



**Gakaria v National Housing Corporation & 2 others (Civil Suit E041 of 2022)
[2023] KEHC 22501 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E041 OF 2022
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

JOSEPH NJOGU GAKARIA PLAINTIFF

AND

NATIONAL HOUSING CORPORATION 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

PATRICK NJUNGE 3RD DEFENDANT

RULING

1. This ruling determines the application dated February 3, 2023, which was brought under sections 1A,1B, 3A and 63(c) and (e) of the *Civil Procedure Act*, sections 97, 102, 103 and 104 of the *Land Act*, Order 40 rules 1, 2, 3 and 4 and Order 51 rule 1 of the *Civil Procedure Rules*, 2010 and rules 15, 16, 17 and 18 of the *Auctioneers Rules*.
2. The application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd respondents either by themselves, their agents, employees and or servants from selling by public auction, entering, taking possession of or in any way interfering with the current ownership of title number L.R No. Muguga/Muguga/1620 situated in Kamuguga area, Kiambu County (hereinafter the "suit property") pending the hearing and determination of this suit.



- iv. That a declaration be issued, that the notification for sale issued to the applicant by the 2nd respondent is a nullity for being defective and for failure on the part of the 1st respondent to follow the laid process as required by section 90 (2) (b) of the Land Act No. 6 of 2012.
 - v. That a declaration be issued, that the issue of 45 days Auctioneer's Notice to sell, served upon the applicant is a nullity, the 1st respondent has never and/or not served upon the applicant a 40 days' Notice to Sell as required by Section 96(2) of the Land Act No. 6 of 2012.
 - vi. Any other order that this Honourable court may deem fit.
3. The application is supported by the grounds found on the face of it, the supporting affidavit sworn by Joseph Njogu Gakaria and written submissions dated February 22, 2023.
 4. The dispute is premised on a credit facility given by the 1st respondent to the 3rd respondent to enable him construct commercial houses. It was anticipated that the facility, in the sum of Kshs. 3,000,000/= would be repaid from the income generated from the commercial rental houses. It was a term of the loan agreement that the facility will be repaid in monthly instalments of Kshs. 45,000/= for a period of 10 years. The applicant guaranteed the facility offering his property L.R. No. Muguga/Muguga/1620 situated in Kiambu County as security through a legal charge registered on 8th October, 2019.
 5. The facility was disbursed and the applicant assumed that the 3rd respondent was honoring the monthly obligations. This was until he later learnt that a Notification of Sale had been issued by the 2nd respondent to the 3rd respondent, demanding the payment of the amount due and owing. He also learnt that the 3rd respondent had defaulted in the monthly instalments from March 2020.
 6. The applicant states that he subsequently received a Notification of Sale by post from the 2nd respondent with the inkling that the suit property was to be sold by public action on January 27, 2023. The notification was dated October 18, 2022. The gravamen of the application is that the said Notification of Sale was premature and contra-statute for failing to comply with the mandatory provisions of section 90 and 96 of the Land Act.
 7. More specifically, the applicant states that he was never served with the mandatory 90 days statutory notice as required under section 90 of the Land Act and the subsequent 40 days' Notice to Sell under Section 96 of the Land Act. The applicant submitted that if the auction is allowed to go on, he would suffer irreparable loss that could not be compensated by damages.
 8. The application was opposed by the 1st respondent vide a replying affidavit dated February 14, 2023 sworn by Wilson Omondi Asingo. The Senior Debt Recovery Officer of the 1st respondent confirmed the credit facility advanced to the 3rd respondent pursuant to a loan agreement dated June 12, 2019 on the terms stated by the applicant.
 9. The 1st respondent further stated that the loan account fell into arrears and as at February 28, 2023 the 3rd respondent had only paid Kshs. 1,184,394/=. The 1st respondent confirmed having issued statutory notices dated November 23, 2021, March 11, 2022 and October 18, 2022 via registered post through PO Box 757-00902 Kikuyu with a copy to PO Box 1007-00902 Kikuyu.
 10. According to the 1st respondent, the applicant and the 3rd respondent had not paid up the outstanding amount as per the notices and as such the chargee's statutory power of sale had arisen as a result of the 3rd respondent's default.



Analysis

11. I have considered the totality of the rival pleadings, submissions and the case law presented by the parties before the Court. The main issue for determination is whether the plaintiff has established a case for the grant of orders of temporary injunction.
12. The conditions that guide the court in granting an order for injunction are well crystalized as set out in the celebrated case of *Giella v Cassman Brown & Co. Ltd*, [1973] E.A 385, at page 360 where Spry J. held that:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
13. On the first limb, this Court is called upon to ascertain whether the applicants have shown a *prima facie* case following the threshold laid out in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, [2003] KLR 125. The Court defined a prima facie case as:

“...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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
14. In determining whether a prima facie case has been demonstrated, I am in turn cognizant of the limitations of enquiry that are permitted of this court at this point in time. The Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 others*, [2014] eKLR observed that:

“In considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation.”
15. Against this background, I note that there is no controversy relating to the 3rd respondent’s default in making the agreed instalments. In fact, the court notes that the 3rd respondent did not even participate in these proceedings. What is in dispute is the manner in which the 1st respondent purported to exercise its statutory power of sale.
16. A cursory look at the record indicates that the 1st respondent vide a letter dated 23rd November sent a demand notice addressed to the applicant Joseph Njogu Gakaria to P.O. Box 757-00902 Kikuyu. This I note was different from the address provided by the applicant in the charge document which is P.O BOX1007-00902 Kikuyu. The applicant subsequently sent the notice dated March 11, 2022 through the latter address which the applicant admits to have received. I also note that the notice of October 18, 2022 is addressed to the 3rd respondent but using the address given as that of the applicant herein.



17. I therefore find merited the argument by the applicant that there was no proper service of the statutory notices since the address used to serve was wrong. The requirements on statutory notices under the *Land Act* are mandatory. I do further concur with the applicant that the right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. The applicant was therefore deprived of the benefit of the protection of the law accorded under sections 90 and 96 of the *Land Act*. I am satisfied that the applicant has established that he has a prima facie case worthy of rebuttal.
18. The second consideration for grant of an injunction is whether the applicant has shown that he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. On this point, I am inclined to concur with the court in the *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others*, [2016] eKLR. The court cited with approval from the Halsbury's Laws of England, in a view that was also captured by Warsame, JA in *Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others*, [2008] eKLR. This was to the effect that:
- “Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law...a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”
19. Applying this reasoning I would agree that the applicant stands to suffer loss if the injunction to stop the sale of his property is not granted.
20. Finally, if an injunction is not granted and the suit is ultimately decided in favor of the applicant, the inconvenience caused to him would be greater than that which would be caused to the respondents. I therefore find that the balance of convenience tilts in favour of granting the orders sought by the applicant.

Determination

21. For the reasons that I have stated, I find that this is a proper case for granting an injunction. Accordingly, I find that the application has merit and the same is allowed as prayed. I further direct as follows:
- i. That the parties shall forthwith comply with Order 11 in readiness for Case Management Conference on directions and a date taken before Court.
 - ii. Costs of the application shall await the outcome of the main suit.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Ms. Njoki for the applicant

N/A for the respondent

Court Assistant: Ms. Carolyn Kyalo

