



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 98 OF 2015**

**PETER NGURE KIHUTO.....PLAINTIFF/APPLICANT**

**VERSUS**

**COOPERATIVE BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SPORT LIGHT INTERCEPTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**Introduction**

1. On **23<sup>rd</sup> March, 2015** the plaintiff, **Peter Ngure Kihuto** (hereinafter referred to as the applicant) filed the suit herein seeking to, *inter alia*, restrain the defendants from auctioning the parcel of land known as **Konyu/Bonchu/2563** (hereinafter referred to as the suit property).
2. Simultaneously with the plaint instituting this suit, the applicant brought the notice of motion of even date seeking to, *inter alia*, temporarily restrain the defendants by themselves their servants, agents and/or assigns from carrying out the intended sale of the suit property pending the hearing of the application and the suit.
3. The application is premised on the grounds that the respondents without issuing proper statutory notices, advertised the suit property for sale by public auction; that despite the suit property being matrimonial property it was in violation of **Section 79(3)** of the Land Act No.3 of 2012 Laws of Kenya charged without spousal consent. The applicant contends that in advertising the suit property for sale, the respondents failed to comply with **Sections 90, 96, 97** of the Land Act No.3 of 2012 thus making the intended public auction of the suit property null and void.
4. Explaining that the suit property is his matrimonial home, the applicant avers that unless the orders sought are granted, he will suffer irreparable loss and damage (he will be rendered destitute).
5. Maintaining that the intended sale is illegal, null and void and ultra vires the respondents' powers, the applicant avers that it is in the interest of justice that the application be granted.
6. The application is supported by the supporting affidavit of the applicant where the grounds thereon are reiterated.

7. In reply and opposition to the application, the branch manager of the 1<sup>st</sup> respondent, **Ken Murungi**, swore the affidavit filed on **26<sup>th</sup> March, 2015** where he has deposed that the applicant applied for and obtained a loan from the 1<sup>st</sup> respondent, that the loan facility granted to the applicant by the 1<sup>st</sup> respondent was secured by a legal charge over the suit property and that despite having been availed with statements as to the amount owed, the applicant completely refused and/or neglected to meet repayment of the loan and immediately fell into arrears.

8. Contrary to the applicant's contention that he was not issued with the necessary statutory notices, Mr. Murungi, deposes that the 1<sup>st</sup> respondent followed the prescribed steps in realising the security offered by the applicant. In this regard he explains that the 1<sup>st</sup> respondent issued a valid statutory notice dated 3<sup>rd</sup> January, 1999 as was then provided under **Section 74** of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). He points out that the 1<sup>st</sup> respondent also served on the plaintiff the requisite forty five day notification of sale as provided for under the Auctioneers Rules. Thereafter an advertisement was placed in a local daily newspaper. The applicant is said to have acknowledged receipt of the notices vide his letter dated 29<sup>th</sup> January, 1999.

9. Mr. Murungi further deposes that on several occasions, the 1<sup>st</sup> respondent has attempted to sell the suit property through public auction in vain. It is pointed out that in the previous attempts to realise the security, the applicant never raised the issue of validity of the notices and submitted that raising it now is an afterthought.

10. It is contended the 1<sup>st</sup> respondent having issued valid notices in 1999, it was not under any legal obligation to issue fresh notes. All what it required to do was to give notice of sale of the property for a period of 14 days.

11. Despite not being obligated to issue fresh notices it is explained that the 1<sup>st</sup> respondent did so on 22<sup>nd</sup> January 2015; that the second notice was served on the applicant by registered post to his last known postal address.

12. In view of the foregoing, it is submitted that the 1<sup>st</sup> respondent complied with all the requirements before attempting to realise the security. The applicant's contention that he was not served with the proper statutory notices is said to be false and misleading.

13. With regard to the alleged non-compliance with certain provisions of the Land Act 2012, it is submitted that those provisions are inapplicable to the charge hereto which was executed under the Registered Land Act, now repealed.

The applicant is faulted for having moved to court with unclean hands.

14. With regard to the applicant's contention that he will be rendered destitute if the suit property is sold, it is explained that the sale was contemplated as at the time the applicant offered the suit property as security for the loan.

15. When the application came up for hearing the applicant informed court that he was relying on his supporting affidavit.

16. Counsel for the 1<sup>st</sup> respondent, **Mr. Kioni**, submitted that for the court to grant the orders sought, the applicant must satisfy the conditions set in the case of **Giella vs. Cassman Brown & Company Ltd (1973) E.A 358** that is to say, the applicant must prove that he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour.

17. Pointing out that the applicant has not denied being indebted to the 1<sup>st</sup> respondent, Mr. Kioni submitted that for this court to stop the auction, it must be demonstrated that the intended auction is

irregular.

18. On the regularity or otherwise of the intended sale, Mr. Kioni explained that the 1<sup>st</sup> respondent issued the applicant with the requisite statutory notice on 1st January, 1999. He explained that the applicant acknowledged receipt of the statutory notice. A letter by the applicant dated 12th November, 1999 is said to attest to that fact.

19. In all occasions when the 1<sup>st</sup> respondent attempted to realise the security, the applicant is said to have acknowledged that he owes the bank money but frustrated any attempt to realise the security by threatening the would be buyers.

20. In view of the foregoing, it is submitted that the applicant has failed to establish a *prima facie case* with a probability of success at trial. The applicant is also accused of having come to a court of equity with unclean hands. Besides, it is submitted that the applicant can adequately be compensated for any damage he may suffer by way of damages.

21. The balance of convenience is said to tilt in favour of 1<sup>st</sup> respondent who has been prevented from realising the security for a long period of time.

22. With regard to the contention that the property was charged without spousal consent, counsel submitted that spousal consent was not required under the Registered Land Act which applies to the charge herein.

23. Maintaining that all legal procedures to be observed before the security could be realised were observed and followed, Mr. Kioni urged the court to allow the auction to proceed.

24. In a rejoinder, the applicant stated that apart from the newspaper advertisement, he was not served with any notice and has never participated in any auction. He blames his woes on the bank which he alleges has identified a person it wishes to sell the suit property to.

**The law applicable to the application:-**

25. The law applicable to the application was stated by **Ouko J.**, (as he then was), in the case of **Patrick Karimi Wairagu t/a Thigi General Stores vs. Barclays Bank of Kenya Ltd & Another; Nakuru HCCC NO. 93 OF 2011** thus:-

**“The onus at this stage, is upon the Applicant to persuade the court that upon the facts he has relied on and on the application of the law, he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour. See Giella V. Cassman Brown & Company Limited (1973) E.A 358.**

**Starting with the second last principle, the answer was provided by the Court of Appeal in Nyanza Fish Processors Ltd. V Barclays Bank of Kenya Civil Appeal NO. 114 of 2009 where the Judges said;**

**“If the property, the subject matter of this litigation is sold, the loss to the Applicant will be financial. True, it may be the property is unique. Its value however is ascertainable... The Applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the Applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the Applicant to damages. The Respondent is a bank and there is no gain saying that it will be able to satisfy the loss.”**

**That is the situation the present Applicant finds himself. On the balance of convenience, the**

Applicant has not rebutted the assertion by the 1st Respondent that the last payment was on 29<sup>th</sup> June 2004, some seven years ago and only Kshs.161,667 was paid and the outstanding unpaid balance is a whopping Kshs.151,980,772.23/=. This amount will continue to escalate to the detriment of the Respondent.

Turning to the question of *prima facie* case, the question must be determined without going to the merit of the Applicant's suit. The Applicant has in the first place argued that the interest charged was outrageous and unascertainable. The answer to such a claim was provided in the case of Joseph OKoth Wando V National Bank of Kenya Civil Appeal No. 77 of 2004, where the law was stated as follows;

“It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute”

See also Maithya V. Housing Finance Company of Kenya (2003) 1 E.A 133.....

It is incredible that having borrowed such a large sum of money in 2001, the Applicant has never bothered to demand a statement of his account if indeed none had been supplied. The Applicant also has not annexed to his affidavits in this suit or in the Nairobi suit any evidence that he has been servicing the loan, yet he has categorically stated that he has “dutifully and promptly” met his obligation under the lending contract...

For the reason that he has denied being served on account of the two matters above, I will give him the benefit of doubt as the onus was upon the 1<sup>st</sup> Respondent to show that the Applicant was indeed properly served.

In view of the foregoing, what is the appropriate order?

In National Bank of Kenya Limited V Shimmers Plaza Limited Civil Appeal No. 26 of 2002, the Court of Appeal answered that question thus-

“We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

It is ordered that there will be orders of temporary injunction as prayed until such time as the 1<sup>st</sup> Respondent shall have served the Applicant with a valid statutory notice and a notification of sale in accordance with the law.”

### Analysis and determination

26. In the circumstances of this case, it is clear that the applicant was served with the statutory notice dated 3<sup>rd</sup> January, 1999. That fact is attested by the applicant’s letter dated 29<sup>th</sup> January, 1999. Although it cannot be stated with certainty that the applicant received the statutory notices issued before the last attempt to realise the suit property was made, given the fact that the applicant was all along aware that the 1<sup>st</sup> respondent’s right to realise the suit property had crystallized, the question to answer is whether the 1<sup>st</sup> respondent had any legal obligation to issue fresh statutory notices before realising the mortgaged property.

27. Faced with the above question, **J. Kamau J.** in the case of Zipporah Mwangi Njenga v. Housing Finance Ltd & Another (2014) e KLR stated:-

“It is very clear from the above that the Plaintiff was duly served with the Statutory Notice

pursuant to Section 74 of the Registration of Land Act (now repealed) and Section 90 of the Land Act, 2012. The postal address in the said notices and the certificates of postages show that the said notices were sent to the Plaintiff through Post Office Box Number 39376- 00623 Nairobi. This was the postal address shown in the Charge Document, which the Plaintiff did not deny ever having executed.

The statutory notice issued to the Plaintiff by the 1<sup>st</sup> Defendant was still valid as it contained all the information that was required to be given therein. It was not waived by the mere fact that the 1<sup>st</sup> Plaintiff accepted payment in instalments. In any event, the 1<sup>st</sup> Defendant's letter of 8<sup>th</sup> June 2012 was crystal clear of what the consequences of default by the Plaintiff would be.

It was therefore not necessary for the 1<sup>st</sup> Defendant to issue a fresh statutory notice after suspension of the impending sale. This is a position that has been held by several courts. Indeed, this court took the same position in the case of John Kinyanjui Kanya & Another vs Barclays Bank of Kenya Limited & Another [2013] eKLR where it also adopted the same holding in the case of Gitau Muiruri vs Standard Bank (K) Limited [2005] eKLR amongst other cases. This position was also held by the Court of Appeal in the case of Civil Appeal No 111 of 1986 George Gikubu Mbuthia vs Jimba Credit & Another (unreported), a holding that is in fact binding on this court."

28. There being no special circumstances warranting departure from the above stated legal position, I find and hold that the applicant was issued with proper and valid notices in 1999. Since the 1<sup>st</sup> respondent was not obligated to issue fresh notices before it could realise the mortgaged property, I find his argument that he was not served with proper notices to have no basis in law.

29. With regard to the contention that the property was charged without spousal consent, I agree with counsel for the 1<sup>st</sup> respondent that under the law governing and applicable to the contract executed between the applicant and the 1<sup>st</sup> respondent, spousal consent was not required before the property could be lawfully charged.

30. On whether the 1<sup>st</sup> respondent complied with the provisions of **Section 97** of the Land Act 2012, before advertising the property for sale, I find no evidence in the court record capable of proving that the 1<sup>st</sup> Respondent complied with the provision of the law which provides as follows:-

1. **A chargee who exercises a power to sell the charged land...owes a duty of care to the chargor... to obtain the best price reasonably obtainable at the time of sale.**

2. **A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**

3. **If the price at which the property is sold is twenty five per centum or below the market value at which comparable interests of land of the same character and quality are being sold in the open market-**

a. **There shall be rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and**

b. **The chargor whose charged land is being sold for the price may apply to a court for an order that the sale be declared void; but the fact that a plot of charged land is being sold by the chargee at an undervalue being less than twenty five per centum below the market value shall not be taken to mean that the chargee has complied with subsection (1).**

31. There being no evidence that the 1<sup>st</sup> Respondent complied with the above provisions of the law, which I find to be applicable to the auction herein, I agree with the applicant that the 1<sup>st</sup> respondent has not complied with all requirements of the law before advertising the property for sale.

32. In the case of Zipporah Mwangi Njenga (*supra*) it was stated that:-

**“The amount that a suit property is disposed of is a relevant issue. The court must be satisfied that the amount the property has been sold at is the best amount the Chargee would have obtained from the sale of the subject property. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant submitted a copy of the said Valuation Report as evidence before this court. It is therefore not known what the value of the suit property was at the time the same was scheduled for sale on 10<sup>th</sup> September 2013.**

**In the absence of any evidence that the subject property was valued in accordance with the provisions of Section 97 of the Land Act, the court can only come to the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not fully complied with the provisions of the law. The importance of this issue was considered by this court in the case HCCC No 318 of 2009 John Mwenja Ngumba & Another vs National Industrial Credit (NIC) Limited & Another [2014] eKLR where it was held that the issue of whether or not the property therein had been sold at the proper price be determined at full trial.**

**While the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to satisfy the court that they had undertaken the valuation as required by the law, the court is not satisfied that the omission would be sufficient to bring the Plaintiff within the parameters of the case of Giella vs Cassman Brown & Company Limited (Supra) as this is an issue that can be remedied without any prejudice being suffered by the Plaintiff and without interfering with the 1<sup>st</sup> Defendant’s statutory power of sale of the subject property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to be afforded an opportunity to comply with the provisions of the law on the valuation of the subject property, if they had not already done so. If they had done so, nothing stops them from proceedings with the realisation of the security herein.**

**The Plaintiff had come to court seeking an equitable relief. She, however, came with unclean hands. She was guilty of non-disclosure of material facts. While she said that the 1<sup>st</sup> Defendant had been paid more than Kshs 18,000,000/=, she failed to provide any tangible evidence that she had paid the said monies....She cannot keep the subject property and keep the 1<sup>st</sup> Defendant from realizing its security. There is every likelihood that outstanding amount could outstrip the value of the property. The same observation was made in the case of Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others[2006] eKLR where Ochieng J stated as follows:-**

**“... In my considered view, if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years...”**

**As the court’s power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence, an applicant seeking such an interlocutory injunction, is expected to satisfy the criteria set out in the case of Giella vs Cassman Brown Company Limited (Supra) in which it was held that:-**

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

**Having considered the parties’ affidavits, the written and oral submissions and the case law in support of their respective cases and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein.**

**Accordingly, having found that the Plaintiff had not made out a *prima facie* case with a probability of success, the court finds that the question of her suffering loss that cannot be compensated by way of damages if the interlocutory judgment was not granted would not arise and that the balance would not tilt in her favour. Indeed, the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is at liberty to exercise its statutory power of sale provided that it fully complies with the provisions of the law.”**

33. Being of the view that the case of **Zipporah Mwangi Njenga** (*supra*) properly captures the principles that a court ought to consider in the considering whether to restrain a mortgagee from exercising its statutory power of sale; despite there being no evidence that the 1<sup>st</sup> respondent complied with the Provisions of **Section 97** of Land Act, 2012, I find that none compliance with the said law to be incapable of tilting the scales in favour of the applicant who, admittedly has not been fulfilling his contractual obligations to the 1<sup>st</sup> Respondent.

34. This however, is not to say that the 1<sup>st</sup> respondent is at liberty to proceed with the sale before complying with the said provisions of law.

35. The upshot of the foregoing is that the 1<sup>st</sup> respondent is restrained from proceeding with the sale without first, complying with the provisions of **Section 97** of the Land Act, 2012 but not pending the hearing and determination of the suit as urged by the applicant.

36. The application is dismissed but with no orders as to costs.

**Dated, Signed and Delivered at Nyeri this 27<sup>th</sup> day of May, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Peter Ngure Kibuto – plaintiff

Mr. Kimunya h/b for Mr. Kioni for the defendants

Court assistant - Lydia