



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

**Civil Case 88 of 2005**

**JULIA WAGACHI NJUNGE .....**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**HOUSING FINANCE CO. LTD. .... 1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**P. NGURU T/A NGURU ENTERPRISES ..... 2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**RULING**

Julia Wagachi Njunge and Francis Njunge Macharia (hereinafter referred to as the applicants) have come to this court as administrators/managers of David Kibara Njunge a mentally incapacitated person (hereinafter referred to as the “Chargor”). By an application dated 9<sup>th</sup> November 2005, the applicants seek an order of temporary injunction against the Respondents Housing Finance Co. Ltd. (hereinafter referred to as the Chargee) and P. Nguru t/a Nguru Enterprises (hereinafter referred to as the “Auctioneer”). The order sought is to restrain the Respondents, their agent, servants or employees from selling by public auction or otherwise disposing or any other way dealing with the Chargor’s proprietary interest in parcel of land L.R. No. Nyeri Municipality Block 1/50 (hereinafter referred to as the suit property) pending the hearing and determination of this suit. Filed contemporaneously with the application is a plaint in which the applicants seek a permanent injunction over the same property. The applicants also seek an order for taking of accounts.

It is the applicants contention that although the chargee has instructed the Auctioneer who has advertised the suit property for sale by public auction, the applicants have not been served with a proper statutory notice under section 74 of the Registered land Act, nor have they been served with a Notification of sale under Rule 15 (c) and (d) of the Auctioneers Rules and the purported sale is therefore a nullity. It was submitted that no notice was served on any member of the chargor’s family. Mr. Mahinda who appeared for the applicants relied on the following authorities:

1. ***Muigai v/s Housing Finance Co. of Kenya & Another HCCC 1678 of 2001 (Milimani C.C.)***
2. ***Trust Bank Ltd. v/s Okoth [2000] 1 EA 274.***
3. ***Trust Bank Ltd. v/s Erozi Chemist Ltd. [2000] EA 2, 550.***

He submitted that failure to serve a statutory notice was a fundamental irregularity which cannot be cured, and the right to realize security could not become excisable without proper service of the statutory notice. He submitted that the Chargor who is mentally incapacitated is likely to suffer irreparable loss as

he is likely to lose his property when he had in fact entered into a compromise with the chargee.

The chargee has strenuously opposed this application. First it was maintained that service of the statutory notices could not have been effected upon the applicants as they were only appointed two weeks ago.

Mr. Okeyo who appeared for the chargee submitted that service of the notices were in fact effected upon the chargor in accordance with clause 16 of the charge document. Documents served on the chargor together with certificate of posting were annexed to the replying affidavit sworn by the chargee's Assistant Manager legal services Janet Mwaluma. The Chargee therefore maintained that it was entitled to exercise its statutory powers of sale as the relevant notices had been served as laid down in the authorities cited by the applicants advocate.

It was further submitted that the applicants are not entitled to an order for injunction as no prima facie case has been disclosed and that the issue of compromise raised could only relate to a dispute over the amount due and owing and could not justify the stopping of the sale. The issue of a fair price could also not justify the stopping of the sale as the chargee was only obliged to take reasonable precaution to get a fair price, which in this case the chargee had done by getting a valuation report.

It was also submitted that the balance of convenience tilts in favour of the chargee, as the chargor owes it over 20 million while the suit property was only worth Ksh.4.5 million. Mr. Okeyo relying on:

- ***Kitur v/s Standard Chartered Bank & 2 others (2002) 1 KLR 630.***
- ***Kenya Commercial Finance Co. Ltd. v/s Afraha Education Society (2001) 1 EA 86.***

Submitted that the conditions for granting an injunction as laid down in the case of **Giella v/s Cassman Brown & Co. Ltd** were sequential and the issue of balance of convenience would only arise if the other conditions had been met which was not the case herein.

Finally it was submitted that the applicants were not entitled to the equitable remedy of injunction as they were indolent in pursuing their remedy as the process of selling the suit property was well underway.

In response Mr. Mahinda submitted that the chargor was entitled to protection by the court as his statutory rights were being infringed. He contested the alleged service by the chargee on the chargor contending that there was no certificate confirming receipt. He also maintained that in some instance service was effected on one Salome Wangechi Wamae who was neither an employee of the Chargor nor an adult member of his family and that the rules require personal service.

I have carefully perused and considered the application, the affidavit in support and in reply and all the annexures thereto.

First and foremost although it is evident that the applicants have been appointed guardian *ad litem* of the chargor who is said to be mentally incapacitated, the supporting affidavit does not reveal at what point the chargor became mentally incapacitated. It is evident that the chargor charged his property to the chargee and signed the appropriate documents. There is no evidence that the chargor was not in control of his mental faculties at that stage.

The chargee has shown evidence that the chargor was served with demand notices and finally served with the statutory notice on 18<sup>th</sup> March 2005 and 23<sup>rd</sup> May 2005. Relevant certificate of postings have been availed and in my view this is sufficient evidence of service in the absence of any other evidence to the contrary. There is no evidence that as at March and May 2005, the chargor was mentally incapacitated. There is further evidence that the chargor was served with the notification of sale in September 2005. Again there is no evidence that as at that date the chargor was mentally incapacitated. Although there is evidence that one Salome Wangechi Wamae also accepted service on behalf of the Chargor, that was neither here nor there as such service was in addition to the service effected on the Chargor through registered post. Further as submitted by Mr. Okeyo, the chargee had no reason to serve

the applicants with any notices or to deal with them prior to their appointment as guardian *ad litem*. It is evident that the applicants simply rushed to court to be appointed guardian *ad litem* of the chargor after the suit property was advertised for sale. I concur with the advocate for the Respondents that the applicants did not move with lightning speed befitting of the urgency with which they wanted this court to handle this matter. Instead they came to this court at the very last minute more than a week after their appointment. This is in sharp contrast to the chargee who was served just a day before the hearing of this application but still managed to file all their papers and competently argue the application.

All in all I am satisfied that the chargee did properly serve the statutory notices on the chargor and was therefore entitled to exercise their statutory powers of sale against the suit property. The applicants have not established any prima facie case and are therefore not entitled to the order for interlocutory injunction sought.

Accordingly I find no merit in this application. I refuse to grant the prayers sought and dismiss the application. Costs to the 1<sup>st</sup> Respondent.

***Dated signed and delivered this 15<sup>th</sup> day of November 2005***

**H. M. OKWENGU**

**JUDGE**