



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI COMMERCIAL COURTS COMMERCIAL TAX DIVISION)**  
**CIVIL SUIT 33 OF 2007**  
**EUNICE GATHIGIA GATHUA .....APPLICANT**  
**VERSUS**  
**JAMES GATHUA KIHORO.....1ST DEFENDANT**  
**CLEAR INSURANCE BROKERS LIMITED.....2<sup>ND</sup> DEFENDANT**  
**STANDARD CHARTERED BANK (K) LTD.....3RD DEFENDANT**

**RULING**

This is an application under Order XXXIX Rule 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and other enabling provisions of the Law. It is by the plaintiff who seeks inter alia an order of temporary injunction restraining the 3<sup>rd</sup> defendant from in any way selling, disposing of, auctioning or alienating howsoever all or any of that parcel of land known as RUIRU/KIU BLOCK 3/208 pending the hearing and determination of this suit.

The application is supported by an affidavit sworn by the plaintiff to which are annexed two exhibits; an earlier order in this suit made by Hon. Waweru J suspending the sale of the same piece of land and a notice by Dolphin Auctioneers to sell the same land on 29.6.2007. The application is opposed and there is a replying affidavit sworn by one Charles K. Wambua an Account Manager of the 3<sup>rd</sup> defendant.

The application was canvassed before me on 27.6.2007 by Mr. Khaminwa Learned counsel for the plaintiff and Mr. Chege Learned counsel for the 3<sup>rd</sup> defendant. The facts which emerge from the material availed to the court are that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are indebted to the 3<sup>rd</sup> defendant in respect of sums advanced to the 2<sup>nd</sup> defendant by the 3<sup>rd</sup> defendant which sums were secured by a charge over the suit piece of land. There was default and the 3<sup>rd</sup> defendant advertised the piece of land for sale prompting the plaintiff to institute this suit and an interlocutory application that gave rise to the order of Waweru J aforesaid. When the plaintiff's earlier application came up for inter partes hearing on 29.1.2007 only counsel for the 3<sup>rd</sup> defendant attended and informed the court that the 1<sup>st</sup> defendant had paid KShs.1,000,000.00 to the 3<sup>rd</sup> defendant towards reduction of the outstanding debt and on that account the 1<sup>st</sup> defendant had suspended the sale even before the service of the temporary order of injunction.

Counsel further informed the court that an arrangement had been reached whereby the 1<sup>st</sup> defendant was to pay 97,000.00 every month w.e.f. 28.2.2007 towards liquidating the debt. The matter was then stood over to 26.2.2007 but even then it was not heard but was adjourned generally. It is significant that on that date, counsel for the 3<sup>rd</sup> defendant informed the court that there was no threat of sale of the suit property.

It would appear that, the 1<sup>st</sup> defendant failed to honour his promise to the 3<sup>rd</sup> defendant who once more advertised the suit property for sale provoking the present application.

The plaintiffs main complaints are that the defendants led her believe that the 3<sup>rd</sup> defendant's debt was being serviced and the 3<sup>rd</sup> defendant did not notify her of the default by the 1<sup>st</sup> defendant. That the 3<sup>rd</sup> defendant has not paid regard to her interests and has acted in bad faith.

The 3<sup>rd</sup> defendant's answer to the plaintiff's application is that she has not proceeded expeditiously with her suit and earlier application. It also contends that it had no legal obligation to serve the plaintiff with a statutory notice of sale or notification of sale. In its view, its statutory power of sale has arisen and it has unassailable right to exercise its said statutory power.

I have considered the application, the affidavits filed, the submissions of counsels appearing and the authorities cited. Having done so, I take the following view of the matter. The principles applicable for the grant of an interlocutory injunction are well settled. The same were set in the case of **Giella – vs – Cassman Brown & Co. Ltd & Another [1973] EA 358**. Firstly the applicant must show a prima facie case with a probability of success at the trial. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages. Thirdly if the court is doubt it should determine the application on a balance of convenience.

The record of this case shows that when the plaintiff's earlier application came up for hearing on 26.2.2007, counsel for the 3<sup>rd</sup> defendant informed the court that there was no threat of the suit property being sold. Indeed in the replying affidavit sworn by one Charles K. Wambua, the 3<sup>rd</sup> defendant's Account Manager on 9.2.2007 it was deponed at paragraph 17 that on 25.1.2007, the 2<sup>nd</sup> defendant paid KShs.1,000,000.00 to the 3<sup>rd</sup> defendant and agreed to be paying KShs.97,000.00 monthly starting February, 2007 until the debt was fully liquidated.

The 3<sup>rd</sup> defendant does not deny that it did not notify the plaintiff of the default of the 1<sup>st</sup> and 2<sup>nd</sup> defendant after the payment of 1,000,000.00 by the 2<sup>nd</sup> defendant. It had however informed the court that the suit property the subject of the suit was not threatened with sale. The plaintiff had obtained an ex parte order of injunction before Waweru J as aforesaid. On the 3<sup>rd</sup> defendant's counsel's representation to the court, the plaintiff may have assumed that there was no longer any urgency in the matter. My understanding of the position is that if she had been informed of the default by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, she would probably have made arrangements regarding settlement of the debt. It appears from the said affidavit of Mr. Charles K. Wambua that at some stage the 3<sup>rd</sup> defendant entertained pleas from the plaintiff to be given time to clear the outstanding sum. The plaintiff may not be the chargor. But she alleges that the property is a matrimonial property in which she alleges she has an interest. That interest is yet to be determined and must await the trial of the suit.

In the premises, I am satisfied that the plaintiff has shown a prima facie case that having instituted this suit and having obtained an interlocutory injunction restraining the sale and further having been informed that there was no threat of the suit property being sold she was entitled to be informed of the default by the 1<sup>st</sup> and 2<sup>nd</sup> defendants regarding the arrangements made in respect of the suit property.

Even if I was not satisfied with the prima facie merits of the plaintiffs application case, it would be my view that on a balance of convenience, I would grant the temporary injunction sought. The sum allegedly outstanding was said to be about KShs.1,167,389.65 as at 4.4.2007. A payment of 1 million was made in January, 2007. The security in the suit property has not therefore deteriorated.

On the 2<sup>nd</sup> condition for the grant of an interlocutory injunction, I am persuaded that the plaintiff would suffer an injury which cannot be compensated in damages. The plaintiff stands to lose her matrimonial home. Loss of such a home to which she obviously has sentimental attachment may not be quantified. I am in the circumstances, inclined to grant an injunction. I accordingly allow the plaintiff's application in terms of prayer 3 thereof. The order is granted on the condition that the plaintiff files a written undertaking under oath as to damages. Such undertaking to be filed within 7 days of today. The order is also granted on the further condition that the plaintiff pays to the 3<sup>rd</sup> defendant KShs.97,000.00 per month w.e.f. 30<sup>th</sup> September 2007 and thereafter on the 30<sup>th</sup> of every succeeding month until the hearing and determination of this suit. In default of compliance with any of the two conditions, the injunction to be discharged on application by the 3<sup>rd</sup> defendant.

The 3<sup>rd</sup> defendant is granted liberty to apply.

Costs in the cause.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

Khaminwa for the plaintiff and Simiyu holding brief for Chege for the respondent.

**F. AZANGALALA**

**JUDGE**

**20/9/07**