**Mediheal Group Limited v Jomuki Auctioneers (Civil Suit E010 of 2024)**
**[2024] KEHC 17050 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 17050 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL SUIT E010 OF 2024**

**E OMINDE, J**

**NOVEMBER 13, 2024**

**BETWEEN**

**MEDIHEAL GROUP LIMITED ..... PLAINTIFF**

**AND**

**JOMUKI AUCTIONEERS ..... RESPONDENT**

**RULING**

1. The Applicant approached this court by way of Plaint dated 29/05/2024 seeking declaratory orders against the Defendant's auction over the Plaintiff's properties. On the instructions of the Plaintiff's creditors the Defendants had indicated that they intended to auction the Plaintiff/ Applicants' properties known as Pioneer/Ngeria Block 1 [EATEC]/11002, Cheptiret/Cheplaskei Block 2 [Chepkigen] 194, 196 and 197, Eldoret Municipality Block 14/474, Eldoret Municipality Block 14/475.

2. The Plaintiff/Applicant [hereinafter referred to as the Applicant] filed the present Application dated 28/05/2024 seeking the following orders;

    i. Spent

    ii. Spent

    iii. A temporary injunction do issue to restrain and prevent the Respondents by themselves and/ or their agents, servants, employees, assigns or otherwise howsoever from interfering with the Applicant's quiet possession of Pioneer/Ngeria Block 1 [EATEC]/11002, Cheptiret/ Cheplaskei Block 2 [Chepkigen] 194, 196 and 197, Eldoret Municipality Block 14/474, Eldoret Municipality Block 14/475 any other property belonging to the Applicant herein or in any other manner exercising or continuing to auction the said properties or any thereof pending the hearing and final determination of the main suit.

iv. The costs be provided for.

3. The Application is premised on the grounds on the face of it and the contents of the supporting affidavit sworn by Swarup Rajan Mishra.

4. The deponent averred that he acknowledges that the applicant is indebted to various creditors. Further, that he has been making payments but to his surprise, they received a public auction notice indicating that some creditors have instructed the Respondent to auction their properties.

5. He stated that the Respondents ought to have prepared and served them with a redemption notice for 45 days then thereafter a 90-day Notice of sale. Both were not done hence the auction should be found to be illegal. He urged that the applicant stands to suffer substantial loss and irreparable damage if the interim orders sought are not granted. Further, that the Respondents will not be prejudiced if the orders sought are granted. He urged the court to allow the application.

**Respondents' Ground of Opposition**

6. The Respondent opposed the application vide Grounds of opposition dated 17/07/2024. The application is opposed on the ground that the applicant has failed to enjoin the primary party with whom the contractual relationship exists and who initiated the statutory power of sale. Further, that the applicant has improperly sued the Respondent as it is an agent of a disclosed principal, the bank.

7. The Respondent stated that it can't be sued for executing the instructions of a disclosed principal entitled to exercise its statutory power of sale and there is no proper cause of action against the Respondent. Additionally, that a temporary/permanent injunction cannot issue against the Respondent as there is no relationship between the Respondent and the applicant.

8. The Respondent further opposed the application on the grounds that the applicants' claim of ignorance regarding the identity of the lender is disingenuous and lacks credibility. That the statutory notices were issued by the bank and not the auctioneers and therefore, the plaintiff cannot claim against the auctioneers.

9. Additionally, he stated that the plaintiff has not established a prima facie case with a probability of success or that they will suffer irreparable harm which cannot be compensated by damages. He stated that the balance of convenience favours allowing the auction process to proceed. The Respondent prayed that the application and main suit be dismissed with costs.

10. When the matter came up for mention on 18/07/2024, learned counsel for the applicant requested for 14 days to file a supplementary affidavit in response to the matters raised on the grounds of opposition. The court granted him 14 days to file the same together with the written submissions on the application. However, at the time of writing this ruling, counsel had only filed the written submissions to the application.

**Applicants' written submissions**

11. Learned counsel filed submissions through the firm of Messrs Aloo Romanus & Company Advocates. Counsel submitted that the conditions for grant of temporary injunctions was set out in the case of Giella v Cassman Brown [1973] EA 358.

12. Counsel urged that a prima facie case was defined in the case of Mrao v First American bank of Kenya & 2 others [2003] KLR. Further, that in order to demonstrate a prima facie case, the applicant has indicated in his affidavit dated 29/05/2024, that he is the owner of the suit properties. That the plaintiff has been financing the loan despite the exaggerated interest rates that were never brought to

its attention at the time they were increased. Counsel submitted that the applicant was never served with the redemption notice or the notification of sale.

13. He cited the case of Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another [1990] KLR in support of this submission. Counsel maintained that the applicant was never served with the requisite notices or informed by the auctioneer of the auction and thus, he has demonstrated that there is the existence of a prima facie case.

14. The applicant urged that if the orders sought are not granted he will suffer irreparable harm as he will be evicted from the properties and remain a squatter. Further, that there is existence of a real injury that cannot be adequately compensated by damages. Counsel submitted that the balance of convenience tilts in favour of the applicant for the reason that his eviction from the suit property will be detrimental to both himself and his family as the same is likely to cause a psychological torture to him.

15. Counsel cited Section 90 of the *Land Act* 2012 urging that it is the gist of the application. He emphasized that it is worth noting that a statutory notice issued under section 90, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under section 90[3] of the Act. That the notice is issued where the chargor is in default of any obligation under the charge or has failed to pay interest or any other periodic payment and such default continues for one month. He reiterated that the said statutory Notice which is a mandatory legal requirement before the Chargee realizes his power of sale was never issued nor served. He cited the case of East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another [2017] eKLR in support of this submission.

16. Counsel reiterated that the notices stipulated under the *Land Act* are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. Further, that section 96 of the *land Act* is explicit to the effect that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96[2] of the *Land Act*, before the chargee can sell the charged property. The notice under section 96[2] of the *Land Act* is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the *Auctioneers Act* as herein explained.

17. Counsel cited the case of David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR where the court expressed itself on a Charge under Section 96[2] of the *Land Act* as compared to the Redemption Notice issued under rule 15 of the *Auctioneers Act*.

18. On whether an independent valuer can be appointed to ascertain the current market value of the suit property, counsel relied on the case of David Gitome Kuhiguka v. Equity Bank Ltd [2013] eKLR and urged that the applicants' contention is that the valuation report was never prepared and if the same was prepared, it was never served upon the Applicant. He stated that the primary provision on forced valuation is found in Section 97[2] of the *Land Act* No. 5 of 2012 and applies where the charged land is to be sold in the exercise of power of sale or pursuant to an order of the court.

19. Counsel urged that the Applicant has not been furnished with any copy of the valuation report to know for how much his properties were valued and as such, the applicant is apprehensive that his properties might be sold at a lesser value compared to the market value at the time of the purported auction. The Defendant initiated the process of exercising the statutory power of sale and it was incumbent upon them to have caused the forced valuation and serve it upon the applicant. He stated that although section 97 of the *Land Act* is silent on the time within which a forced valuation should be done, except that it is done before the public auction. Further, that in the interest of justice, it is the Applicant's submissions that this court reinforce the rights of the chargor to have current market value for his properties and the same be conducted by an independent valuer within reasonable time

20. Counsel submitted that the obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer is provided for in Section 97 of the *Land Act*, 2012 which makes it statutory and obligatory. It should not be left to the whims of the chargee and its agents especially the auctioneers.

21. Counsel urged that the Plaintiff/ Applicant has met the legal threshold required to grant the orders sought for vide the application dated 28th May,2024.

**Respondents' Submissions**

22. Learned counsel for the Respondent submitted that the Court has been empowered by Order 2 Rule 15 to strike out a pleading which does not disclose a reasonable cause of action or defence. He cited the Court of Appeal in Attorney General & another v Andrew Maina Githinji & another [2016] eKLR [Nambuye J.] which defined a cause of action. Additionally, he cited Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No 62 of 1958 as cited in Szaredo Investments Limited v Chief Land Registrar & 2 others [Land Case 167 of 2016] [2022] KEELC15589 [KLR] [21 November 2022] [Judgment]. Counsel urged that it is not enough that there is a cause of action but that the said cause of action be reasonable. He cited the case of DT Dobie & Co [K] Ltd v Muchina, [1982] KLR in support of this submission.

23. It is the Respondents' case that from these decisions, we can deduce that the Plaintiff has a reasonable cause of action if the Plaintiff sets out a combination of facts which gives rise to a right to the Plaintiff to obtain a remedy or, every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. That the first point of call for this court to establish whether there exists a reasonable cause of action is whether the Plaintiff has a right that has been violated or threatened to be violated by the Defendant to warrant the Plaintiff to obtain a remedy in this court. From the pleadings, the Plaintiff is claiming proprietary rights over the suit properties. This is the right it seeks to protect and claims has been threatened with violation by the Defendant.

24. Counsel submitted that the Plaintiff has not set out in the plaint that it has proprietary rights over the suit properties or such facts that give rise to a right in the properties. He stated that the facts establishing proprietary rights over suit properties generally involves demonstrating legal ownership or a legal interest in the property. In a claim that one is the proprietor of the suit properties, there at least needs to some facts towards proving title. The plaintiff has not presented such facts as to title in the suit properties showing registered ownership of the properties it claims belong to it. A mere averment of the existence of an official search at the Land Registry to confirm ownership would have sufficed but the Plaintiff has not done that either. He urged that the facts of a search provides an official record of who holds the title to the property.

25. It is the respondent's case that no facts relating to actual possession or occupation of the property, such as through photographs, receipts for land rates, or utility bills have been stated to entitle the Plaintiff to claim a right over the suit properties. In addition. Contracts and Agreements would show a valid and enforceable sale agreement where the property was sold to the Plaintiff. However, no such facts have been stated by the Plaintiff. He stated that courts do not act in vacuum. If you claim that your proprietary rights over properties which rights have been threatened with violation thus warranting protection, then you better set out facts that indeed that rights are vested in you.

26. Counsel submitted that the Plaintiff has alluded to the existence of preservative orders issued in other matters relating to the suit properties but it has not specified the court orders or the court cases they emanate from or which properties they relate to. Previous judgments or decrees that have determined or affirmed ownership rights over the suit properties would have helped but none have been presented. In essence the Plaintiff has failed to set out facts that support the existence of such orders. Counsel

submitted that if there exists preservative court orders issued in other matters then the doctrine of Lis Pendens would come to the Plaintiffs aid. He pointed out that ongoing litigation may establish proprietary rights by presenting interim orders, injunctions, or any related court pleadings or setting out facts on such orders and that this has not been done.

27. Counsel submitted that the mere mention of subsisting court orders issued in other matters points this court to consider two legal principles that would in their own rights determine this suit summarily. The first principle is the res subjudice doctrine which is encapsulated in Section 6 of the *Civil Procedure Act* [Cap 21 of the Laws of Kenya]. The second principle is the res judicata doctrine which is enshrined by Section 7 of the *Civil Procedure Act* [Cap 21 of the Laws of Kenya]. The Defendant and indeed the Court is at a loss as to whether the principles of res-sub judice or res judicata are applicable in this case or whether the alluded to preservative court orders are applicable to this case and bind this court in any way.

28. Counsel submitted that the process for obtaining a loan facility from a lender where the borrower proffers their property as a collateral commences with issuance of a letter of offer from the lender, which is accepted by the borrower. They then draft security documents wherein they declare that the lender shall advance an agreed sum and that the borrower offers the property as security to secure the amount lent. These security documents include a legal charge which is then registered as an encumbrance on the title section. Nothing would have been easier for the Plaintiff to just set out the facts of the Loan facilities, the lenders it alleges issued those facilities and which property was used to secure which loan property, the extent of repayments or indebtedness since these will be facts that are definitely likely to be traversed by any defendant sued over such a claim. He reiterated that the Plaintiff has failed to set out combination of facts which entitles or gives rise to a right to the Plaintiff to obtain a remedy.

29. Counsel urged that the Plaintiff averred that the Defendant, an auctioneer acting upon instruction of a Principal whom the Plaintiff, ought to know violated its right to be served with the necessary statutory notices before proceeding to auction the subject properties. From the above definition, a cause of action flows from an entitlement that arises from violation of a right by the Defendant. The Defendant in this matter is the auctioneer acting under the instructions of the Bank that advanced facilities to the Plaintiff. It is clear that the Defendant is an agent of a disclosed principal. The Plaintiff knows who the Principal is. It knows from whom in borrowed money and whether it has defaulted on the repayment or not. It knows which security is charged to which bank and as such if indeed the suit properties belong to the Plaintiff, it knows in whose favour the securities are held.

30. Counsel urged that a disclosed principal in the context of agency law is a person or entity whose identity is made known to the third party at the time of the transaction by the agent. When an agent acts on behalf of a disclosed principal, the third party understands that the agent is not acting in their own capacity but on behalf of another identifiable party [the principal].

31. Counsel laid down the circumstances under which a principal is said to be disclosed and cited Ison, Delmer [1950] "Partially Disclosed Agency and Its Significance," Kentucky Law Journal: Vol. 39 in support of his submissions. Further, he submitted that the Applicant knew that the Defendant was acting as an agent of the Bank as it was disclosed in the notice. Secondly, it is by virtue of the nature of the business of the Defendant being auctioneers to act as agents and not in their capacities. Thirdly, based on the suit properties which were disclosed by the Defendant, the Plaintiff was at all times in position to know who the principal is since the said suit properties were charged to a specific bank and the details of the facilities, they secured were well within the knowledge of the plaintiff.

32. Counsel urged that as such, the Defendant being an agent of a disclosed or partially disclosed principal it cannot be sued. This is a well-established principal of law. Consequently, the present suit violates

the common law principal that an agent cannot be sued where there is a disclosed principal. Counsel placed reliance on the holding of the High Court in Simon Gichuru Ngomonge f/a Dollar Auctioneers v William Sagini Oribu [2021] eKLR and the sentiments of the Court in Presbeta Investment Limited & another v National Bank of Kenya & 2 others [2016] eKLR.

33. Counsel submitted that as the Defendant is the agent of a disclosed principal, the Applicant is in breach of the common law rule that an agent cannot be sued for actions done on behalf of a disclosed principal. Consequently, the Plaintiffs suit does not disclose a reasonable cause of action against the Defendant thus cannot sustain a claim against it. Consequently, counsel implored the Court to strike out the present suit against the Defendant as the same cannot stand in law.

34. On whether the Plaintiff has satisfied the threshold for grant of temporary injunction counsel cited the Court in Hannah Njeri Thube v Equity Bank Limited [2021] eKLR where it stated that in order for an applicant to be granted an injunction, they need to demonstrate;That the Applicant has a prima facie case with a high probability of success;That irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted will be suffered and;If the Court is in doubt, show that the balance of convenience lies in the Applicant's favour.

35. Noting the required threshold, counsel cited the finding of Odunga J in JM v SMK & 4 others [2022] eKLR and urged this Court to keenly assess the conduct of the Plaintiff in seeking the temporary injunction as the Plaintiffs Application is marred by several inconsistencies which question whether his conduct meets the eye of equity as we shall seek to demonstrate hereunder.

36. On whether there is a prima facie case, counsel cited the Court of Appeal in Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] KLR125, where a prima facie case was defined and the case of Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR. Counsel submitted that flowing from the above decisions, it is clear that for an Applicant to establish a prima facie case, based on the material presented to Court, a tribunal properly directing itself will conclude that there exists a right which apparently is being infringed by the opposite party to call for an explanation.

37. The gist of the Plaintiff's case is that it took out various loan facilities with various lenders and has been making payments to service the loans. It acknowledged that it received an undated letter on 27th May, 2024 wherein the Defendant communicated its intention to carry out an auction on 2nd July, 2024. The Applicant decries that the auction process was foul as the Defendant did not issue a notification of sale and redemption notice. Further, that it fulfilled its obligations under the *Auctioneers Act*, 1996 and Auctioneers Rules 1997 by issuing a redemption notice and notification of sale contemporaneously.

38. Counsel cited Rule 15 and 16 of the Auctioneers Rules and submitted that the Plaintiff albeit attaching the said undated letter averred that the Defendant served it with a letter indicating that an auction would be carried out on 2nd July, 2024. Further, the Plaintiff attached a notice of intended Public Auction annexed as MCL-1. It therefore goes without saying that based on the material adduced by the Plaintiff, the Defendant fulfilled its obligations under the *Auctioneers Act* and Rules.

39. Counsel urged that the Applicant has not at any point stated whether or not it was served with the 90 days and 40 days notices that precede the 45 days, notification of sale and intention to sell. This silence can only point to one thing; the plaintiff is in default, was served with the 90- and 40-days' notice and is now keen on stalling the process by targeting a party it knows has no role in being sued. As such, the Plaintiff has not discharged the onus of establishing a prima facie case.

40. With regards to whether the Plaintiff has demonstrated that it will suffer irreparable loss, counsel cited the holding in Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR. He submitted that the applicant claims it will suffer irreparable loss since some of the properties house patients who shall

lose their lives if service is halted. It therefore stands to suffer substantial loss and irreparable damage. Counsel urged that this argument is neither here nor there as the Plaintiff took out a loan facility, secured it using properties that had a hospital facility with patients knowing fully well that, in the event it defaulted in paying, the lender has the statutory power of sale to pursue the collateral. Further, he presented the said properties knowing that in case he defaulted, the same would be sold to recover the outstanding sums. Counsel relied on the Court in Stephen Michuki Kiunga v National Bank of Kenya Ltd [2018] eKLR in support of this submission..

41. Counsel urged that the Plaintiff averred that he has been servicing his loans, but he did not attach any bank account statements to prove that. It is trite law that he who alleges must prove and thus, this limb of argument cannot stand. Further, the value of the suit properties is known and thus, if the Court eventually found that the Defendant was at fault, it could ask the Defendant's Principal to compensate it.

42. In respect of who the balance of convenience, counsel cited the case of Pius Kipchirchir Kogo v. Frank Kimeli Tenai [2018] eKLR Further, he stated that the Plaintiff has failed to demonstrate the inconvenience it will suffer. While it has claimed that there exists subsisting preservative court orders in other matters and unless the sale is stayed there shall be contradictory orders, it has not attached any of those subsisting orders regarding the properties in question. Further to that, even if the Court would issue the injunction against the Defendant, it would not adequately protect the Plaintiff as the Defendant is but an agent. The order will only bar the Defendant and won't extend to the principal who could as well instruct other auctioneers to realize its statutory power of sale. As such without the principal, any order issued will be in futility.

43. Counsel urged that it is important to note that in the circumstances, the Plaintiff makes it difficult for this Court to adequately determine this as the Plaintiff tactfully sought to bypass proof of this element by suing the Defendant instead of the Principal. While the Plaintiff has averred that it needs to be accorded an opportunity to face its adversaries, it has not brought those adversaries before Court for the inconvenience to be weighed against the adversaries. The balance of convenience therefore cannot fairly tilt as the Plaintiff unjustly instituted the suit while titling it towards its end. In other words, the Plaintiff has already stolen a march against the Defendant.

44. Counsel urged the Court to dismiss the suit and Application with costs to the Defendant as costs follow the event and, in the circumstances, it would befit to award the Defendant costs due to the trouble the Plaintiff has taken it through in prosecuting a cause which would be proper against its Principal.

**Analysis & Determination**

45. The following issues arise for determination;

    i. Whether the Respondent is non-suited

    ii. Whether orders for a temporary injunction should issue.

**Whether the respondent is non-suited.**

46. Order 1 Rule 1 of the Civil Procedure Rules states;

    All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

47. The Court of Appeal in Anthony Francis Wareheim T/A Wareheim & 2 Others V Kenya Post Office Savings Bank, Civil Application Nos. NAI 5 & 48 of 2002, stated thus:

> "It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. [Emphasis Mine]

48. The above said, in the present case, prima facie, it is apparent from the parties sued that the Respondent who is an Auctioneer and who must have acted at the behest of a principal is the one who has been sued and the principal has not been joined. The Respondent states that the principal is disclosed and he is the one who ought to have been sued because that principal is the one who is best suited to respond to the issue on whether the requirements of the *Land Act* herein above cited were adhered to before they were instructed.

49. The question that arises in determining whether the Respondent is non-suited given the above circumstances is whether that principal was disclosed as the Respondent has submitted. I have perused the impugned Notice of the Public Auction. The same had proposed to sell four separate properties' all belonging to MEDIHEAL GROUP LIMITED. The said Notice states thus;

> "Under instructions from our client, we shall sell the following property by way of Public Auction"

It then proceeds to list the properties.

50. The Rules under the *Auctioneers Act* Cap 526 provide for the following procedure in the sale of immovable property

15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

a. record the court warrant or letter of instruction in the register;

b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold; [Issue 1] 30 [Rev. 2012] Auctioneers CAP. 526 [Subsidiary]

c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction; [Emphasis mine]

e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

51. It further provides for the following requirements in the advertisement giving the Notice of an intended auction;

16. Advertisement

1. An advertisement by an auctioneer shall, in addition to any other matter required by the court, contain—

    a. the date, time and place of the proposed sale;

    b. the conditions of sale or where they may be obtained;

    c. the time for viewing the property to be sold;

    d. in respect of movable property other than perishable goods and livestock, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price;

    e. in respect of goods of a perishable nature or livestock an accurate description of the goods to be sold and of their condition and a statement as to whether or not they are to be sold subject to a reserve price;

    f. in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price.

52. Thereafter, Sale Form 1, which is part of the appendices to the Rule, lists the name and address of the instructing party as forming part of all the information required as envisaged in the above Rule 16[f] above.

    In most instances however, the detailed particulars of the instructing party is usually not given in the Notice of Public Auction in the case of immovable property. Compliance is usually in the following format.....

    " Under instructions received from our principal, the chargee....."

53. It is important in my view to disclose which type of principal an auctioneer is acting on behalf of so as to enable the party against whom it is proceeding to appreciate which of their lenders, financiers, creditors etc they are dealing with, given that it is a matter of public notoriety that one property can be used to secure several financial facilities from different institutions and/or persons. It is therefore not enough for an auctioneer the state they are "under instructions from their client..." without disclosing the nature of that client vis a vis the debtor and presume that to be deemed to be sufficient disclosure.

54. Much as the Respondent states that the Principal is disclosed and that it is the Bank which the borrower is in a contractual relationship with and who they can therefore not claim not to know, the Court notes that the Applicant sates that they are indebted to various creditors, a fact that was not denied and/or contradicted by the Respondents. They also allege that they were not issued with any Statutory Notices and that further, contrary to the requirements of Rule 15 of the Auctioneers Rules, they were not also issued with the requisite 45 Days Redemption Notice by the Auctioneer. That in this regard, they are not aware which of their creditors had instructed the Respondent.

55. The Respondent have not at all denied that they did not issue the 45 days' Notice to the Applicant and so it is therefore safe for the Court to assume that it was not issued. The Court further notes that the Notice of Public Auction is undated. It is therefore not possible, even if one was to count backwards from the date of the intended auction to deduce from this reverse count that the Applicant was accorded the requisite 45 days before the auction to enable him make arrangements to redeem his properties. The Respondent's argument that this Notice suffices as a 45 days' Statutory Notice has no legs to stand on therefore and is without merit.

56. If the 45 days' Statutory Notice had been issued to the Applicant, in my considered opinion, given the several creditors that the Applicant alleges he has which allegation was not controverted, it would have sufficed to disclose to the Applicant the particular principal the Respondent was acting at the behest of. The allegation of the non-disclosure of the principal by the Respondent would then not have arisen even assuming as has been alleged by the Applicant that the 90 and 40 days' Statutory Notices required to be served upon the Applicant under the *Land Act* had not been served upon them by the Chargee.

57. Given that these are the prevailing circumstances, the allegations by the Applicant that Statutory Notices were not issued to them by whichever creditor instructed the Respondent coupled with the non-issuance of the 45 days Redemption Notice lends credence to their submission that they were therefore not able to know which of their creditors the Respondent was proceeding at the behest of hence their inability to join the principal.

58. In light of my analysis as above, my finding on the issue of whether the Respondent is non-suited is that in this instant case the principal was not disclosed by the Respondent and because it was the Respondent's duty to so disclose as provided by the Rules herein above cited, the Respondent then was the right party to sue. I am therefore well satisfied that the Respondent is properly sued is not non-suited.

59. The next issue for determination is whether the orders for a temporary injunction sought by the Applicant ought to issue. Injunctions are governed by Order 40 of the Civil Procedure Rules and Order 40 Rule 1 provides as follows;

Order 40, rule 1

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.

60. In the celebrated case of Giella v Cassman Brown & Co. Ltd [1973] EA, 358 which is the locus classicus on injunctions, and which has been cited by both parties the principles for grant of injunction were set out as follows;

> " The conditions for the grant of an interlocutory injunction are now, I think, 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."

61. In the case of Nguruman Ltd v Jan Bonde Nielsen & 2 Others, Civil Appeal No. 77 OF 2012 the Court of Appeal stated as follows on the three pillars that set out in the case of Giella v Cassman Brown above cited;

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

**Prima Facie Case.**

62. The Court of Appeal, in determining what it is that an applicant is required to demonstrate for the court to satisfy itself that a prima facie case has been established held as follows in the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123:

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. 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."

63. In the instant case, under the provisions of Rule 15 of the *Auctioneers Act* herein above cited, the requirement for the issuance of the Redemption Notice to a debtor by an Auctioneer with regard to immovable property before the debtor's property can auctioned is a mandatory requirement because the operative word therein used is shall.

63. Even assuming as the Respondent submits that the Applicant was indeed served with the 90 and 40 day Statutory Notices by the Bank and that the Applicant deliberately omitted to join the Bank as a party in order that they may sufficiently rebut his allegation of non-service, the law provides that even with that having been done by the principal, once instructed, the Respondent was duty bound to issue the Redemption Notice to the Applicant. It has not been sufficiently demonstrated by the Respondent that such a notice was issued in this case.

64. The above being the case, I am satisfied that prima facie, the Applicant has sufficiently demonstrated that he has a case that has a probability of success and on this first hurdle therefore, I find in favour of the applicant.

**Irreparable loss**

64. In the above cited case of Nguruman Ltd v Jan Bonde Nielsen & 2 Others, Civil Appeal No. 77 OF 2012 the Court of Appeal expressed itself on what irreparable injury is and it described such injury as follows;

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable

remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

65. The above said, in this instant case, the Applicants have stated that they are a renowned medical facility with its services rendered members of the public in major parts of the Republic of Kenya. The Applicant further stated that some of the properties earmarked for auction house patient. That these patients stand to lose their lives if the service that the Applicants offer is halted. The Court in noting that the Respondents did not file a Replying Affidavit in response to the Application but only filed Grounds of Opposition finds then that the facts deposed in the Affidavit filed in support of the Application were not at all controverted, contradicted denied and or rebutted by the Respondents in any way.

66. The above being the case, then it is apparent that the lives of innocent people who have nothing at all to do with this case would be in jeopardy if the Respondent is not restrained. In my considered opinion, loss of life firstly and secondly the lives of third parties who have nothing at all to do with the dispute except that they sought treatment in the facility the subject matter of the dispute does fit the description of irreparable injury that cannot be adequately compensated by way of damages and I now hereby so find. On this second hurdle too, I find in favor of the Applicant.

**Balance of Convenience**

67. Balance of convenience was defined in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR as follows;

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer."

68. In light of my findings above and particularly on my finding on irreparable loss, I have no difficulty in finding that the balance of convenience tilt in favour of the Applicant. For the above reasons, I find merit in the Applicants Application and the same is now hereby allowed to the following effect:

    i. A temporary injunction be and is now hereby issued restraining and preventing the Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from interfering with the Applicant's quiet possession of Pioneer/Ngeria Block 1 [EATEC]/11002, Cheptiret/Cheplaskei Block 2 [Chepkigen] 194, 196 and 197, Eldoret Municipality Block 14/474, Eldoret Municipality Block 14/475 belonging to the Applicant herein or in any other manner exercising or continuing to auction the said properties or any thereof pending the hearing and final determination of the main suit.

    ii. The Respondent is to bear the costs of the Application

**Read Date and Signed at ELDORET on 13th November 2024.**

**E. OMINDE**

**JUDGE**