



Saku (suing as Personal Representative of the Estate of Onesmus Misoa Mukima-deceased) v Family Bank Limited & 2 others (Environment & Land Case E53 of 2021) [2022] KEELC 3363 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E53 OF 2021**

MN GICHERU, J

MAY 18, 2022

BETWEEN

JACINTA MBITHE SAKU(SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ONESMUS MISOA MUKIMA-DECEASED) PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

STANLEY KIMANI T/A PROGRESSIVE LIMITED 3RD DEFENDANT

RULING

1. This ruling is on the Notice of Motion dated 11th August, 2021. The motion which is by the Plaintiff, Jacinta Mbithe Saku, is brought under Order 40 Rules 1, 2 and 4 of the [Civil Procedure Rules](#), Section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) and all other enabling provisions of law.
2. The motion seeks the following prayers against the Defendants being Family Bank (first), Philips International Auctioneers (second) and Stanley Kimani T/A/ Progressive Limited (third);
 - i. An Interim Injunction against the Defendants by themselves, their servants or agents from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by the auction or private treaty, taking possession or exercising any power conferred by Section 90(3) of the [Land Act](#) 2012, leasing, letting, charging or otherwise interfering with all that parcel of land known as Ngong/ngong/45779 pending the hearing and determination of this suit.
 - ii. That the Defendants, their servants and or agents be restrained by an order of injunction from lodging with the Registrar of Titles Kajiado Land Registry or any other registry, a transfer



or any other document that would transfer the ownership of the suit property pending the determination of the suit.

- iii. That the Court be pleased to issue a temporary injunction restraining the Defendants by themselves or their servants, agents, employees or any other person claiming under them from taking possession of, evicting the Plaintiff or in any other manner with the Plaintiff's quiet possession of the property known as Ngong/ngong/45779 (suit property) pending the hearing and determination of the suit herein.
3. The motion is supported by ten grounds, a fifty five paragraph affidavit and many annexures. A summary of the said evidence is that the Applicant is the widow of Onesmus Misoa Mukima who is now deceased and who was the owner of the suit land.

Between 2010 and 2015, the deceased charged the suit property to the first Defendant for various loan facilities which amounted to Kshs. 20, 941,401.95. The deceased died in December, 2018 through an unfortunate traffic accident before paying off the loan.

The first Defendant had issued a statutory notice of sale of the suit property on 24th August, 2018 and a further notice on 5th December, 2018, without the knowledge of the Plaintiff or the deceased. The Covid -19 pandemic made matters worse because most of the Plaintiff's tenants could not pay rent on time making it next to impossible for her to honour payments under the prevailing circumstances.

The Applicant did all she could to save her property including depositing Kshs. 2 million with the first Defendant but this did not help because the bank went ahead and instructed the second Defendant to sell the suit land by public auction. The bank also gave conflicting figures of the debt at over 21 million and 18, 500,000/= instead of Ksh. 13, 818,000.

The Applicant concludes by saying that even though the property was valued at over Ksh. 30 million it was sold at Ksh. 22,500,000/= in an irregular auction which should be nullified.

4. The application is opposed by the first Defendant whose legal officer Sylvia Wambani has sworn a replying affidavit with many annexures. It is dated 16/11/2021 and can be summarized as follows;

Most of the Applicant's affidavit as pertains to the loan and defaulting is correct except that she was served with the statutory notices through registered post whose details they themselves had provided.

The Applicant and her deceased husband did not comply with notice by rectifying the loan default. The first Defendant on learning of the death of Mr. Onesmus gave the Applicant time and halted the recovery process.

The life policy cover on the loan in the name of Hillmark Trading Agencies was paid to the tune of Kshs. 7, 179, 500/= but other loans were not covered because their tenure had expired and the third one was a Limited Liability Company.

The Applicant promised to fast track the outstanding amounts on the loan facilities in writing on 12th June, 2019 but soon thereafter complained against the first Defendant to Central Bank of Kenya. The first Defendant responded and the Central Bank was satisfied with the explanation. Despite numerous promises of payment by the Applicant, she never made good of any of them.

She is a flagrant defaulter and does not deserve any of the orders sought as she has not made out a prima facie.

5. The third Respondent also swore a replying affidavit dated 12th September, 2021 saying that he has been wrongly joined in his personal capacity yet the purchaser is a Limited Liability Company.

In addition, he has defended the way the public auction was conducted on 15th July, 2021.



The Applicant filed a supplementary affidavit on 23/2/2022 in which she responded to the replying affidavits by the first and third Defendants and repeated some of the deposition in the supporting affidavit.

6. I have carefully considered the application in its entirety including the affidavits, the grounds, the annexures and the submissions on record.

This being an application for injunction, the trite law in the case of Giella –vs- Cassman Brown kicks in with the three prerequisites namely, prima facie case with a probability of success, loss that cannot be adequately compensated with an award of damages and if the Court is not sure of the above two, the balance of convenience.

On the first issue, I find that the Applicant has not established a prima facie case with a probability of success. She has admitted that a loan of close to Ksh. 20 million was advanced to her husband and it was not paid. Apart from the admitted deposit of Kshs. 2 Million made on 27/4/2021, the Applicant has not produced even a single deposit slip to prove payment of the loan.

The first Respondent has proved that the requisite statutory notices were issued as required and it is not therefore true to say that such notices were not served upon the applicant or her late husband.

On the second issue, the Applicant has not proved that the loss that she may suffer will not be adequately compensated by an award of damages. In the event that her suit will be successful, she will be compensated with an award of money.

Finally, the balance of convenience favours the first and third Defendants because it has been demonstrated that the suit property has already been sold and there is no guarantee that the Applicant will be able to meet the costs of the Defendants if the Application were allowed even in part.

For the above stated reasons, I dismiss the application dated 11th August, 2021 with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF MAY, 2022.

M.N. GICHERU

JUDGE

