



REPUBLIC OF KENYA



**KENYA LAW**  
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**Meru Green Horticulture EPZ Limited v Equity Bank (Kenya) Limited (Civil Case E005 of 2023) [2024] KEHC 16126 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16126 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E005 OF 2023  
MW MUIGAI, J  
DECEMBER 17, 2024**

**BETWEEN**

**MERU GREEN HORTICULTURE EPZ LIMITED ..... PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... DEFENDANT**

**RULING**

**Introduction**

1. Pursuant to the Ruling of this Court delivered on 22/02/2024 this Court in its disposition directed that:
  1. The Court finds that the Plaintiff has not established prima facie case to warrant grant of temporary injunction pending hearing and determination of the application/suit.
  2. The Court finds that the Defendant served the Plaintiff Company and Directors by registered post the statutory notices as provided Sections 90 (2) & 96 (2) of *Land Act*.
  3. The Court finds that 45 Day Notice was served to 1 Director physically and he signed whereas it is contested if the 2<sup>nd</sup> Director was/was not served or  
She refused to sign. The 45 day notice shall be served to 2<sup>nd</sup> Director and Affidavit of Service filed.
  4. The Plaintiff shall have valuation of the suit property LR No 18474/196 and the Defendant may have Valuation conducted too after 12 months validity is agreed.
2. On 15/10/2024 virtually on line vide Certificate of Urgency filed on 9/10/2024, this court granted interim/temporary injunction to ventilate compliance with the Court's Ruling of 22/2/2024.



## Notice Of Motion

3. The Plaintiff filed an application dated 9/10/2024 and sought the following orders that: -
  - a. Spent
  - b. This Court to issue an order of injunction restraining the defendant through the directors, employees, servants agent and/or anyone deriving benefits and/or instructions from them from advertising, seeking, alienating and in any other way interfering with the quiet enjoyment of properties known as Titles Nos. L.R No.18474/196 (L.R. 167993) Meru Greens Horticulture EPZ LTD Mavoko Machakos County pending interpartes hearing and determination of this application and suit.
  - c. This Court to issue an order declaring that the Defendant failed to follow the provisions of Section 90(2) 96 (2) and 97(3) of the Lands Act.
  - d. This Court to issue an order that the Defendant do supply the Plaintiff with loan account statement in respect to account Nos.037056511xxxx, 037057949xxxx, 0370xxx- 68xxxx & 0370580xxxx held at Equity Bank Branch.
  - e. This Court to issue an order declaring that the Defendant failed to comply with the orders of this court issued on the 22<sup>nd</sup> February, 2024 prior to the said advertisement this rendering the same null and void ab initio.
4. The grounds upon which the application is premised are on the body of the said application.

## Supporting Affidavit

5. The Application herein is supported by the Affidavit sworn by on 7<sup>th</sup> October, 2024 stating that the defendant through Garam Auctioneers have advertised for sale the Plaintiff properties being Titles Nos. L.R No.18474/196 (L.R. 167993) Meru Greens Horticulture EPZ LTD Mavoko Machakos County on 15<sup>th</sup> October 2024 contravening of the orders issued on the 22<sup>nd</sup> February 2024.
6. The Plaintiff directors John Baker and Rosemary K. Muthoni were never served as per the said order herein and in line with Section 90(2) and 96(2) of the Land Act.
7. The said advertisement is done contrary to the mandatory direction that the 2<sup>nd</sup> director is served within the 45 days Notice and an affidavit of service thereto be filed. The said order contravenes the said Order in respect of valuation and Section 97(3) of the Lands Act as no validity period was agreed on.
8. The facility being the loan and the interest chargeable and accrued as at today and being the basis of the intended Auctions is contrary to Section 44 of the Banks Act Cap 488 laws of Kenya.

## Replying Affidavit By Defendant

9. By Replying Affidavit filed by Kariuki Kingori & by Joseph Gikonyo stating that:

Kariuki King'ori Replying Affidavit sworn on 24/10/2024.

1. The Defendant had conducted a fresh valuation of the charged property and had served all the directors of the Plaintiff with a 45 days' notice and should be allowed to exercise its power of sale.
2. The Plaintiff has alleged that its directors were not served with the notices required under section 90 and 96 of the Land Act in the application dated



7<sup>th</sup> October, 2024. This is an issue that was raised in the previous injunction application and that the court dismissed when it held at paragraph 88 of the ruling that the defendant has proved on a balance of probabilities that the notices were sent by registered post to the Plaintiff.

3. It is not correct that the defendant has charged interest contrary to section 44 of the Banking Act as alleged. This allegation has been made for the first time in the application dated 7<sup>th</sup> October, 2024 after this court has already determined the injunction application.
4. The Plaintiff is entitled to its statement of accounts and has not made a request for these statements before filing the application dated 7<sup>th</sup> October, 2024. The defendant will avail copies of the statements of account to the plaintiff.
5. It is the Plaintiff's habit of repeatedly filing suits and raising the same allegations is an abuse of the court process. The Plaintiff has also filed Meru High Court Civil Case No. E006 of 2023 Meru Greens Horticulture EPZ limited & Mount Kenya Gardens limited versus Equity Bank (K) limited which relates to the same lending and credit facilities that are the subject of these proceedings.

Joseph Gikonyo Affidavit – sworn on 30/10/2024

1. On or about March, 2024 he was instructed by the Defendant to serve the 45 days' Notice required under the Auctioneers' Act on all the directors of the Plaintiff
2. On 8<sup>th</sup> March 2024 he prepared the notification of sale which sets out the 45 days' notice and a letter of notice to be served on John Alfred Baker, Rosemary Muthomi and Gerald Muthomi, the directors of the Plaintiff.
3. He was then given the contact details of the 3 directors by the defendant.
4. He served the notices on the Plaintiff using three different modes of service namely WhatsApp, email and via registered post.

#### **Further Affidavit**

10. By Further Affidavit filed by Muthomi Gerald sworn on 29<sup>th</sup> October, 2024 stating that;
  1. The Plaintiff comprises of 3 Directors as follows;
    - a. Rosemary Kagendo Muthomi
    - b. Gerald Muthomi Mutuambugu
    - c. John Alfred Baker
  2. The purported details from the Directors as effected by the Auctioneers are not consistent with the true and correct details of the directors.

#### **Written Submissions**

##### **Plaintiff Submissions Dated 15/11/2024**

11. On behalf of the Plaintiff, it is submitted that the Plaintiff is entitled to the orders sought. Section 90 of the Land Act which is of importance in the instance case for remedies of a charge to the effect that.



90(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

90(2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters – .....

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

- a) the nature and extent of the default by the chargor;
- b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
- d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
- e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies

12. Reliance is made in the case of East Africa Venter Co. limited v Agricultural Finance co-op limited and another [2017] eKLR the Court held that;

‘The Statutory notice in the present case in my humble view was not in accordance with section 90(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee’s statutory power of sale are unlawful.

46. Secondly, 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.

13. Section 96(2) of the Land Act which provides as follows:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

14. It is submitted that the statutory notices stipulated under the land Act are mandatory requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework



on statutory notices. The defendant have not served the plaintiff direction with a notice to sell as mandatorily required under Section 96(2) of the Land Act which provides as follows:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

15. In the case of David Ngugi Ngaari v Kenya Commercial Bank Limited, the Court has this to say 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.

“Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the Land Act which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.”

16. The failure by the Defendant to serve the Plaintiffs with A Notification of sale is a clog on the equity of redemption. When the Chargee chooses to sell the charged land as the remedy, then the provisions of sections 90(2) and 96(2) of the Land Act come into play. It is submitted that we are convinced that we have satisfied the Principles of granting an injunction as set in *Gieüa v Cassman Brown & Co. Limited*(1973) E.A 38 at 360:

“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 be adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide the application on the balance of convenience.”

17. In the case of *Mrao Limited V'. First American Bank of\_Kenya Limited & 2 others* (2003) KLR 125 the court held that:

“In civil cases, a prima facie 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.”



18. The Defendant herein did not serve all the plaintiff directors with a statutory notice and therefore its right of statutory power of sale has not accrued since it did not comply with section 90 of the Land Act. Further, that it also did not serve all the plaintiff directors with 40-day notification of sale under section 96 of the Land Act.
19. We submit that the above violations of law constitute a prima facie case with a high probability of success. We submit that the defendant has not complied with all the requisite provisions of law by failing to serve the statutory notice to all the plaintiff directors. We therefore urge this court to find that the plaintiffs' application dated 8th October 2024 is merited and should be allowed.
20. See the case of Muthoni -v- K-Unity Sacco limited (Commercial case E003 of 2023 [2024] KEHC [KLR] the court stated as follows:-

“...Having found that the Respondent has not complied with all requisite provisions of law in trying to exercise its Statutory Power of Sale, the balance of convenience tilts towards the Applicant. Therefore, the Notice of Motion application dated 31<sup>st</sup> March, 2023 is found meritable and is hereby allowed.”

#### **Defendants Submissions Dated 26<sup>th</sup> November, 2024**

21. It is submitted that the Plaintiffs injunction application dated 24/04/2023 was dismissed and the defendant was at liberty to exercise its statutory power of sale in respect of the charged property.
22. The Application is an abuse of Court process as it is a blatant attempt to re-litigate the Plaintiff's injunction application dated 24/4/2023 that was dismissed by the Court Ruling. See Muchanga Investments Ltd vs Sheria Limited (Africa) & 2 Others [2009]
23. The findings of this court on the injunction application as set out in para.7 cannot be re-litigated in the present application. The Plaintiff's attempt by repeating allegations of failure to issue statutory notices under Section 90 & 96 of the Land Act is an abuse of Court process. If the Plaintiff was aggrieved with the aforementioned findings, the Plaintiff should have appealed the Ruling.
24. A court should not be asked to sit on appeal on its own decision. See the cases of Sheilla Akinyi Marco & 2 others -v- Sasanet limited & 3 others [2009] eKLR where Kimaru J stated;  

“I think , with greatest respect to Learned Counsel for the Plaintiff's the Plaintiffs are seeking to have a second bite of the cherry. In essence, the Plaintiff's appear to be calling upon this Court to sit on appeal against its own decision. That cannot be.....”
25. A comparison of the Applications dated 24/4/2023 and the instant Application of 7 /10/2024 filed by the Plaintiffs shows that the issues being canvassed in the present application are res judicata.
26. The issues that were in issue in the injunction Application of 24/4/2023 are directly and substantially in issue in the present application. These issues relate to the same parties and these issues have been tried by a competent Trial Court.
27. In John Florence Maritime Services limited & Anor -v – Cabinet secretary for Transport and Infrastructure and 3 others [2015] eKLR it was held that the doctrine of res judicata has 2 main dimensions; cause of action res judicata and issue res judicata....
28. In Naveen Prakash Sharma & Others vs Kenya Commercial Bank& Anor HCOM 362 of 2014, the Court held that challenging compliance with judgment to issue an injunction under Order 40 CPR



2010 and sought the Court to order issue of fresh notices constituted a new cause of action and the Court was functus officio.

29. In the present case, the Ruling held that the Defendant was required to serve Plaintiff's Directors with the 45 days notice and Notification of sale prior to the public auction of the charged property.
30. The plaintiff made new allegations seeking to be availed Statements of Accounts and contesting interest contrary to Section 4 of the Banking Act.
31. The Defendant confirmed compliance with Court orders as outlined by Affidavits of Kariuki Kingori of 24/10/2024 & Joseph Gikonyo of 30 /10/2024.

### **Determination**

32. The Application of 9/10/2024 contests compliance of this Court's Ruling of on 22/02/2024.
33. The Court finds that 45 Day Notice was served to 1 Director physically and he signed whereas it is contested if the 2nd Director was/was not served or She refused to sign. The 45-day notice shall be served to 2nd Director and Affidavit of Service filed.
34. The Plaintiff shall have valuation of the suit property LR No 18474/196 and the Defendant may have Valuation conducted too after 12 months validity is agreed.

### **Service Of 45 Day Notice**

35. The Civil Procedure Rules Order 5 prescribes service of Summons and Court documents as follows;  
Service on a Corporation [Order 5, rule 3.]

Subject to any other written law, where the suit is against a corporation the summons may be served—

- (a) on the secretary, director or other principal officer of the corporation; or if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
  - (i) by leaving it at the registered office of the corporation

36. The 2<sup>nd</sup> Director was to be served the 45 days' Notice as Director of the Company Meru Greens Horticulture EPZ Limited that obtained Loan Facility from the Defendant Bank as per the Court order.

37. By Affidavit filed by Mr. Joseph Gikonyo , who attached his license to Affidavit, on 8/3/2024 he went to the Charged property and found the Plaintiff's Plant was not in operation.

He obtained the mobile phone contacts of the 3 Directors of the Plaintiff company;

Mr.John Alfred Baker +44744686xxx

Mr.Gerald Muthomi 07227xxxx

Ms Rosemary Muthomi 072228xxx

Mr.Joseph Gikonyo called Mr.Gerald Muthomi who stated he was in Meru and he could be sent the Notices on WhatsApp to ALL Directors of the Company as shown above and annexed the Screenshots Messages to his Affidavit.



38. Mr. Joseph Gikonyo served the 45 days -Notices through E-mail to;  
Gerald.muthomi@merugreenepz.com & info@alcolondon.com
39. Mr. Joseph Gikonyo served the 45 days -Notices through Registered Post to P.O.Box Number 607-00242 Kitengela which is the address the Court confirmed as correct Address for the Plaintiff in the Court's Ruling of 22/2/2024.
40. After serving the 45 day Notice, he prepared and signed a Certificate under Rule 15 (c) of Auctioneers Rules 1997. A copy of the Certificate is annexed at Pg 11 of the Exhibit.
41. Mr. Joseph Gikonyo deposed that he sent Ksh 20/- to 0722280981 & 0722783045 and Mpesa messages he received in reply confirmed the Directors of Plaintiff Company as the Mobile phone owners.
42. At Pg 12 he attached the Mpesa message which reads;  
SJT3TL53VT Confirmed. Ksh 20 Sent To Rosemary Muthomi 072228xxxx ON 29/10/2024 AT 4.26PM.....  
SJT4TL9G04 COnfirmed.ksh 20 Sent To Gerald Mutambu 07227xxxx ON 29/10/2024 AT 4.27PM.....
43. He did not see any affidavit sworn by Alfred Baker & Rosemary Muthomi disputing service of the 45 day- Notices.
44. Mr. Muthomi Gerald vide Further affidavit stated that the Defendant failed to comply with Court Ruling of 22/2/2024 as the 3 Directors of Plaintiff Company are;
1. Rosemary Kagendo Muthomi- 074802xxxx & 073605xxxx
  2. Gerard Muthomi Mutambu-072237xxxx & 073322xxxx
  3. John Alfred Baker-+44743810xxxx-John .ideal@live.co.uk
- He attached the CR-12 as MG2
45. He also gave the correct details of the 3 Directors and attached copies of Mpesa messages to that effect marked MG3.
46. The plaintiff Postal Address P.O. Box 607 Kitengela is inaccessible and is currently closed due to unpaid subscriptions and attached Notice MG5.
47. In the case of Elizabeth Wanjiku Kariungi vs Equity Bank Ky Ltd [2017] eKLR referred to the case of Peter Kuria Munyira vs Housing Finance Co Ltd & Anor HCCC 457 of 2006 where Warsame J alluded to the fact that the Chargor must ensure receipt of the notice by registered Post, & Justice Ochieng stated;
20. Whilst I do share the view expressed by my learned brother concerning the fact that service of a valid statutory notice of sale on the chargor is a condition precedent to the exercise of the chargee's statutory power of sale, I am unable to find the legal basis for the contention that the chargee has an obligation of ensuring that the chargor collected or received the notice which was sent by registered post.
  21. In my considered view, when the court imposes upon the chargee the obligation of demonstrating knowledge of when the chargor received or



collected the notice which had been dispatched by registered post, that constitutes an extra burden, which was not anchored in statute. The chargor has an obligation to dispatch the notice to the correct postal address. The chargor's other duty is to ensure that the contents of the notice meet the requirements set out in the *Land Act*. My considered opinion is that the chargee does not have any control over the chargor, so as to be able to ensure that the chargor collects or receives the notice.

48. This Court is satisfied that the Defendant undertook service of the 45 days Notice to the 2<sup>nd</sup> Defendant, Rosemary Muthomi in compliance with Order 5 CPR rules and Ruling of 22/2/2024. The Notices were sent through WhatsApp messages on their respective Mobile phones and copies are attached, and Mpesa messages sent were received and confirmed. They were served through Registered mail through the known address given by Plaintiff Company through Directors to the Defendant Bank as in the Loan Facility document. They were served through 3 legal methods as provided above and therefore service is sufficient.
49. On the Plaintiff's objection to proper service and issuance of CR12- the Directors are the same and have been served accordingly; I note with Concern the CR-12 was /is of 9/3/2024 after the Ruling of this Court of 22/2/2024. The CR12 now including 3 Directors not 2 Directors who signed the Legal Charge on 17/12/2019- namely; Gerald Muthomi Mutuambugu (Director) & Rosemary Kagendo Muthomi ( Director) John Alfred Baker- Director as per CR-12 is not privy to the contract between the Defendant bank & Plaintiff Company, he did not execute the legal Charge the basis of which the statutory power of sale is grounded in default of servicing the outstanding loan.
50. Secondly, on different mobile phone numbers and email addresses, with respect in the era of technology one may acquire various mobile numbers and /or email addresses that does not mean that the one used is not correct as long as it was given by the Plaintiff Company Directors and/or was in the Legal Charge document. Finally with regard to Postal Address 607-00242 Kitengela was closed, as per attached document, I find it irrelevant to confirming service because 3 alternatives were used, email, WhatsApp and registered Post so either one was sufficient.
51. The Defendant conducted a recent Valuation of the property in line with the Court order of 22/2/2024. The Valuation was conducted by Tysons Limited of LR 18474/196 in spite of the Defendant's earlier Valuation of 2023 that was still valid and legal for conduct of sale as 12 months validity was not yet over.
52. So this Court indicated the Defendant may conduct valuation conducted too after 12 months period validity is agreed. That the Defendant did not have to have valuation of the property again as it was done in 2023 but it was not clear to the Court if it would still be valid for 12 months before sale, that had to be agreed upon first. For the Plaintiff since their claim was that the property was under valued they were granted opportunity to have their own valuation and compare prices before the intended sale. The plaintiff has not confirmed having conducted valuation for the intended sale The valuation must also be valid for 12 months.

The Plaintiff shall have valuation of the suit property LR No 18474/196 and the Defendant may have Valuation conducted too after 12 months validity is agreed.
53. Finally, parties & the Court are bound by pleadings, The Application of 24/4/2023 & 10/8/2023 raised issues of service of Statutory notices under Section 90 (3) & 96(2) of *Land Act* were contested. This Court vide Ruling of 22/2/2024 at Paragraph 84, 85 & 86 this Court found the 2 Statutory Notices of 90 days & 40 days respectively were complied with. This Court can say no more. The issue



of Bank Statements being availed to Plaintiff Company Directors and the issue of interest rate contrary to Section 44 of *Banking Act*, those are uncharted waters, raised for the 1<sup>st</sup> time after delivery of the Ruling of the Court and cannot be addressed now, it is reopening rehearing a new case and/or sitting on appeal on this Court's own decision. Parties are at liberty to exercise Right of Appeal.

**Disposition**

1. The Ruling of 22/2/2024 is complied with by parties on service of 45 days' Notice and conduct of valuation of the suit property with 12 months valid Report.
2. The Application for grant of injunction is dismissed.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 17/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In The Presence Of:

.....for The Plaintiff

.....For The Defendant

.....court Assistant(s)

