



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & COMMERCIAL COURTS**  
**CIVIL SUIT NO. 280 OF 2014**

**GITOBU IMANYARA.....PLAINTIFF**

**- VERSUS -**

**ECO-BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**S. M. GATHOGO T/A**

**VALLEY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff, **GITOBU IMANYARA**, has asked the court for an interlocutory injunction to restrain the defendants from selling, charging, mortgaging, leasing, entering into, taking possession of, or in any way interfering with the suit property, until the suit is heard and determined.
2. The suit property is identified as **LR No. 13460/19 KAREN**.
3. The said property was charged to the 1<sup>st</sup> Defendant, **ECO BANK KENYA LIMITED**, as security for a loan which the bank advanced to the plaintiff.
4. The 2<sup>nd</sup> Defendant, **S. M. GATHOGO**, Trading as **VALLEY AUCTIONEERS**, had been contracted by the bank to sell the suit property by public auction.
5. The plaintiff's case was that the suit property had been advertised for sale without following the law and due procedure.
6. It is common ground that on 17<sup>th</sup> June 2015, Gikonyo J. granted an interlocutory injunction to restrain the 2<sup>nd</sup> defendants from selling the suit property. The said injunction was to remain in force until such time as the defendant's would give fresh Redemption Notice and fresh Notification of sale, in compliance with the law.
7. By the said Ruling, the learned Judge expressly stated that the statutory Notice under Section 90 of the Land Act, had been issued properly.
8. According to the plaintiff, the defendants had not issued either a fresh Redemption Notice or a fresh Notification of sale which was in compliance with the law.
9. Secondly, the defendants are said to have failed to carry out a valuation of the suit property, as required by law.
10. Thirdly, the defendants are said to have declined, refused or neglected to disclose or issue a statement demonstrating the outstanding payment.
11. In his supporting affidavit, the plaintiff said that the bank had served him with a Notice dated 22<sup>nd</sup>

- June 2015, which was issued pursuant to section 96 (2) and 96 (3) of the Land Act.
12. His complaint is that the defendants deemed that Notice to run concurrently with the Notice contemplated by Rule 15 (b) of the Auctioneers Rules 1997.
  13. As far as the Plaintiff was concerned, the auctioneers ought to issue the Notification of Sale only after the Redemption Notice had run its full course.
  14. In respect to the valuation of the suit property, the Plaintiff said that the only time when the same was done, was over a year before the intended auction.
  15. Therefore, the value assigned to the property could not represent the true value of the suit property.
  16. The absence of a current valuation report was perceived, by the Plaintiff, as the basis for a real risk that the property would be sold at a gross undervalue.
  17. In the light of the failure to comply with the law, on the part of the defendants, it is the Plaintiff's case that his equity of redemption would be extinguished if the court allowed the auction to proceed.
  18. The sale of this suit property would, in the opinion of the Plaintiff, cause him to suffer irreparable damage as he would have lost a property to which he had so much sentimental attachment that it would be impossible to compensate him for such a loss.
  19. The plaintiff pointed out that he and his family live on the suit property. Therefore, the unlawful sale of the said property would result in the plaintiff's family being thrown out, thus causing them irreparable loss and damage.
  20. When the application first came up for hearing before me, I asked the plaintiff's advocate, Mr. Onyango, to tell me if his client had made payments to the bank.
  21. Mr. Onyango advocate told me that he needed time to talk to the plaintiff, so as to verify whether or not the plaintiff had remitted any payments.
  22. At that stage, the case was adjourned for about 3 hours, to give the Plaintiff an opportunity to make available to the court information regarding the payments he had made to the bank.
  23. When the case resumed later that afternoon, Mr. Onyango advocate informed the court that his client would remit a substantial payment within 2 weeks.
  24. The Plaintiff also indicated a willingness to offer to the bank, another property whose value he described as very substantial.
  25. In effect, although the plaintiff was given an opportunity to show the court that he had been servicing the loan, he opted to tell the court about what he intended to do in the future.
  26. When canvassing the application, Mr. Onyango advocate reiterated that the redemption Notice ought to first run its term, before the Notification of sale was issued.
  27. The plaintiff also submitted that when a chargee conducts a valuation of the charged property, he had an obligation to inform the chargor of the value assigned to the property.
  28. It was the Plaintiff's understanding that it was wrong for the bank to keep to itself, the valuation report, as by doing so, the bank would be denying the borrower the opportunity to get a reasonable value for his property.
  29. In answer to the application, Mr. Kimani, the learned advocate for the defendants, submitted that the application was without merit.
  30. The first reason for that contention was that on 22<sup>nd</sup> June 2015, Gikonyo J. had already held that the bank could proceed to realize the security provided that it had issued a fresh Redemption Notice and a fresh notification of sale.
  31. As far as the bank was concerned, the defendants had complied with the requirements spelt out in the court's Ruling dated 17<sup>th</sup> June, 2015.
  32. As pointed out earlier, it is common ground that on 22<sup>nd</sup> June 2015, the bank issued a Redemption Notice.
  33. The said Notice told the Plaintiff that he had 40 days from the date of service to pay Kshs.87,644,774.79 plus further interest at the rate of 17.75% per annum, plus (further) default interest at 10% per annum.
  34. In the event that the Plaintiff failed to comply with the Notice, the bank told him that it would take steps to sell the charged property.
  35. The Notice is attached to the plaintiff's affidavit sworn on 19<sup>th</sup> October 2015. Upon the face of the Notice, there is an endorsement, indicating that the said Notice was received at 5:00 p.m. on 22<sup>nd</sup> June 2015.

36. By my calculations, the period of 40 days lapsed on or about 1<sup>st</sup> of August 2015.
37. It was not until 24<sup>th</sup> August 2015 when the Auctioneers issued the Notification of Sale. Clearly, therefore, the defendants did not ever purport to have the Redemption Notice run concurrently with the Notification of sale.
38. In effect, the Notification of Sale was issued after the Redemption Notice had run its full term.
39. Furthermore, the Notification of Sale was, on a prima facie basis, fully compliant with the statutory provisions governing its duration and also governing its content.
40. In a nutshell, it does, on a prima facie basis, appear that the defendants complied with the conditions which had been set by Gikonyo J. on 17<sup>th</sup> June 2015.
41. I also note that there is a valuation report prepared by messers I. W. Mbugua and P. M. Muswii, both of **LLOYD MASIKA LIMITED**. The valuation report is dated 30<sup>th</sup> July, 2015.
42. Bearing in mind the fact that the auction was scheduled for 28<sup>th</sup> October 2015, it does appear that the process of having the suit property valued was done within an acceptable period, preceding the intended sale.
43. In any event, the plaintiff's complaint was not that the valuation exercise was conducted too early. His position was that the bank had not conducted a valuation.
44. The bank has demonstrated to the court that it had carried out a valuation of the suit property. That is sufficient to answer the Plaintiff's claim.
45. Nonetheless, the Plaintiff advanced the argument that the bank was obliged to make available to him, a copy of the valuation report.
46. I find that there is no legal duty imposed on a chargee, to disclose to the chargor the particulars of the valuation report prior to the exercise of the chargee's statutory power of sale.
47. I also find that there is no bar to a chargor having the charged property valued, if he wishes to do so.
48. However, a chargee is not under any legal duty to accept the results of the valuation process undertaken by the chargor. The chargee's primary duty is to ensure that he engages a reliable professional to undertake the process of valuation of the charged property.
49. As regards the proposals which the plaintiff was putting forward, for the repayment of the outstanding loan, I note that the same did not include any payments that were to be made prior to the date of the intended auction.
50. In effect, if the sale were put-off simply on the basis of promises, that would have been prejudicial to all parties. I say so because the plaintiff was already in arrears, and had failed to demonstrate that he had remitted any payments.
51. Therefore, by stopping the auction unconditionally, the court would have created a scenario in which the bank had to pay both the auctioneers and its lawyers from the bank's own resources. The effect of that would be a further debit to an account which was already non-performing.
52. If the plaintiff was already in default, a further debit to his loan account would only make the situation worse for both himself and the bank.
53. I also note that whilst the plaintiff was now asserting that he had great sentimental attachment to the suit property, he had previously expressed a desire to sell-off the house so that the proceeds of sale could be used to pay the bank.
54. The previous intentions of the plaintiff are well captured in his affidavit sworn on 26<sup>th</sup> June 2014.
55. But whether or not the plaintiff and his family have a great sentimental attachment to the suit property, the important thing is that he can only keep it if he honours his obligations by paying-off the loan.
56. As the bank appears to have given the requisite Notices, and because the plaintiff has not demonstrated that he has met his obligations by remitting payments as and when due, I find no merit in the plaintiff's application dated 19<sup>th</sup> October 2015. Accordingly, the application is dismissed.
57. The costs of the application are awarded to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>st</sup> day of December 2015.**

**FRED A. OCHING**

**JUDGE**

No appearance for the Plaintiff

Kimani for the 1<sup>st</sup> Defendant

Kimani for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk.