



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 655 of 2005**

**FRANCIS GATHUNGU KARIUKI ..... PLAINTIFF**

**V E R S U S**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....DEFENDANT**

**R U L I N G**

I have before me an application by chamber summons dated 18<sup>th</sup> November, 2005. It is stated to be brought under Order 39, rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules (the Rules). It seeks in the main an order for temporary injunction to preserve the suit property, plot **L.R. NO. NYANDARUA/MAGUMU TOWNSHIP/32**, pending hearing and determination of the suit. The broad ground for the application is that the Defendant's statutory power of sale has not accrued for lack of proper service of the statutory notice upon the Plaintiff. There is a supporting affidavit sworn by the Plaintiff.

The Defendant has opposed the application upon the ground, *inter alia*, (grounds of opposition dated 14<sup>th</sup> December, 2005) that the Plaintiff has been duly served with requisite statutory notice. There is a replying affidavit sworn by one ISAAC BUDDY MOGAKA, the corporation secretary of the Defendant.

I have considered the submissions of the learned counsels appearing. I have also read the supporting and opposing affidavits. It is common ground that the suit land is registered under the Registered Land Act, Cap. 300 (the Act). Under section 74 (1) of that Act, if default is made in payment of the principal sum advanced, or any interest, or any other periodical payment or any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and such default continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing, or to perform and observe the agreement, as the case may be. Under sub-section (2) of the same section, if the chargor does not comply within three months from the date of service of such notice, the chargee may either appoint a receiver of the income of or sell the charged property.

In order for the chargee's statutory power of sale to accrue, a proper statutory notice must have been duly served. Was such notice duly served upon the Plaintiff by the Defendant? Section 153 of the Act makes provision for service of notices. It provides:-

**“153. A notice under this Act shall be deemed to have been served on or given to any person-**

**(a) if served on him personally;**

- (b) if left for him at his last known place of residence or business in Kenya;**
- (c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;**
- (d) if served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorized to accept such service;**
- (e) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land.”**

It is disclosed by the affidavit of service sworn by one TIMOTHY BALA exhibited at paragraph 16 of the replying affidavit that the statutory notice was served upon one SAMUEL KARIUKI GATHUNGU who is said to be the elder son of the Plaintiff. Service upon an adult member of the chargor's family is not one of the methods of service permitted by section 153 of the Act. There was thus no proper service of the statutory notice upon the Plaintiff, and the Defendant's statutory power of sale did not accrue. The Plaintiff has therefore established a *prima facie* case with a probability of success.

Only KShs. 328,000/00 was advanced to the Plaintiff by the Defendant. He says he has already paid nearly KShs. 900,000/00. The Defendant is demanding over KShs. 6,500,000/00. To have to repay nearly 8 million shillings on an advance of less than KShs. 350,000/00 would, *prima facie*, amount to irreparable loss. In any event, it is convenient that the suit property be preserved pending determination of the issues raised by the Plaintiff in his suit.

I will therefore allow the application and grant the order of temporary injunction sought in prayer 3 thereof. The costs of the application shall be in the cause. There will be orders accordingly.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF AUGUST, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 24<sup>th</sup> DAY OF AUGUST, 2007**