



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**CIVIL CASE NO 637 OF 2010**

**GEORGE IRERI MUKINDIA T/A GIM FRESH.....PLAINTIFF**

**VERSUS**

**K-REP BANK LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion dated and filed on 5<sup>th</sup> June 2014 was brought under the provisions of Section 12 (1) (a) and (c), Section 98 (1) and (2) of the Lands Act No 6 of 2012, Section 3A of the Civil Procedure Act and Order 40 Rules 1,2,3,4 & 5 of the Civil Procedure Rules. Prayers Nos (1), (2) and (3) were spent. It sought for the following remaining orders:-

**1) Spent.**

**2) Spent.**

**3) Spent.**

**4) THAT the Honourable Court be pleased to issue an order of temporary injunction to restrain the Defendant/Respondent by itself, or through Garam Investments (auctioneers), or any other of its' (sic) agents, employees, nominees and/or servants from selling by public auction or selling in any other manner the Applicant's parcel of land known as IGONJI/KIANGUA/2053 (IMENTI SOUTH DISTRICT) on 9<sup>th</sup> June, 2014 or on any other day until this suit is heard and determined.**

**5) THAT the Defendant/Respondent be restrained by itself, its' (sic) agents, employees, nominees and/or servants from interfering with the Plaintiff's business, user and quiet occupation and/or enjoyment of all that Parcel of Land known as IGONJI/KIANGUA/2053 (IMENTI SOUTH DISTRICT) until this suit is heard and determined.**

**6) THAT the Defendant/Respondent be restrained by itself, its servants, employees, nominees and/or agents from levying distress on any other of the plaintiff's (sic) properties and goods pending the hearing and determination of this suit.**

7) **THAT the Defendant/Respondent be ordered to pay the costs of this application in any event.**

### **THE PLAINTIFF'S CASE**

2. The application was supported by the Affidavit of George Ileri Mukindia that was sworn on 5<sup>th</sup> June 2014. His Written Submissions were dated 25<sup>th</sup> August 2014 and filed on 11<sup>th</sup> September 2014.

3. The Plaintiff was the registered owner of all that parcel of Land known as Igonji/Kiangua/2053 (Imenti South District) (hereinafter referred to as "the subject property"). He contended that the Defendant instructed Garam Investments auctioneers to dispose of his property by way of public auction in total and blatant disregard of the unresolved issues that were raised in the suit herein.

4. He was emphatic that the legal processes and mandatory steps to be undertaken before conducting the auction, not limited to him being issued with a Notification of Sale, were omitted, ignored or conducted in blatant breach of the provisions of the Land Act Cap 280 (Laws of Kenya).

5. He also contended that he had never been issued with a copy of the charge documents through which the Defendant purported to sell his property despite his requests both at the Defendant's Branch Office at Nyeri County and the head office in Nairobi.

6. It was therefore his case that the Defendant had no legal basis to auction his property and urged the court to grant him the orders he had sought in his present application.

### **THE DEFENDANT'S CASE**

7. In response to the said Application, Nancy Kaume, the Defendant's Recoveries Manager swore a Replying affidavit on 21<sup>st</sup> July 2014 that was filed on 22<sup>nd</sup> July 2014. The Defendant's Written Submissions were dated and filed on 2<sup>nd</sup> October 2014.

8. The Defendant's case was that the Plaintiff had wrongly brought the application herein because the issues in the current suit had been compromised in the years 2012 and 2013 when it was agreed that he would abandon this suit in consideration of the Defendant agreeing to restructure the then outstanding amount of Kshs. 4,309,608 which was the subject of its Counterclaim.

9. It stated that the Plaintiff acknowledged the loan advanced to him which the Defendant then restructured and that he provided the subject property which was charged as security. When he defaulted in repaying the loan, it issued the mandatory statutory notices. It averred that the Plaintiff was in default and that he had been regularly served and notified of the intended sale of his charged property.

10. It therefore termed the Plaintiff's application a gross abuse of the court process that ought to be dismissed with costs to it.

### **LEGAL ANALYSIS**

11. The principles for granting an injunction are well settled in the case of **Giella vs Cassman Brown Company Limited [1973] E.A 358**. The principles are that an applicant must establish a *prima facie* case with a probability of success, he must demonstrate that damages will not be an adequate remedy if the interlocutory injunction is not granted and that if the court is in doubt of the foregoing, it will determine the matter on a balance of convenience.

12. A *prima facie* case was defined by the Court of Appeal in the case of **Mrao vs First American Bank (K) Ltd 2003 KLR 125**, that was relied upon by the Plaintiff, as being where an applicant establishes that his legal right has been infringed by the opposite party thereby calling for a rebuttal by the latter. This therefore begged the question as to whether the Plaintiff herein had established a *prima facie* case with a

probability of success which would then entitle him to the equitable relief of an injunction.

13. It was the Plaintiff's submission that the Defendant had filed a Statement of Claim herein, an indication that there existed issues for determination, between him and the Defendant in the existing customer-banker relationship. He did not, however, set out what the surrounding issues of the debt were.

14. As was rightly pointed out by the Defendant herein, the Plaintiff's the cause of action arose from its alleged illegal and/or unauthorised dealing of his account. The suit herein had nothing to do with the subject property which the Plaintiff gave the Defendant as security as was evidenced in the Charge Instrument dated 18<sup>th</sup> February 2013 that was annexed in the Defendant's Replying Affidavit and was marked "NK-2".

15. Appreciably, the question of whether or not the Defendant had fully complied with the provisions of the Land Act before it purported to exercise its Statutory Power of Sale was a different matter altogether and could not be dealt with in the context of the present application.

16. Notably, a prayer for injunctive orders in an application must mirror the prayers that have been sought in the main suit. This was a position that was held in the cases of **Kihara vs Barclays Bank Limited [2001] 2 EA** and **Francis Mutua vs Southern Credit Banking Corporation [2010] eKLR** that were relied upon by the Defendant. A perusal of the Plaint dated 22<sup>nd</sup> September 2010 and filed on 24<sup>th</sup> September 2010 shows that injunctive orders were not part of the reliefs that the Plaintiff had sought in his Plaint.

17. Despite noting the parties' submissions regarding the issue of crystallisation of the Defendant's Statutory Power of Sale, the restructuring of the loan and the purported non-issuance of the mandatory Statutory Notices amongst all the other issues that were raised by the parties, the court found that it could not delve into the discourse of the validity or otherwise of the same as the property in question was not subject of the suit herein, a position that was rightly pointed out by the Defendant.

18. As the entry point of any dispute for determination by the court system is by way of suit as defined in the Civil Procedure Act, the Plaintiff's prayers for injunctive orders had no leg to stand on as there was no prayer seeking injunctive orders in his suit.

19. Accordingly, having considered the pleadings, the affidavit evidence, written submissions and the case law in support of the respective parties' cases, the court came to the conclusion that it could not grant any orders in a vacuum. The provisions of Order 40 of the Civil Procedure Rules, 2010, Section 12 (1) (a) and (c), Section 98 (1) and (2) of the Lands Act were irrelevant in the circumstances of the case herein. Additionally, the inherent powers of the court under Section 3A of the Civil Procedure Act that was relied upon by the Plaintiff could also not come to his aid.

20. The court was thus more persuaded by the Defendant's submissions that the Plaintiff had not met the criteria that were set out in the case of **Giella vs Cassman Brown Co Limited** (Supra) and found that the Plaintiff's submission in this regard fell by the way side.

## **DISPOSITION**

21. In the circumstances foregoing, the upshot of this court's ruling was that the Plaintiff's Notice of Motion dated and filed on 5<sup>th</sup> June 2014 was not merited and the same is hereby dismissed with costs to the Defendant herein.

22. For the avoidance of doubt, the status quo orders that were issued on 9<sup>th</sup> June 2014 and subsequently extended on various dates are hereby discharged, set aside and/or vacated.

23. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of April 2015**

**J. KAMAU**

**JUDGE**