



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 21 OF 2017

CHAXTON GEOFFREY KAMAMI MAINA.....PLAINTIFF

VERSUS

KCB KENYA LTD.....1ST DEFENDANT

JEED AUTO SPARES LTD.....2ND DEFENDANT

EDWARD MURIMI.....3RD DEFENDANT

ISHMAEL ELISHA ESIKOTE

T/A HIGH CLASS AUCTIONEERS.....4TH DEFENDANT

RULING

1. What is for determination is the **notice of motion** dated **30th August, 2016**, but amended on **18th January, 2017**. By that application **Chaxton Geoffrey Kamami Maina** (*the plaintiff*) seeks an interlocutory injunction to restrain the defendants from transferring or interfering with the plaintiff's occupation and ownership of **Plot 18111/53** (*the suit property*).
2. The plaintiff obtained a loan facility from **Kenya Commercial Bank (KCB)** and as security for that facility, **KCB** created a legal charge over the suit property. **KCB** exercised its right of sale over the suit property which was sold for **ksh 8 million**.
3. The plaintiff deponed that he was unaware of any auction undertaken by **KCB** of the suit property because he was not served with the statutory notices of sale and was neither served with the Auctioneer's notification of sale. He also stated that his property (*the suit property*) was not advertised for sale. It is because of those depositions that the plaintiff seeks through his plaint a declaration that the sale of the suit property by **KCB** was illegal.
4. It needs to be stated that the plaintiff acknowledged that he was in arrears with his repayment of the loan facility at the time of the sale of the suit property.
5. **KCB** by its replying affidavit sworn on **18th October, 2016** by the credit support manager, deponed that the plaintiff was served with the statutory notices of sale. In that regard, those statutory notices dated **18th January, 2015**, and **4th May, 2015** were annexed to the replying affidavit. Those notices were served upon the plaintiff by registered post.
6. The plaintiff did not provide evidence, perhaps from the post master general, that the address used by **KCB** to send those notices was not his address, nor did he provide evidence, again from the post master general that he did not receive those notices.
7. This court therefore, on a **prima facie** basis, shall presume that those notices were served upon him.
8. **KCB** also annexed an affidavit of service of **Michael M Siloya**, a process server who served the 45 days redemption notice, and who stated that he posted, at strategic places, posters of the auction of the suit property.
9. In respect to the service of the 45 days redemption notice, the process server described how he went to the suit property on **6th May, 2016** at **9.30 a.m** and served the plaintiff who was called outside from the house by a house help.
10. Other than denying that he was served, the plaintiff did not deny that he was not at home on that day. Further he did not request for the

cross examination of the process server in regards to that service. There is always a presumption of service. This was the holding in the case City Service Station vs Jamreck Peter Njuguna [1989] eKLR as follows:

“The position in law is that there is a presumption of service as stated in the process server’s report and the burden lies on the party questioning it, to show that the return is incorrect – see Shadrack K Arap Baiwo v Bodi Bach – Court of Appeal Kisumu Civil Appeal No. 122 of 1986.”

11. The plaintiff was required to meet three pronged principles of granting an injunction as set out in **Giella Vs Cassman Brown** and Co. Ltd [1973] EA358. That is:-

- i. The Plaintiff must establish that he has a prima facie case with high chances of success.*
- ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.*
- iii. If the court is in doubt, it will decide on a balance of convenience.*

12. Having considered the affidavit evidence, and the submissions, the plaintiff in my view failed to show **prima facie** case with probability of success. Having failed to prove the first principle in **Giella** (*supra*), and because those principles are sequential, I shall not proceed to consider the other 2 principles.

13. In my examination, of the documents before me, the affidavit evidence or the submissions, I was unable to determine, on a **prima facie** basis, that **KCB** or the **Auctioneer** did anything illegal or irregular in auctioning the suit property. It ought to be noted that once the plaintiff offered the suit property as security he equated that property to commodity which can be disposed by the chargee. Those words are the holding in the case Kisimani Holdings Limited & another V Fidelity Bank Limited [2013]eKLR as thus:

“By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.”

14. In view of the above finding, the **notice of motion** dated **30th August, 2016** and amended on **8th January, 2017** is **dismissed with costs**. Any **interim orders** granted to the plaintiff in that regard, are **hereby vacated**.

DATED, SIGNED and DELIVERED at **NAIROBI** this **19th** day of **July** 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

..... for the 4th Defendant