



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 483 OF 2016**

**DAVID NDIRITU GATHUNGU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DANIEL NDUNG'U KANYIGI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**CHASE BANK (KENYA) LIMITED**

**(IN RECEIVERSHIP) .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**TETALK COMMUNICATIONS LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANTIQUE AUCTIONS AGENCIES .....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated 9<sup>th</sup> July 2018, brought under the provisions of; Section 1A, 1B, 3A & 63(c) and (e) of the Civil Procedure Act, (Chapter 21 of the Laws of Kenya), Order 42 Rule (2) of the Civil Procedure Rules, 2010 and all enabling provisions of the Law.
2. The Plaintiffs (herein “the Applicants”) are seeking for orders, that the Defendants (herein “the Respondents”), whether by themselves or their agents, officers, servants or otherwise howsoever be and are hereby restrained from advertising, offering for sale, auctioning either by private treaty or public auction, transferring, alienating, leasing, offering security, or otherwise dealing with properties known as; Limuru/Ngecha/2148, Limuru/Ngecha/2143 and Kiambu/Lari/2238, (herein “the suit properties”), pending the filing, hearing and determination of; an application for injunction to be filed in the Court of Appeal. The costs of this application be in the cause.
3. The application is premised on the grounds on the face of it and an affidavit of even date, sworn by the 1<sup>st</sup> Applicant; David Nditiru Gathungu, and authorized by the 2<sup>nd</sup> Applicant. He avers that, on 25<sup>th</sup> June 2018, the Honourable Court delivered a ruling herein dismissing the Applicants’ notice of motion dated 28<sup>th</sup> November 2016, which was seeking to stop the Respondents from dealing or otherwise disposing off suit properties.
4. That the Applicants are dissatisfied with the ruling of the Honourable Court and intend to file an application in the Court of Appeal for injunction order pending the hearing and determination of the intended appeal. In that regard their Advocate on record has subsequently filed a notice of appeal and duly served upon the Respondents. They have also sought for the proceedings for purposes of lodging the application.
5. However this Court declined the oral request for an interim injunction pending the filing of a formal application and directed that a formal application be filed. However, the application to be filed in the Court of Appeal cannot be heard sooner or faster than this one, hence the need for an order of injunction for a limited period of time.
6. That the intended Appeal will be rendered nugatory if an injunction is not granted to preserve the property from invasion, demolition, auction, occupation, alienation and encumbering by the Respondents. The intended appeal is not frivolous and/or an abuse of the court process. Further the application has been made without unreasonable delay and Respondents will not suffer prejudice in the event that the orders sought are granted. Therefore it is in the interest of justice that an injunction be issued as prayed.

7. However the application was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents vide an affidavit in reply dated 5<sup>th</sup> October 2018 sworn by Kevin Kimani, the Legal manager of the 1<sup>st</sup> Respondent. He deposed that this Application is bad in law, vexatious, mala fides and intended to mislead the Court to issue orders prejudicial to it.
8. The 1<sup>st</sup> Respondent offered the 2<sup>nd</sup> a loan of Kshs. 19,500,000, by a letter of offer dated 22<sup>nd</sup> April 2013, a loan of Kshs, 19,000,000, by a letter of offer dated 13<sup>th</sup> August, 2013, and a loan of Kshs.19, 500,000 by a letter of offer dated 20<sup>th</sup> June, 2014. The Applicants executed a Guarantee and Indemnity in favour of the 1<sup>st</sup> Respondent to make good the default if any by the 2<sup>nd</sup> Respondent.
9. However, the 2<sup>nd</sup> Respondent defaulted on the repayments of the loan facilities and was issued with a demand to regularize the account. It was not done, as a result the Applicants were issued with a ninety (90) days' statutory notice to remedy the default and/or the securities be realized. They did not and a forty (40) days' notice was issued of the intention to sell the property. Even the then default was not regularized where upon a further forty five (45) days notification of sale notice dated 26<sup>th</sup> September 2016, was issued through Antique Auctioneers agencies.
10. As neither the 2<sup>nd</sup> Respondent nor the Applicants obliged, the property was valued by Messrs; Acumen Valuers Limited and a valuation reports dated; 16<sup>th</sup> 17<sup>th</sup> and 18<sup>th</sup> August 2016, issued. Subsequently it was advertised in the Daily Nation Newspaper for sale on 30<sup>th</sup> November 2016. However the Applicants filed a notice of motion application dated 28<sup>th</sup> November 2016, seeking for an order to restrain the 1<sup>st</sup> Defendant from selling the charged property
11. The 1<sup>st</sup> Respondent argues that, it followed the due process in realizing the charged property and that the Applicants cannot seek a court order to avoid a contractual obligation under the letter of offer and duly registered charge by claiming that they were not issued with a statutory notice. The default in repayment of the loan is not disputed and therefore it is only fair that the Application be dismissed. Further the Applicants have not satisfied the conditions necessary for the grant of an injunction order and therefore the balance of convenience tilts in favour of the 1<sup>st</sup> Respondent to recover its money.
12. The Application was disposed of by filing of submissions. The Applicants submitted that, under the provisions of; Sections IA, IB, 3, 3A, 63(c) & (e) of the Civil Procedure Act (cap 21) Laws of Kenya, the Court has unlimited jurisdiction to grant an injunction pending appeal. Further, under Direction No. 32 of the Practice Directions issued on 25<sup>th</sup> July, 2014, the Court has the power to grant an order of status quo, to preserve the suit property and/or pending the hearing and determination of the suit, without the need to go to the Court of Appeal, as held in the case of; *Erinford Properties Ltd vs Cheshire County Council (1974), 2 ALL ER 448* and affirmed in the case of; *Madhupaper International Ltd vs Kerr (1985), KLR 840*.
13. The Applicants urged the Court to balance the interest of the parties and preserve the subject matter of the suit. Reference was made to the case of; *Alliance Media Kenya Limited vs World Duty Free Company Complex Limited (2005) eKLR*. It was finally argued that the Respondent has not established that it has the means to pay back the sums of money herein if the Application in the Court of Appeal succeeds.
14. However, the Respondent submitted that, it has demonstrated and discharged its burden to prove that, it issued the requisite statutory notices as evidenced by the registered slips produced. Therefore the burden shifts to the Applicants as required under the provisions of Section 3(5) of Interpretation and General Provisions Act (cap 2) of the laws of Kenya, that they did not receive the notices. The case of; *Nyangilo Ochieng 7 Another vs Fanuel B. Ochieng & 2 Others Civil Appeal No. 148 of 1995 (Kisumu)*, was relied on.
15. The Respondents further argued that; Section 97 (1) and (2) of the Land Act, 2012, only requires that a valuation be carried out. It does not require that it should be served on the Chargor(s). That the properties herein were valued as per the reports produced. Further, the Applicants have not tendered proof of the alleged under valuation of the charged property. Finally it was submitted that, the Applicants having admitted the debt and failure to make good, they have not established a prima facie case, as per the principles set out in the case of; *Mrao Limited vs First American Bank of Kenya Limited & 2 Others (2003) eKLR, and Geila vs cassman Brown 7 Co. (1973), EA 358*. Neither have they proved the irreparable harm they will suffer.
16. I have considered the application in total in the light of the arguments and submissions filed and I find that, first and foremost, the Applicants filed a notice of motion application dated 28<sup>th</sup> November 2016, together with the Plaintiff. Upon service of the Application, the 1<sup>st</sup> Respondent filed a preliminary objection dated 30<sup>th</sup> November 2016, challenging the competence of the suit herein.
17. The preliminary objection was heard inter parties and a ruling delivered on 25<sup>th</sup> June 2018, where upon the suit against the 1<sup>st</sup> Respondent was held to be incurably defective and/or incompetent and struck it out with costs to the 1<sup>st</sup> Respondent. The question that arises is, whether there is a suit in which the court can determine the current application and/or issue the orders sought. In my considered opinion, the answer is in the negative and on that ground alone the prayers sought for herein cannot be granted.
18. Even then the orders the Applicants are seeking for herein are mainly against the 1<sup>st</sup> Respondent, although they may be against the 3<sup>rd</sup> Respondent by extension in that the 3<sup>rd</sup> Respondent is basically the agent of the 1<sup>st</sup> Respondent. If no orders cannot be issued against the 1<sup>st</sup> Respondent, then by extension it cannot be issued against the 3<sup>rd</sup> Defendant.
19. Furthermore, the prayer for an injunction was sought for herein for a limited period of time pending the filing of an appeal. The decision to be appealed was rendered on 25<sup>th</sup> June 2018, by now the Applicants must have lodged the Appeal. It is unfortunate that due to indisposition and sheer work load this ruling was not delivered timely and the delay is highly regretted.
20. In conclusion I find that in view of the fact that there is no competent suit in which to anchor the Application, the Application herein is

incompetent and/or fatally defective and I hereby strike it out with no orders as to costs.

21. It is so ordered.

**Dated, signed and delivered on this 12<sup>th</sup> day of November, 2019 in an open Court at Nairobi.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:-**

**Mr Kiprono for Mr Osundwa for the Plaintiff/Applicants**

**No appearance for the Defendant/ Respondents**

**Dennis the Court Assistant**