



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 100 of 2012**

**PETER OWUOR OTULA.....PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**  
**PENGUIN ENGINEERING LIMITED.....2<sup>ND</sup> DEFENDANT**  
**AMOS OTULA.....3<sup>RD</sup> DEFENDANT**  
**VALLEY AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 17<sup>th</sup> February 2012. It is expressed to be brought under Order 40 Rule 1 and 2, Order 50 Rule 1 of the Civil Procedure Rules, and Sections 1, 1A, 3 and 3A of the Civil Procedure Act. The application seeks for orders that pending the hearing and determination of this suit, the defendants be restrained whether by themselves, his agents, servants or employees from in any way advertising, selling, transferring or in any way dealing with property No. Ngong/Ngong/10897.
2. The application is based on grounds set out on the face of the application and is supported by the plaintiff's affidavit sworn on 17<sup>th</sup> February 2012 together with its annexures.
3. In reply to the application, the 1<sup>st</sup> and 4<sup>th</sup> defendants filed grounds of opposition dated 2<sup>nd</sup> March 2012 and a Replying Affidavit sworn by George Amollo on 5<sup>th</sup> March 2012.
4. The background to the suit is that in 1990 the plaintiff purchased a property and subdivided it into two portions. He surrendered the possession of property No. Ngong/Ngong/10897 to the 3<sup>rd</sup> defendant, who is his brother, and remained in possession of property No. Ngong/Ngong/10894. He also surrendered to the 3<sup>rd</sup> defendant the original title in respect of the property No. Ngong/Ngong/10897 together with the original transfer duly signed and the Land control Board consent so that he could process the title in respect of the said property.
5. The plaintiff avers that on 7<sup>th</sup> February 2012 while reading the Daily Nation Newspaper, he learnt that the said property was scheduled for sale by public auction. It is the plaintiff's contention that the 2<sup>nd</sup> defendant has in collusion with the 3<sup>rd</sup> defendant obtained a loan from the 1<sup>st</sup> defendant and used his property as security without his knowledge, consent or authority. The plaintiff further contends that the Statutory Notice to exercise its power of sale by the 1<sup>st</sup> defendant had been addressed to him but sent to an address not known to him. The 4<sup>th</sup> defendant sent an Auction Notice dated 6<sup>th</sup> December, 2011 addressed to the plaintiff but through an address unknown to him.

6. It is the plaintiff's case that he has never executed any charge document, borrowed any money from the 1<sup>st</sup> defendant and neither has he guaranteed any loan granted to any party by the 1<sup>st</sup> defendant. In the circumstances, the plaintiff asserts that the action by the 1<sup>st</sup> defendant to advertise his property for sale is unlawful, baseless and unfounded.

7. In opposition to the application, the 1<sup>st</sup> and 4<sup>th</sup> defendants aver that the principles laid down in the celebrated case of ***Giella –vs- Cassman Brown*** have not been met to warrant the issuance of the orders sought. It is the 1<sup>st</sup> and 4<sup>th</sup> defendants' contention that the orders sought are part of an elaborate scheme by the plaintiff, the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant to defraud the 1<sup>st</sup> defendant who complied with all the lawful processes in seeking to secure facilities offered to the 2<sup>nd</sup> defendant.

8. The application was prosecuted by way of written submissions. The plaintiff, as well as the 1<sup>st</sup> and 4<sup>th</sup> defendants put in written submissions together with authorities. The 2<sup>nd</sup> defendant also filed its submissions.

9. I have carefully considered the application herein, the pleadings, the supporting affidavit and its annexures as well as the grounds rendered in opposition to the application. I have also considered the submissions made by learned counsel for both parties.

10. In my view, the main issue for determination is whether the Plaintiff has met the conditions for granting a temporary injunction. These were clearly spelt out by the Court of Appeal in the case of ***GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358*** in which Spry V.P., said at page 360 –

***“The conditions for the grant of an interlocutory injunction are now ... 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.”***

11. The first question that should be answered is whether the Applicant has established a *prima facie* case with a probability of success. From the court records, it is plain and clear that the plaintiff is the registered owner of the suit property **Ngong/Ngong/10897** as evidenced in the title deed attached to his application. It is disputed by the plaintiff that he offered his property as collateral security to secure a loan from the 1<sup>st</sup> defendant. The plaintiff denied signing any charge document and averred that the signature in the alleged charged document was not his.

12. The plaintiff has also claimed that the statutory notice was not sent to his address and that he was therefore not properly served. The defendants have not shown how they came to the conclusion that the address used to serve the Notices was the plaintiff's. There is need to prove the proper address of the plaintiff to ascertain whether he was properly served.

13. I have also noted that the 3<sup>rd</sup> defendant has not in any way responded to this application, which raises an eyebrow. It could be that the 3<sup>rd</sup> defendant actually colluded with the 2<sup>nd</sup> defendant to acquire the loan as alluded to by the plaintiff. On the other hand, it could be that the plaintiff and the 3<sup>rd</sup> defendant are colluding to frustrate the 1<sup>st</sup> defendant from exercising its statutory power of sale. Whichever the case, these assumptions together with the foregoing concerns can only be ascertained at full trial by way of some *viva voce* evidence and not at this interlocutory stage.

14. From, the foregoing this court is inclined to find that the plaintiff has made out a *prima facie* case with a probability of success. It is in the interest of justice for this court to grant the injunction orders for purposes of preserving the status quo pending the hearing and determination of the suit. I am also of the view that no prejudice will be occasioned to the defendants if the said orders are granted.

15. In the result, I am minded to allow the plaintiff's Notice of Motion dated 17<sup>th</sup> February 2012. The

costs of the application shall be in the cause.

**IT IS SO ORDERED.**

**DATED, DELIVERED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER 2012**

**J.M MUTAVA**  
**JUDGE**