



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO.302 OF 2017**

**JACKSON MUTUGI MWANGI.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUNGAI GIKONYO**

**T/A GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The premise upon which this Court would have issued orders of injunction sought in the Notice of Motion dated 20<sup>th</sup> July 2017 have, in the view of the Court, all but vanished.

2. In that Motion the Plaintiff seeks the following substantive orders:-

3. THAT pending the hearing and determination of this suit, this Honorable Court be pleased to issue an order restraining the Defendants by themselves or their agents and assigns from selling, offering for sale, transfer or in any way disposing of all that property known as L. R No.9042/587 (I.R. 72111).

4. THAT this Honourable Court be pleased to issue an injunction compelling the 1<sup>st</sup> Defendant and/or its agents to supply the Plaintiff with a current statement of Account, Rent schedules in respect of the business premises erected on L.R No.9042/587 (I.R. 72111) and a current Valuation Report in respect of LR. No. 9042/587 (I.R 72111).

3. At his own request, the Plaintiff was granted a credit facility in the sum of Kshs.100,000,000/= by Equity Bank Ltd (the Bank). The Bank alleges default in repayment of the facility. There was then an arrangement between the Plaintiff and the Bank that an agent of the Bank collects Rent from the building standing on LR.9042/587 (I.R 72111) (the suit or charged property). The Bank states that it collected rent from the period March 2016 to February 2017.

4. Upon default, the Bank issued the Notices required under sections 90 and 96 of the Land Act. This is admitted by the Plaintiff. The Plaintiff's cause of action in the suit which is rehashed in the application before Court is threefold. First that the Bank has failed to furnish to him an account of the Rental income realized from the suit premises. Second, that the Bank intended to proceed with sale of the charged property without obtaining a current valuation of the property and was in danger of breaching the provisions of Section 97(1) of the Land Act which obliges the chargee to ensure that a forced sale value is undertaken by a Valuer before exercising the right of sale.

5. Lastly that there is a suit between the Plaintiff and the Bank on the one hand and one Kamau & Wang Industries Limited on the other being Nairobi Hcc. No.402 of 2016 in which the suit property is under dispute. This Court is asked to find that on the strength of the doctrine of *lis pendens*, the proposed sale by the Bank cannot proceed.

6. The Bank resisted the application through a replying affidavit by Jane Gathuita sworn on 19<sup>th</sup> September, 2017. She is the Credit Administrator of the Bank. One of the things she does in the affidavit is to attach to it a schedule of Rent collection of the charged property for the period March 2016 to February 2017. On the basis of that collection, the Respondent gives an explanation of the amounts realized and applied towards the debt (see paragraph 13 of the affidavit). The Plaintiff does not react to that schedule or explanation by way of affidavit. This Court takes that silence by the Plaintiff as an acceptance that the schedule represents a true account of the Rental income from the property. The question of accounts has therefore been addressed.

7. While this application was pending, parties agreed to a joint valuation of the suit property. Milligan Valuers Limited prepared a valuation

Report dated 23<sup>rd</sup> January 2018. By way of a small table below, the Court compares that report with those returned by Homesplus Realtors Limited (the Valuers of the 1<sup>st</sup> Defendant) on 20<sup>th</sup> January 2017.

	<u>Milligan</u>	<u>Homesplus</u>
Market value	Kshs.142,500,000/=	Kshs.136,000,000/=
Forced sale value	Kshs.107,000,000/=	Kshs.102,0900,000/=
Insurance value	Kshs. 90,000,000/=	Kshs.100,000,000/=

Valuation not being an exact science, I would agree with counsel for the Bank that the differences in values are not substantial. The difference could even be further minimized when one considers that the second valuation was conducted one (1) year after the other. Any concerns raised by the Plaintiff about the possible infraction of section 97 of The Land Act are now resolved.

8. The proposition that the doctrine of *lis pendens* requires no disposition of the suit property be made because of the pendency of Milimani Hcc No. 402 of 2016 (Kamau & Wang Industries Limited vs. John Mutugi & Equity Bank Ltd) can quickly be discussed. In an application dated 19<sup>th</sup> July 2015, the Plaintiff in HCC. No. 402 of 2016 had sought to restrain the Bank from exercising its statutory power of sale in respect to the suit property citing an ownership dispute between it and the Plaintiff herein. This Court declined to grant that order in a ruling of 22<sup>nd</sup> June 2017. No order barring the Bank from selling the suit property subsists in that suit and the doctrine of *lis pendens* cannot be invoked to obtain a restraint that the Court had expressly declined to grant. In any event the doctrine of *lis pendens* is not available as a general embargo to restrain a chargee from exercising its statutory power of sale. An aggrieved chargor needs to bespeak and obtain an order of injunction. Finally there are doubts that the doctrine is still in the scheme of our land law. It was codified in section 52 of the repealed Indian Transfer of Property Act. The doctrine may have gone with the Act!

9. It would now be clear that this Court is not persuaded that the Notice of Motion of 20<sup>th</sup> July 2017 has merit. It is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15<sup>th</sup> day of February, 2019.

F. TUIYOTT

JUDGE

**Present:**

Wakhisi for Saluni for Plaintiff

Mbugua for Wahota for Respondent

Nixon- Court Assistant