



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 61 of 1998

**JAMES KUNGU MBUTI:.....1ST PLAINTIFF
EVANSON KAMANDE MUNJUA:.....2ND PLAINTIFF**

VERSUS

TRANS NATIONAL BANK LTD:.....DEFENDANT

RULING

This application seeks to have set aside the ex parte orders of injunctions discharge and/or vary such orders of the 01.03.2010 on the grounds that the Defendant was not given an opportunity to be heard, that the application was set to be heard on 26/2/2010 on which date no cases were heard as the honourable the Chief Justice was visiting this High court station and no cases were to be heard on that date as members of the bar were to visit with the Hon. the Chief Justice and while the advocates for the Defendants were in session with the Hon the Chief Justice counsel for the Plaintiff had the application heard ex parte and that the orders granted do not disclose the reasons for restraining the chargee from exercising its statutory power of sale and finally that such orders as were granted are punitive and unconscionable to the Defendant especially because they were given in breach of the Rules of Natural Justice. The affidavit in support depones to the same issues as above.

In opposition to the application the 1st Plaintiff swore a Replying affidavit stating that the application was set down to be heard and was heard on 24th February 2010 and not on 26th February 2010 as stated by the Applicant. He added that he obtained an interim injunction order restraining the sale of his property by the Defendant and it is that order that he needed confirmed. He adds that the real reason the advocates for the Defendant did not attend court on 24/02/2010 was that they were with others boycotting the court presided over by the judge who granted the orders now sought to be set aside and that that is no reason to disturb such orders.

I have carefully considered the application. I find that the hearing Notice served on the Defendant for the hearing of the application dated 20/03/1998 stated that the same was scheduled to be heard on 24/02/2010. That is confirmed by the cause list for the day. I take judicial notice of the fact that on the said date counsel at this court station were on aboycott of the court that granted the orders now sought to be set aside, varied or discharged. That was pursuant to a notice given by the Law Society of Kenya, North Rift Branch. Learned counsel for the Applicant Mr. Machio chose to stand alone from his colleagues and refused to abide by the boycott notice and went ahead and prosecuted his application. I refuse to sit in judgment over him for not standing in solidarity with the rest of his colleagues at the time and leave that issue to his conscience and sense of judgment.

That the matter proceeded to hearing on 24/02/2010 is therefore not disputable. I am now being asked to vary, set aside or discharge those orders for the reason, among others, that the orders sought and granted were so granted without basis. I have looked at the application dated 20th march 1998 and the Ruling dated 01/03/2010 and I am of the considered view that that was the only Ruling that any judicial

officer ceased of the matter and correctly applying the law would have come to. The statutory notice given for payment of the balance of the loan to be made “**within three (3) months**” of the date of such notice was clearly defective and invalid in light of the authority of various decisions by the courts and more particularly **TRUST BANK LTD –vrs- EROS CHEMITSTS LTD (2000) 2 EA 550** where it was held that:-

“There is a positive and mandatory requirement that a valid notice of sale of charged property has to be expressly stated that the sale is to take place after a three (3) months period following service of notice has lapsed.”

For those reasons therefore no useful purpose would be served by setting aside, varying or discharging the orders of the 01/03/2010. The application under consideration is found to be without merit and it is accordingly dismissed with costs.

DATED SIGNED AND DELIVERED AT ELDORET THIS

25TH DAY OF MAY 2010.

**P.M.MWILU
JUDGE**

IN THE PRESENCE OF

Mr. Alwanga - Advocate for Applicant
Mr. Machio - Advocate for Respondent
Andrew Omwenga - Court Clerk

**P.M.MWILU
JUDGE**