



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

**Civil Case 424 of 2004**

**GITAU MUIRURI.....PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK (K) LTD.....DEFENDANT**

**RULING**

On 28/7/04, the Plaintiff applied by way of Chamber Summons, under Order 39 rule 1 (b) and Order 44 rule 1 of the Civil Procedure Rules, for two orders:

**1. Already spent**

**2. A temporary injunction to restrain the defendant; its servants, or agents from proceeding with the sale, by public auction scheduled for 30/7/04 by Dolphin Auctioneers of L.R. No. Rural/Kiu/Block 6/246 until the final determination of this suit or further orders of this court.**

**3. Costs of this application.**

The application is supported by Gitau Muchuu's affidavit of even date, and on the grounds that; the Plaintiff has not been served with any Statutory Notice as required by the Registered Lands Act, and the Defendant's power of sale, as chargee, has therefore not arisen; that the Defendant or its agents have not issued a notification of sale to the Plaintiff as required by the Auctioneers Act (and rules) before the intended sale; the intended sale of the property is not in accordance with the law governing the same.

In their Replying Affidavit, dated 5/8/04 by Grace I. Mukulu, the Defendants deny that the intended sale in any way violates either the requirements of Statutory Notice, under R.L. Act; or the Notification of Sale, under the Auctioneers Act. After due consideration of the pleadings and submissions by both sides to the dispute herein, the success or otherwise of this application revolves on whether the requisite statutory notices were actually served upon the Plaintiff/Applicant, as by law prescribed.

It is important to note, at this early stage, that a party's affidavit without more, may not always suffice in support of its averments. There may be need for oral evidence to substantiate the veracity of such averments.

In the instant case, there is no contention as to whether or not the Plaintiff borrowed any money from the Defendant; nor is there any dispute as to the Defendant's Statutory power of Sale, as chargee; if that right has arisen. This is thus the question; has the Defendant's statutory power of sale arisen and what are the legal provisions precedent to the chargees sale of the mortgaged property? Have those requirements been complied with by the Defendant in this case?

The law, under Registered Lands Act, Cap. 300, Laws of Kenya, requires that upon default by the Mortgagor, the chargee shall give to the chargor a 90 day statutory notice of sale. At the expiry of such notice, the chargor must be given a 45 day Notification of Sale, before the property can validly be sold by public auction. Failure to comply with any of these two types of notices nullifies the sale or intended sale.

I begin by the Notification of Sale, under the Auctioneers Act. The auctioneer in this case was Dolphin Auctioneers, and the person who averred that he served the Plaintiff, was a Mr. Kinyanjui Wanjuu, who was called and examined by Counsel for the Defendant, and cross-examined by Mr. Kingara, learned counsel for the Plaintiff/applicant, on 10/9/04.

From the proceedings and the evidence by Mr. Kinyanjui Wanjuu, the auctioneer, I reached the conclusion that the Plaintiff was not served with the Notification for Sale, as required by the Auctioneers Act, and Rules.

The auctioneer gave contradictory evidence on cross-examination. He said that, he, and one of his employees, went to the Plaintiff's home at 11a.m. on a Wednesday, and failing to trace the debtor, he served the debtor's son, who was aged 21 years, but the son refused to accept service. But the Notice of Sale, contrary to the legal requirements, was not signed by the auctioneer – Mr. Kinyanjui Wanjuu, but by his employee, a Mr. Protous, who states that he served the Notice at 4p.m. Further, the Plaintiff denied, in his affidavit, having any son aged 21 years. This averment was admitted by the auctioneer, Mr. Kinyanjui Wanjuu, adding that "I had no reason not to believe him (the son)"

The law requires that the auctioneer can serve an adult member of the debtor's family. Without any further ado, the auctioneer violated this law, and I am convinced that the so called service of Notification on the Plaintiff was a mere fabrication by the auctioneer. Hence, no Notification of Sale was effected upon the Plaintiff, and on this alone, the intended sale is invalid.

I now turn to the statutory Notice under the Registered Lands Act. Again, without any hesitation, I concluded that no such Notice was served upon the chargor in this case.

According to the affidavit by Grace Mukulu, the Statutory Notice was served upon the chargor, through a Mr. Mwaura. But when summoned Mr. Mwaura declined to come to testify on the issue before this court. The Process Server – Mwaura - stated in his Return of Service – that he gave the Notice to the Secretary to the chargor. "The secretary, in her affidavit, denied ever seeing a Mr. Mwaura. It was thus critical that Mr. Mwaura appear. But he declined to appear.

The only inference I could draw was that the process server was not truthful in whatever he said in his Affidavit of Service, especially on such an important matter as this one on the service of the Statutory Notice which effectively sets the ball rolling in the exercise of the chargees power of sale.

Having arrived at the above factual findings and conclusions with regard to both the Statutory Notice and the Notification for Sale, the law is very clear, both in the statutory provisions and decisions by this court.

**In Civil Case No. 937 of 2001, MARTHA KHAYANGA SIMIYU V. HOUSING FINANCE CO. OF KENYA AND 2 OTHERS, this court held, per A.G. Ringera, at page 18, "The above understanding of pertinent provisions of the Restrictions of Land Act and the auctioneers rules lead me to the conclusion that the service of both an adequate statutory notice and a notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under Registered Land Act.**

**Without compliance with those statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the chargors equity of redemption is extinguished in any sale conducted in breach thereof. Without compliance with those conditions precedent the purported sale would be void and liable to be nullified at the instance of the chargor."**

For the above reasons, the application herein succeeds and I grant the following orders:

**1. Grant temporary injunctive orders, restraining the Defendant by itself, its servants and or agents, from proceeding with the sale by Public Auction of L.R. No. Rural/Kiu/Block 6/246 until the final determination of this suit.**

**2. Order that the Defendants do pay costs of this application.**

DATED and delivered in Nairobi, this 8th Day of July, 2005.

**O.K. MUTUNGI**

**JUDGE**