



REPUBLIC OF KENYA



**Njeru v Housing Finance Company of Kenya & another (Commercial Case 007 of 2022)  
[2023] KEHC 24547 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 007 OF 2022**

**MN MWANGI, J**

**JULY 21, 2023**

**BETWEEN**

**IGNATIUS MITHAMO NJERU ..... PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion application dated 8<sup>th</sup> March, 2022 brought under the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 40 Rules 1(a), 2, 10(a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, the Land Act No 6, the Land Registration Act No 3 of 2012, Laws of Kenya and all other enabling provisions of the law. He seeks the following orders -
  - i. Spent;
  - ii. That pending inter-parties hearing and determination of this application this Honourable Court be pleased to grant a temporary order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves, employees, agents or servants from doing any of the following acts or any of them that is to say from advertising for sale, selling whether by public auction or private treaty, taking possession, trespassing, disposing off, selling or completing by conveyance or transfer of any sale, leasing, letting or otherwise howsoever interfering with the plaintiff's occupation and ownership of title to all those parcels of land known as Land Reference Number LR No 209/11358/141 and Ngong/Ngong/12855 Juanco area, Ngong, pending hearing and determination of this suit; (*sic*)



- iii. That pending hearing and determination of this application this Honourable Court be pleased to grant a temporary order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves, employees, agents or servants from doing the following acts or any of them that is to say from advertising for sale, selling whether by public auction or private treaty, completing any sale conducted by public auction or private treaty by conveyance or transfer of any sale, leasing, letting or otherwise howsoever interfering with the plaintiff's occupation and ownership of title to all that parcels of land known as title No Land Reference Number LR No 209/11358/141 and Ngong/Ngong/12855 Juanco area, Ngong; (sic)
  - iv. That prayers (2) and (3) hereinabove be granted pending hearing and determination of this suit; and
  - v. That the costs of this application be borne by the respondents.
2. The application has been brought on the grounds on the face of it and is supported by affidavits sworn on 8<sup>th</sup> March, 2022 and 27<sup>th</sup> June, 2022, by Ignatius Mithamo Njeru, the plaintiff herein. In opposition thereto, the defendants filed a replying affidavit sworn on 23<sup>rd</sup> March, 2022 by Christine Wahome, the Legal Manager of the 1<sup>st</sup> defendant herein.
  3. The application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of K. Macharia & Company Advocates while the defendants' submissions were filed on by the law firm of Nyaanga & Mugisha Advocates.
  4. From the record, I note that on 8<sup>th</sup> December, 2022, Hon. Lady Justice Okwany directed the parties herein to avail physical copies of all the pleadings and submissions in this matter as there was no data on the CTS. Further, on 27<sup>th</sup> April, 2023, I gave directions to the effect that the Advocates on record supply the physical documents for the application dated 8<sup>th</sup> March, 2022, the responses filed and the written submissions within (14) fourteen days. On perusal of the record, it is evident that all the parties complied with the said directions however, the plaintiff's written submissions that were availed are incomplete thus the Court did not have an opportunity to consider them at the time of writing this ruling
  5. Mr. Mugisha, learned Counsel for the defendants submitted that demand and statutory notices were duly served upon the plaintiff hence allegations that the plaintiff was never served with the forty-five (45) days' redemption notice and notification of sale before the advertisement for the auction of 22<sup>nd</sup> May, 2022 was misleading. He relied on the case of *Emcee Global Investors Ltd v Housing Finance Company of Kenya Ltd & 2 others* [2014] eKLR and submitted that the 1<sup>st</sup> defendant was not mandated to issue the plaintiff with the twenty one (21) days' courtesy notice that was issued on 11<sup>th</sup> February, 2022, before re-advertising the suit properties for sale, since the plaintiff had been previously issued with the statutory notices. It was stated that the plaintiff has never disputed the amounts demanded by the 1<sup>st</sup> defendant and he never requested for and was denied, his loan statements by the 1<sup>st</sup> defendant.
  6. Counsel referred to the case of *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others* [1998] eKLR where the Court of Appeal cited the English case of *The King v The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: ex parte Princes Edmond De Pligac* [1917] 1KB 486 and the case of *Abraham Mutai & 5 others v Paul Mutwii & 34 others* [2015] eKLR, where the Court set aside interim orders issued *ex parte* due to material non-disclosure of facts by the applying party. He submitted that it is a principle of equity and natural justice that a dishonest party who fails to disclose material facts within his knowledge is not entitled to benefit from reliefs given in his favour *ex parte* and such orders must be set aside once the Court gets wind of the deception.



7. Mr. Mugisha contended that the plaintiff is guilty of material non-disclosure since he failed to inform the Court that the 1<sup>st</sup> defendant had issued him with statutory notices between January 2020 and January 2021 and the suit properties had been scheduled for sale by public auction but the 1<sup>st</sup> defendant called off the auction so as to allow the plaintiff to redeem himself on condition that if he failed to clear his arrears again, the 1<sup>st</sup> defendant would proceed and auction the suit properties. Mr. Mugisha relied on the case of *Gotv Kenya Limited v Royal Media Services Limited & 2 others* [2015] eKLR and submitted that the *status quo* orders in place must be set aside and the instant application dismissed.
8. He cited the case of *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKLR, where the Court outlined the principles to be established so as to succeed in an application for an interim temporary injunction. He also cited the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR, where the Court defined what constitutes a *prima facie* case. He submitted that the plaintiff had failed to demonstrate a *prima facie* case with a probability of success as the plaintiff's allegation is that the 2<sup>nd</sup> defendant advertised the suit properties for sale without serving him with the requisite statutory notices.
9. It was submitted by Counsel for the defendants that the plaintiff was served with the ninety (90) days' statutory notices dated 13<sup>th</sup> January, 2020, a forty (40) days' notice to sell dated 21<sup>st</sup> April, 2020 and a notification of sale and forty-five (45) days' redemption notice dated 14<sup>th</sup> January, 2021, which notices resulted in the plaintiff seeking the 1<sup>st</sup> defendant's indulgence in clearing the loan amounts. Counsel submitted that the 1<sup>st</sup> defendant was not mandated to re-issue fresh notices before advertising the suit properties for a second auction. To support his submission, Counsel relied on the case of *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] eKLR and the Court of Appeal holding in the case of *Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others* [2020] eKLR. He stated that the 1<sup>st</sup> defendant is in compliance with the law hence its statutory power of sale cannot be impeached by the plaintiff.
10. He submitted that having proved that the plaintiff was duly served with the requisite notices, the burden of proving non-receipt of the said notices shifted to the plaintiff in line with the provisions of Section 3(5) of the *Interpretation and General Provisions Act*. Mr. Mugisha relied on the case of *Nyagilo Ochieng & another v Fanuel Ochieng & 2 others* Civil Appeal No 148 of 1995 [1995-1998] 2 EA 206 and urged this Court to adopt the reasoning by the Court in the case of *Stek Cosmetics Limited v Family Bank Limited & another* (*supra*) and dismiss the application herein. He referred to the case of *National Bank of Kenya Limited v Shimmers Plaza Limited* [2009] eKLR and urged that in the unlikely event that the Court finds that the statutory notices were not properly served, any injunctive relief should be limited up until the defendants issue fresh notices.
11. It was submitted by Mr. Mugisha that the 1<sup>st</sup> defendant is a financial institution capable of compensating the plaintiff in the event that the plaintiff's suit is successful, thus the plaintiff does not stand to suffer any irreparable injury in the event the instant application is not allowed. He further submitted that the balance of convenience tilts in favour of not allowing the application herein.

### **Analysis and Determination.**

12. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the defendants and the written submissions by Counsel for the defendants. The issues that arise for determination are –
  - i. Whether the plaintiff is guilty of material non-disclosure; and



- ii. If an order of an interim injunction should issue pending the hearing and determination of the suit between the parties herein.
13. In the affidavit filed by the plaintiff he deposed that he is the registered owner of parcels of land known as LR No 209/11358/141 and Ngong/Ngong/12855 Juanco area, Ngong. He averred that he received statutory notices from the 2<sup>nd</sup> defendant in his postal address and thereafter, the 2<sup>nd</sup> defendant gave him copies of a notification of sale dated 10<sup>th</sup> February, 2022 and a letter dated 11<sup>th</sup> February, 2022 giving him 21 days' notice to settle his loan arrears as at 28<sup>th</sup> February, 2022.
14. It was stated by the plaintiff that he was also served with a notification of sale dated 9<sup>th</sup> February, 2022 indicating that the suit properties would be sold by way of public auction on 11<sup>th</sup> March, 2022. He further stated that the said notifications of sale and the letter dated 11<sup>th</sup> February, 2022 do not adhere to the statutory timelines provided.
15. The plaintiff contended that the 1<sup>st</sup> defendant has refused to supply him with any statements of account on the repayment of the loan amounts and any further transactions involving the security and loan amount. He asserted that the intended sale of the suit properties by the 1<sup>st</sup> defendant is unlawful and marred with illegalities since it is to be conducted without the issuance of the requisite statutory notices and a legitimate forced sale valuation conducted on the suit properties.
16. He averred that if the orders sought herein are not granted, he stands to suffer irreparable loss and damage since the suit properties will be taken out of his reach. In addition, the suit property is his home and is of great sentimental value to him since it reflects the crystallization of his labour. The plaintiff averred that the defendants stand to suffer no prejudice since they have acted contrary to the law.
17. The defendants in their replying affidavit deposed that the plaintiff was granted an aggregate mortgage facility amounting to Kshs 23,065,344.00 by the 1<sup>st</sup> defendant through letters of offer dated 8<sup>th</sup> March, 2012 and 29<sup>th</sup> November, 2012. They averred that as security for the said financial facilities, the plaintiff offered his properties known as LR No 209/11358/141 and Ngong/Ngong/12855 to be charged in favour of the bank.
18. The defendants contended that the plaintiff defaulted in making payments to service the said loan amounts which resulted to several demand requests and reminders being issued to him requiring him to regularize the loan accounts and arrest the defaults. It was stated that the plaintiff failed to pay the outstanding amount and loan arrears hence the 1<sup>st</sup> defendant initiated realization of the securities to safeguard its interest and that of its depositors.
19. It was stated by the defendants that on 13<sup>th</sup> January, 2020 the 1<sup>st</sup> defendant issued a statutory notice to the plaintiff via registered post in relation to L.R No 209/11358/141 and Ngong/Ngong/12855 demanding payment of the amount owing together with interest being Kshs 19,006,077.74 and arrears of Kshs 1,016,620.75. That on the said date, the 1<sup>st</sup> defendant also communicated to the plaintiff informing him that his name had been forwarded to the Credit Reference Bureau for listing due to persistent default.
20. The defendants averred that the plaintiff was issued with a forty (40) days' statutory notice dated 21<sup>st</sup> April, 2020 pursuant to the provisions of Section 96 (2)(3) of the *Land Act* in respect to the suit properties. That thereafter, he was served with a forty-five (45) days' redemption notice. That he was also served with the notification of sale by the 2<sup>nd</sup> defendant via registered post and by sticking the said notices on the gate of the suit properties.



21. That sometime in March, 2021, the 1<sup>st</sup> defendant suspended the impending sale of the suit properties since the plaintiff cleared the loan arrears and promised to continue making payments as required. It was deposed that the plaintiff's loan account fell into arrears again since the plaintiff failed to make the necessary payments and as a result, the 1<sup>st</sup> defendant resuscitated the realization process.
22. It was deposed that on 11<sup>th</sup> February, 2022, the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to issue the plaintiff with a twenty-one (21) days' courtesy notification of sale over the suit properties. The defendants averred that on 28<sup>th</sup> February, 2022, the suit properties were advertised in the Daily Nation and scheduled for sale on 11<sup>th</sup> March, 2022. They asserted that the 1<sup>st</sup> defendant instructed M/s Pinnacle Valuers Limited to undertake valuation of the suit properties so as to ascertain the market value and forced sale value of the suit properties which culminated in valuation reports dated 29<sup>th</sup> January, 2022.
23. The defendants stated that as at 14<sup>th</sup> March, 2022, the plaintiff was indebted to the 1<sup>st</sup> defendant to the tune of Kshs 16,481,915.43 which amount continues to accrue interest thus it is only fair that the 1<sup>st</sup> defendant be allowed to recover what it is owed. The defendants further stated that the plaintiff has never disputed the loan balances and/or written to the 1<sup>st</sup> defendant requesting for account statements and his request denied.
24. In a rejoinder, the plaintiff deposed that he came up with a payment plan with the 1<sup>st</sup> defendant where he made payments and cleared the arrears hence he was in good standing with the mortgage loan facilities. He averred that he was never served with the requisite statutory notices when the 1<sup>st</sup> defendant was exercising its statutory power of sale for the second time.
25. It was stated by the plaintiff that the twenty-one (21) days' courtesy notice dated 11<sup>th</sup> February, 2022 can never serve the purpose of, or substitute a statutory notice. He further stated that the defendants had advertised the suit properties for sale, without following due procedure and without acting in good faith.

#### **Whether the plaintiff is guilty of material non-disclosure.**

26. The defendants contended that the plaintiff is guilty of material non-disclosure thus the instant application should be dismissed. They submitted that the plaintiff failed to inform the Court that the 1<sup>st</sup> defendant had issued him with statutory notices between January 2020 and January 2021 and the suit properties had been scheduled for sale by public auction but the 1<sup>st</sup> defendant called off the auction, so as to allow the plaintiff to redeem himself on condition that if he failed to clear his arrears again, the 1<sup>st</sup> defendant would proceed and auction the suit properties.
27. When this matter first came up under certificate of urgency, the plaintiff was granted an interim order of injunction *ex parte* to last until 24<sup>th</sup> March, 2022. On 24<sup>th</sup> March, 2022, the Court then issued *status quo* orders to be maintained until 31<sup>st</sup> March, 2022. The said orders were then extended on 4<sup>th</sup> May, 2022 to last until the instant application was heard and determined.
28. In the case of *Tate Access Floor v Boswell* [1990] 3 All ER 303 cited with authority by the Court in the case of *Gotv Kenya Limited v Royal Media Services Limited & 2 others* (*supra*), the Court at page 316 held thus -

“No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge



the *ex parte* order and may mark its displeasure, refuse the Plaintiff further inter-partes relief even though the circumstances would otherwise justify the grant of such relief.”

29. On perusal of the plaintiff’s affidavit in support of the application herein, it is evident that he only disclosed service and receipt of the twenty-one (21) days’ notice dated 11<sup>th</sup> February, 2022 and a notification of sale of the suit properties dated 11<sup>th</sup> February, 2022. The defendants on the other hand averred that the plaintiff was served with all the requisite statutory notices between January 2020 and January 2021 but sometime in March 2021, the 1<sup>st</sup> defendant suspended the impending sale of the suit properties at the behest of the plaintiff on condition that he clears the arrears, continues to make payments as required and in the event that he failed to clear his arrears again, the 1<sup>st</sup> defendant would proceed with auctioning the suit properties. That the plaintiff’s loan account fell into arrears again thus the 1<sup>st</sup> defendant resuscitated the realization process. In his further affidavit, the plaintiff confirmed that indeed there was an auction that was cancelled after he cleared all the outstanding arrears. He claimed to be in good standing with the loan repayment. He further claimed that he was not served with the requisite statutory notices when the 1<sup>st</sup> defendant was exercising its statutory power of sale the second time.

30. Based on the foregoing, it is my finding that the plaintiff is guilty of material non-disclosure, for having failed to disclose that at one point in time, the 1<sup>st</sup> defendant served him with all the requisite statutory notices. The plaintiff had a duty to disclose all material facts within his knowledge at the time he approached the Court seeking for an *ex parte* interim injunction so as to give the Court an opportunity to make an informed decision. For this reason, I hold that the plaintiff was not entitled to the *ex parte* interim injunction and *status quo* orders.

If an order of an interim injunction should issue pending the hearing and determination of the suit between the parties herein.

31. Temporary injunctions are provided for under Order 40 Rule 1 of the [Civil Procedure Rules, 2010](#) which state that -

“Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

32. In an application for an interlocutory injunction, the onus is on the applicant to satisfy the Court that it should grant an injunction. The Court in the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR when dealing with an application where an order for an injunction was being sought held as follows-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;



- a. establish his case only at a *prima facie* level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

33. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, considered what constitutes a *prima facie* case and stated the following-

“So what is a *prima facie* case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

34. The plaintiff’s application is anchored on the fact that he was not issued with the requisite statutory notices before the suit properties were advertised and scheduled for sale by public auction. From the plaintiff’s pleadings, it is evident that he does not dispute the debt as claimed by the 1<sup>st</sup> defendant. The defendants have exhibited in their replying affidavit a copy of a statutory notice pursuant to the provisions of Section 90(1), (2) & (3) of the *Land Act*, 2012 dated 13<sup>th</sup> January, 2020 that was sent to the plaintiff via registered post, a copy of a forty (40) days’ notification of sale pursuant to the provisions of Section 96(2) of the *Land Act*, 2012 dated 21<sup>st</sup> April, 2020 that was also sent to the plaintiff via registered post. They have also exhibited copies of forty-five (45) days’ notice and notification of sale of immovable property in respect to the suit properties dated 5<sup>th</sup> February, 2021 and 14<sup>th</sup> January, 2021, which were served on the plaintiff personally and pasted on the gate of his suit properties.

35. It is noteworthy that the plaintiff does not dispute service of the aforementioned statutory notices, instead, he contends that the 1<sup>st</sup> defendant ought to have issued fresh notices since he cleared his loan arrears and the first auction was cancelled. The question this Court now has to answer is whether upon clearing his arrears and since the sale of the suit properties by public auction was suspended/cancelled, if the 1<sup>st</sup> defendant required to issue fresh statutory notices before exercising its statutory power of sale when the plaintiff’s loan account fell into arrears again. The Court of Appeal in the case of *Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others* (*supra*) answered this question as hereunder –

“From the record it is clear that after receiving the notice giving (whether it was for the 14 days or 90 days), the advocates on record for the mortgagor engaged counsel for the Bank with proposals on how to liquidate the loan. They did not complain at all that the notice they had been given was invalid. They actually acted on it. Following the discussions, the auctioneers were advised to hold any advertisement for the sale of the suit property. That was in November 1998. The property was not re-advertised until April 2001. The question we should be asking, in our view is whether in these circumstances, it was necessary to re-issue another statutory notice. The answer to this is in the negative as the default in payment had continued for more than 3 months following the notice in view of Section 69A(1) (a).”



36. Further, in *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] eKLR, the Court held that-

“In the premises, any averment that no Statutory Notice was served under Section 90 of the *Land Act* is clearly untenable. It is also immaterial that the Section 90 Notice was issued on 7 June 2016, for, once a valid notice has been given, there is no obligation in law for a Chargee to re-issue a notice, even where the sale is not conducted as initially scheduled. In this respect, I would agree with and endorse the expressions of Warsame, J in *Executive Curtains & Furnishings Ltd v Family Finance Building Society* [2007] eKLR in which he had the following to say:

“The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charged property is out of the hands of the borrower”.

37. Based on the above decisions and the depositions of the parties hereto, I find that the 1<sup>st</sup> defendant was not under a duty to re-issue fresh statutory notices to the plaintiff once the plaintiff's loan account fell into arrears for the second time, as the plaintiff had been duly served with all the requisite statutory notices between January 2020 and January 2021. Accordingly, I find that the plaintiff has not discharged his burden of demonstrating that he has a *prima facie* case with a probability of success.

38. On the issue of whether the plaintiff stands to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event the instant application is not allowed, I am not persuaded that this is the case. The plaintiff did not dispute being indebted to the 1<sup>st</sup> defendant. The said defendant has demonstrated that it served the plaintiff with all the requisite statutory notices. As such, the 1<sup>st</sup> defendant's right to exercise its statutory power of sale over the suit properties had accrued as at the time it advertised the plaintiff's property for sale the second time. In addition, the 1<sup>st</sup> defendant is a financial institution with the capability of compensating the plaintiff, in the event that the main suit is determined in his favour.

39. The issue of the balance of convenience does not arise since this Court is not in doubt. Nevertheless, based on this Court's determination here before, the balance of convenience tilts in favour of the defendants since the plaintiff can always be compensated by an award of damages, in the event that his suit is successful.

40. The upshot is that the application dated 8<sup>th</sup> March, 2022 is bereft of merit. It is dismissed with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**



In the presence of:

Mr. Macharia for the plaintiff

Mr. Mugisha for the defendants

Ms B. Wokabi – Court Assistant.

