



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 107 OF 2013

LEAH MWERU WAIGWA.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT/RESPONDENT

RULING

1. On the 1st October 2014, the applicant **Leah Mweru Waigwa** obtained a court order by way of an injunction restraining the Respondent Bank from selling property known as **Nakuru Municipality Block 7/65** registered in her late husband's names, the late **Naftali Waigwa Githinji**, but on conditions that she would obtain Letters of Administration of the Estate within 90 days, and upon the Respondent Bank serving upon her the requisite notices as envisaged under **Section 90 of the Land Act No. 6 of 2012**. The Letters of Administration were obtained on the 4th August 2014 vide **Nakuru HCCC Succession Cause No 332/2014** before the above order was issued.
2. In her motion dated 23rd April 2015 the applicant approached the court for an order of temporary injunction to restrain the Respondent from selling the subject property on the grounds that the necessary notices under **Section 90 and 96 of the Land Act** had not been served upon her and that the property had not been valued to establish the market and forced sale value.
3. In the supporting affidavit sworn on the 23rd April 2015, the applicant reiterated the above two grounds.
4. The application was opposed by a Replying affidavit sworn by the Respondent's Credit Remedial Manager one Paul Chelang'a. It is his disposition that a fresh statutory notice was sent to the applicant by Registered Post on the 12th November 2014 and that the property was valued on the 11th March 2015 and sought dismissal of the application.
5. In the court's view there are only three issues for the courts determination:
 1. Whether the necessary statutory notices under the **Land Act No. 6 of 2012** were duly served upon the applicant.
 2. Whether the property was valued before the Advertisement for sale by public auction.
 3. Whether the order of injunction ought to be issued.

The Parties by consent, filed written submissions on the application.

6. **The applicant's submissions** are that she is the Administrator of the **Estate of Naftali Waigwa Githinji** and not the **Estate of Jimmy Naftali Waigwa Githinji** to whom the statutory notice dated 12th November 2014 was sent by the respondent, and therefore, no competent notice was issued and served upon her. She denies receipt of the said notice.

It is further submitted that the amount borrowed was Kshs.830,000/=as evidenced in the search certificate which attached in her affidavit and states that such could only be confirmed on evidence. The applicant framed the following issues and invoked **Section 44A of the Banking Act:**

- (a) the principal amount owing when the loan became non-performing
- (b) the interest in accordance with the contract between the lender and the borrower
- (c) Expense incurred in the recovery of the amount owed.

It was finally submitted that the recoverable amount from the estate ought to be ascertained before any sale can take place and also faults the market value given to the property of Kshs.11,000,000/= in March 2015 as being too low.

7. **The Respondents Submissions** are that the statutory notice dated 12th November 2014 was issued and served to the Administrator of the Estate of Naftali Waigwa Gathenji (deceased) as stated in grant of **Letters of Administration in Nakuru HCCC Succession Cause No. 332 of 2014.**

A certificate of posting was produced as evidence of posting to the applicant and a copy of the valuation report undertaken in March 2015 was also sent to her.

The Respondent has urged the court to dismiss the application and discharge the interim order of injunction issued on the 24th April 2014.

8. The court has considered submissions by both counsel together with the affidavit evidence and annexures.

As stated above, the applicant stated only two grounds upon which the application before the court is based. The court is guided and shall consider the pleadings by the party and prayers sought. Any other matters as raised in the applicant's submissions, having not been pleaded or even supported in the supporting affidavit fall outside this court's jurisdiction as far as the application at hand is concerned.

9. I have seen the grant of Letters of Administration issued on the 4th August 2014 in **Nakuru High Court Succession Cause No 332 of 2014.** They relate to the Estate of **NAFTALI WAIGWA GATHENJI** . The certificate of Official Search on the suit property **Nakuru Municipality block 7/65** dated 17th April 2013 shows the **registered owner as Naftary Waigwa Githinji**, and in the applicants affidavit in support, it states that the **deceased is also known as Naftali Waigwa Gathenji**. This confirms that the **Late Naftary Waigwa Githinji and the Late Naftali Waigwa Gathenji are one and the same person** to whom the estate relates.

10. The statutory notice dated 12th November 2014 was sent by registered post to the **Estate of the Late Jimmy Naftali Waigwa Githinji** of P.O.Box 50756-00200, and copied to the applicant hereof as evidenced by the certificate of posting.

Receipt of the same is denied, and further the applicant denies being the Administrator of the Estate of the Late Jimmy Naftali Waigwa Githinji.

So are the above two deceased persons different or one and the same person?

11. In her submissions, the applicant denies being the administrator of the Estate of Jimmy Naftali Githinji. In an attempt to find out if there are two deceased persons bearing the above names, I perused the plaint dated 27th November 2013 that originated these proceedings. It states that Jimmy Waigwa Naftary who is also deceased was not the registered owner of the subject land parcel.

The Applicant submitted that the issue of whether the deceased person is one and the same one known as Jimmy Waigwa Naftary is a matter to be resolved upon evidence. I do not hold the same view. The applicant knows the answer, and justice and equity demands disclosure of all material facts to the court.

Admittedly, at this interlocutory stage the court is not mandated to conduct a mini trial. However, in one of her affidavits sworn on the 29th January 2014 the applicant's deposition is that the **Late Jimmy Waigwa Naftali** is her late son also deceased. If that is so, then, the court makes a finding that the statutory notice dated 12th November 2014 was not properly served as it was not sent to the Applicant as the Administrator of the deceased's Estate, the **Late Naftali Waigwa Gathenji** under the names appearing on the title to the property and in all other documents including, and not limited to the official search certificates, copy of the title, but were sent to a different person's Estate, the Late **Jimmy Naftali Waigwa Githinji**.

12. The second limb of the application is based on valuation of the subject property. There is no dispute that there is a valuation report dated 15th March 2015 that gave the market and forced sale value of the property subject of this application.

It is the court's finding that the report was current for purposes of the Banks realization of the security that should have been sold by public auction in April 2015. Under the **Land Act 2012**, a chargee is under an obligation to obtain the best price reasonably obtainable at the time of sale. A valuation report is but a guide. Having been done just a month before the then intended sale, the courts finds it to be proper.

13. The court having made the above observations and conclusions, the following orders are issued:

1. That the application dated 23rd April 2015 is allowed to the extent that the Respondent is restrained from selling the suit land title **No. Nakuru Municipality/Block 7/65** for a period of 100 days from the date of this ruling.
2. In the meantime, the Respondent is at liberty to issue and serve the prerequisite statutory notices under **Section 90(1), and 96(2) of the Land Act 2012** and all other necessary notices by registered post to the Applicant as the administrator of the Estate of the late **Naftary Waigwa Gathenji alias Naftali Waigwa Githinji**.
3. Thereafter, and upon compliance with Order 2 above, and the applicant being in default, the Respondent shall be in order to take further steps towards realization of its security.
4. Costs of the application shall be costs in the cause.

Dated, signed and delivered in the open court this 16th day of December 2015.

JANET MULWA

JUDGE