

The Plaintiff was indulged by the bank to redeem his property but in vain as he could not fulfill any of the undertaking and/or promise he gave to the bank to pay the loan. This culminated with the sale by public auction of the suit land on 26.5.09.

7. Though the Respondent impugning the replying affidavit for not attaching documents to support the averments, the court notes that a bundle of documents filed along with 1<sup>st</sup> Defendant's defence dated 2.7.2012 has put all the referred documents. The Applicant has not commented or impugned the documents on record by way of an affidavit. The statutory notice was dated 2.10.07 and was posted on 30.10.07. The Applicant does not deny the address used was his.

8. The application was also filed over 1½ years after filing the Plaint which raises suspicions that, it could have been an afterthought. The court thus finds that the threshold for grant of interim injunction has not been met.

9. The court makes the following orders:

1. The Application dated 21.8.2012 and filed on 8.2.2013 is dismissed.
2. Costs to the 1<sup>st</sup> Defendant/Respondent.

**Dated and Delivered Machakos this 27<sup>th</sup> day of February, 2015.**

**CHARLES KARIUKI**

**JUDGE**