



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 77B of 1994

KENYA COMMERCIAL BANK.....PLAINTIFF

VERSUS

JOHN GATHOGO NDEGWA..... DEFENDANT

R U L I N G

This matter came up for the hearing of the application dated 8th June 2012 and filed on the 23rd July 2012 under certificate of urgency. The applicant is seeking the following orders namely.

- 1. The Honourable Court be pleased to certify this application as urgent and be heard ex-parte in the first instance.**
- 2. This Honorable Court be pleased to grant an interim injunction restraining the plaintiff/Respondent, its servants, employees and/or agents from advertising for sale, selling, disposing off, transferring, alienating or in any manner whatsoever dealing with the properties known as Title Numbers NYERI/MWEIGA/124 and EWASO NYIRO/ILPEJETA BLOCK 1/568 (hereinafter referred to as the “Properties”) pending the hearing and determination of this application.**
- 3. A Declaration that the Decree herein dated 18th August 1994 is time barred by virtue of the provisions of Section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya.**
- 4. A Declaration that the plaintiff's statutory power of sale with respect to the Defendant's properties has been extinguished by virtue of Sections 4 and 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.**
- 5. A Mandatory injunction to compel the plaintiff to deliver up to the defendant the title documents for the properties, the charges executed in favour of the defendant and duly executed discharge of charge in favour of the defendant within such time as this Honourable Court shall deem fit and just in default the Deputy Registrar of the High Court be ordered to execute the discharge of charge in favour of the defendant.**
- 6. That costs of this application be borne by the plaintiff/respondent.**

Prior to this application on 23rd November 2000, the applicant filed another application dated on the same date for orders of a temporary injunction against the respondent, its agents, servants or any other party claiming interest under it, restraining it from selling by public auction or otherwise the applicants pieces of land **EWASO NYIRO/ILPEJETA/BLOCK 1/568** and **NYERI MWEIGA/128** until further orders of the court. This application was prompted by activities of 21st November 2000 when he noticed

that the respondent had put his parcels of land for sale by public auction and the sale had been scheduled for 24/11/2000.

The applicant obtained interim orders on 23/11/2000 and that was all for the application to date when the applicant seeks to withdraw the same.

The second application was prompted by a Notification of sale dated 2/6/2011.

Before making his submissions **Mr. Mburugu** applied for withdrawal to application dated 23/11/2000 as his client had abandoned it.

Miss Ndegwa opposed the withdrawal and argued that the applicant should have first withdrawn the application before filing a fresh one. She stated that both applications are an abuse of the process of the court.

This court finds that though the issue in the two applications is **directly** and **substantially** the same, the applicant has sought different orders in the second application. However allowing both applications to proceed would be occasioning an injustice on the respondent. Moreover the applicant would be declared vexatious if he chose to proceed with both applications. Neither the court nor the respondent can choose for the applicant which application to withdraw between the two and since he has chosen to withdraw the one dated 23/11/2000 the same is hereby marked as withdrawn. Costs in the cause.

Dated, signed and delivered at Nyeri this 16th day of May 2013.

A. OMBWAYO

JUDGE