



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 260 OF 2016**

**WANYOIKE NG'ANG'A.....PLAINTIFF**

**VERSUS**

**JAMII BORA BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**ELIUD C. WAMBU T/A CHADOR AUCTIONEERS .....2<sup>ND</sup> DEFENDANT**

**RULING**

**[1]** The Plaintiff, **Wanyoike Ng'ang'a**, moved the Court vide his Notice of Motion dated **1 July 2016** for the following orders:

[a] spent

[b] spent

[c] That pending the hearing and determination of this suit, the Court be pleased to grant an Injunction restraining the Defendants, their agents, servants, employees or any other person claiming under them from selling, transferring, disposing off, alienating, attaching, auctioning, using or in any other way dealing with all that property known as Title **No. Loc.5/Ngurwe-ini/396 Kiawanjeru-Gaichanjiru**;

[d] that the Court be pleased to make such further orders as are necessary for the ends of justice;

[e] that the costs of the Application be provided for.

**[2]** The application was filed pursuant to **Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 40 Rules 1 & 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, to forestall the sale, by public auction, of the Plaintiff's property known as **Title No. Loc.5/Ngurwe-ini/396 Kawanjeru-Gaichanjiru** (the suit property). According to an advertisement placed by the Defendants in the Daily Nation newspaper of **21 June 2016**, the sale was scheduled for **6 July 2016** in purported exercise of the 1st Defendant's statutory power of sale on the basis that the Plaintiff had guaranteed a borrowing by **Tejjca Scrap Metal Limited** from the 1st Defendant.

[3] The grounds upon which the application was premised are set out therein; which grounds are buttressed by the Applicant's affidavit sworn on **1 July 2016** as well as the Supplementary Affidavits sworn by **Grishon Thuo, Advocate** on **4 July 2016** and by the Plaintiff on **11 August 2016**. The outstanding aspect of the application is the assertion by the Plaintiff that he never charged his property to the 1st Defendant and therefore never signed any charge Document in favour of the 1st Defendant. Contending that he is a stranger to the alleged borrower, the Plaintiff posited that the 1st Defendant may have colluded with other persons to commit a criminal offence by charging his property without his knowledge or consent.

[4] The second aspect of the Plaintiff's application is his contention that although the law provides for a series of notices covering about five months, he was never served with any notice of the impending sale; and that he only got to learn of the impending sale when on **28 June 2016**, a friend of his showed him a newspaper advertisement indicating that the suit property was scheduled for sale on **6 July 2016**. He added that he is a frail and sickly 76 year-old man and that he resides on the property with his family, including his grandchildren; and that unless the orders sought are granted, he stands to suffer immense prejudice as he would be rendered destitute.

[5] The 1st Defendant, opposed the application on the basis of the averments set out in the Replying Affidavit sworn by **Christine Wahome** on **18 July 2016**, in which it was deposed that the Plaintiff duly executed the Charge Instrument dated **16 March 2015** in respect of the suit property to secure financial facilities amounting to **Kshs. 2,500,000** that was advanced to **Tejca Scrap Metal Limited**; and that the officials of the 1st Defendant visited the suit property for the purpose of inspection and valuation, which valuation was done in the presence of the Plaintiff. To further demonstrate that the Plaintiff knowingly and willingly charged his title, it was averred that the Plaintiff's wife, **Jennifer Njeri Wanyoike**, also executed an affidavit consenting to the charging of the suit property; and that both the Plaintiff and his wife executed the Charge and Spousal Consent before an Advocate, to confirm that they understood the contents of the Charge.

[6] It was thus the contention of the 1st Defendant that, in the absence of payment of the sums due, it is within its right to sell the charged property as the requisite notices were duly served at the address provided in the Charge Instrument. It further expressed its apprehension that the Plaintiff and the borrowers could be acting in collusion to defeat its right over the suit property and urged the Court to accordingly dismiss the application with costs.

[7] The Plaintiff refuted the averments in the Replying Affidavit vide his Supplementary Affidavit sworn on **11 August 2016**. He denied that the suit property was valued in his presence as alleged. He further denied having signed the Charge as alleged or that his wife signed the Spousal Consent. The Plaintiff reiterated his contention that neither him nor his wife was ever served with the Statutory Notice or Notice to Sell, and pointed out that while the Statutory Notice dated **2 December 2015** and the Notice to Sell dated **11 March 2016** attached to the letter dated **4 July 2016** by the 1st Defendant's Advocate to the Plaintiff's Advocate were addressed to **P.O. Box Number 10205-305 Sabasaba**, copies of the same letters that were attached to the 1st Defendant's Replying Affidavit were addressed to **P.O. Box Number 1167-0040 Nairobi**; yet the address indicated on the Charge was **P.O. Box Number 116-00400 Nairobi**. The Plaintiff supplied documents to buttress his averments aforesaid and postulated that his Title may have been stolen and charged without his knowledge.

[7] The Court has given due consideration to the application and the grounds set out therein, as well as the averments in the Supporting and Replying Affidavits and the oral and written submissions made herein by Learned Counsel. The principles guiding the grant of a temporary injunction were set out in the celebrated case of **Giella Vs Cassman Brown and Company Limited [1973] E.A 358**, thus:

**"The conditions for a 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 must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the**

**balance of convenience."**

[8] And in the case of Mrao –vs- First American Bank (K) Ltd, the Court of Appeal had this to say with regard to what amounts to a prima facie case:

**"So what is a prima facie case? I would say that in civil cases 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 a rebuttal from the latter."**

[9] It is not in dispute that the Plaintiff is the registered owner of the suit property. Copies of the Title and a Certificate of Search were exhibited herein in confirmation of the Plaintiff's ownership. What is in dispute is whether the Plaintiff charged the Title to the 1st Defendant as alleged and by extension, whether the conditions for the grant of a temporary injunction as set out in the Giella Case (supra). As has been stated herein above, the Plaintiff presented a two-pronged application, contending that he did not charge his Title as alleged, and that in any event, he was not served with the Statutory Notices as provided for in the law.

[10] On its part however, the 1st Defendant argued that the Plaintiff had failed to establish a prima facie case in that he did not explain how his original Title as well as copies of his and his wife's identification documents landed into the hands of the 1st Defendant; particularly granted that no report of loss of the documents was shown to have been made to the Police or the Registrar of Lands as required by law. It was further submitted that the Plaintiff and his wife appeared before the 1st Defendant's Advocates to execute the Charge Instrument and Spousal Consent and therefore should not be heard to say that they did not sign the Charge documents. It was thus the contention of the 1st Defendant that the Plaintiff's application and the narrative proffered in support thereof has been contrived with the sole intention of defeating justice.

[11] The Plaintiff contends that he does not know and has never had any dealing with had any dealings with the borrower; and therefore did not provide a Guarantee for the facility in issue as alleged. He further denied having appeared before any Advocate for the purpose of signing the Charge. He similarly denied that his wife, **Jennifer Njeri Wanyoike**, signed the Spousal Consent attached to the Charge, an averment that is supported by the Supplementary Affidavit of **Jennifer Njeri Wanyoike** sworn on **11 August 2016**. In the premises, it would require rebuttal evidence and the testing thereof at the hearing through cross-examination for the Court to finally determine where the truth lies. It similarly remains to be proved whether the Plaintiff's Title was stolen as alleged. Thus, for the purpose of the instant application, the Plaintiff has shown that he has a genuine grievance in the form of a right which has been infringed. Indeed, in the case of Nguruman Limited Vs Jan Bonde Nielson & 2 Others Court of Appeal No. 77 of 2012 the Court of Appeal set out the standard of proof in such matters thus:

**"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."**

[12] The Plaintiff's second ground for complaint was that neither his wife nor himself was served with the requisite statutory notices provided for in the **Land Act, 2012** and the Auctioneers Rules. There is no dispute that before a Chargee can exercise its Statutory Power of Sale in respect of a charged property, compliance with **Sections 90 and 96(2) of the Land Act** as well as **Rule 15 of the Auctioneers Rules** is a prerequisite. **Section 90(1) of the Land Act** provides that:

**"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."**

[13] The Notice must entail the elements set out in **Section 90(2)** of the Land Act, which include express communication of the consequence that if the default is not rectified within the time stipulated in the notice, which should not be less than **three months**, the chargee will proceed to exercise any of the remedies set out in **Section 9(3)** of the Act. Needless to say that the remedies provided for in the provision aforementioned include sale of the charged land. Where, however a chargor remains in default at the expiry of the three months aforementioned, **Section 96 of the Land Act** provides that the chargor would, in those circumstances be at liberty to exercise its power to sell the charged land, provided it complies with the provisions of **Section 96(2)** by serving a Notice to Sell of at least 40 days. In addition, the Auctioneer charged with the responsibility of conducting the sale is required by **Rule 15 of the Auctioneers Rules, 2009** to give to the chargor a redemption notice in writing of not less than 45 days upon receipt of a court warrant or letter of instruction to sell. In addition thereto, the Auctioneer is required to place an advertisement of sale, giving notice thereof of not less than 14 days from the date of expiry of the redemption notice.

[14] The 1st Defendant annexed, as **Annexure CW-4 and CW-5** to the Replying Affidavit of **Christine Wahome**. The first notice issued pursuant to **Section 90 of the Land Act** is dated **2 December 2015**, while the second notice under **Section 96(2) of the Land Act** is dated **11 March 2016**. Whereas the two notices appear to be in conformity with the stipulations of the aforementioned provisions, the address used was disowned by the Plaintiff, who contends that his address is **P.O. Box Number 42, Sabasaba**. The 1st Defendant's argument that the address in question is the same address that was allegedly provided by the Plaintiff in the Charge Instrument would be of no help, for the reason that the Plaintiff's address in the Charge Document is shown as **P.O. Box 116-00400 Nairobi**, whereas the Certificate of Posting evidencing the postage reads **P.O. Box 1167-00400 Nairobi**.

[15] Whereas it could be argued that this was a typographical error in the Charge Instrument and that the intended address was **P.O. Box 1167-00400**, which is the same address attributed to the Borrower, it is noteworthy that the two notices were addressed to **P.O. Box 1167-0040**, and not **1167-00400** as stated in the Charge. Besides, the Court has already found that the Plaintiff's contention that he does not know the Borrower and has had no dealings with that company constitutes a prima facie grievance for purposes of trial. Thus, again it would require evidence to demonstrate that the Notice was properly served on the Plaintiff through the address of the Borrower; but perhaps what is more intriguing is the established fact that the same set of notices are purported to have also been sent by the 1st Defendant to **P.O. Box 10205-305, Sabasaba** (see pages 47 to 51 and 60 of the Plaintiff's Supplementary Affidavit).

[16] The documents marked **WN-6** at pages 95 and 96 of the annexures to the Plaintiff's Supplementary Affidavit show that an the Plaintiff requested for information regarding the addresses aforementioned from the **Postal Corporation of Kenya**, and the response was thus:

**"The code you had given of 00400 is for Tom Mboya Post Office. However, in Tom Mboya Post Office, we do not have number 116 series of boxes, we are therefore unable to identify owners of Box 116-00400; 1167-00400 and 116700040 Nairobi.**

**The Box Number 10205-305 is for Sabasaba Post Office Muranga County and is rented to Kawanderu Primary School since year 2005 to date. However, we note that the Code quoted (10205) is for Maragua Post Office also in Muranga County."**

[17] The above inconsistencies are too many to be ignored; and the sum total thereof is a prima facie demonstration that the Plaintiff was not properly served with the requisite notices. It is noteworthy that there is no indication as to whether or not the Redemption Notice was given in accordance with **Rule 15 of the Auctioneers Rules**. Also pertinent is the Plaintiff's contention that his wife, who is purported to

have given Spousal Consent to the Charge, was not served with any notice, contrary to Section 96(3)(c) of the Land Act, which provides that:

**"A copy of the notice to sell served in accordance with subsection (2) shall be served on—**

**(a) ...**

**(b) ...**

**(c) a spouse of the chargor who had given the consent;"**

[17] In her supplementary Affidavit sworn on **11 August 2016** and filed herein on **12 August 2016**, the Plaintiff's wife, **Jennifer Njeri Wanyoike**, denied having been served with the Statutory Notice dated **2 December 2015** or the Notice to Sell dated **11 March, 2016**. There being no proof of such service, I would find and hold that the Plaintiff has demonstrated a prima facie case to the effect that no care was taken by the 1st Defendant to adhere to the strictures of **Section 96 of the Land Act** in terms of service of the requisite notice on his spouse as required by the law.

[18] Having satisfied myself that the Plaintiff has made out a prima facie case, the next issue to consider is whether it has been shown that he stands to suffer irreparable loss for which damages would be inadequate remedy, and the main argument advanced by the Plaintiff in this connection is that the suit property is matrimonial property on which he resides with his wife, children and grandchildren; and that he stands being rendered destitute should the property sold. Whereas authorities abound to support the position that the mere fact that the charged property is matrimonial property is not sufficient proof that its sale would entail irreparable loss, I would agree with the position taken in **Elizabeth Wambui Njunguna vs Housing Finance Co. of Kenya Ltd [2006] eKLR** in which it was held that:

**" ...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."**

[19] The same viewpoint was taken in the cases of **Kanorero River Farm Ltd and 3 Others vs National Bank of Kenya Ltd [2002] 2 KLR 207; Waithaka vs Industrial and Commercial Development Corporation [2001] KLR 374; and Joseph Siro Mosioma vs HFCK and 3 others [...]** eKLR. For instance in the **Joseph Siro Mosioma Case** (supra), Warsame J, (as he then was) had the following to say:

**"On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law... a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."**

[20] For purposes of the second requirement in **the Giella Case**, namely proof of irreparable harm, it suffices therefore, that the Plaintiff has demonstrated, albeit on a prima facie basis, that neither himself nor his wife was served with the requisite statutory notices. Moreover, on the basis of the facts of this case, the balance of convenience would favour the granting of an temporary injunction. In this regard, I find instructive the expressions of **Ojwang Ag. J** (as he then was) in the case of **Suleiman -vs- Amboseli Resort Ltd (2004) 2 KLR 589**, that:

**"Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella v Cassman Brown, the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied: (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should**

**always opt for the lower rather than the higher risk of injustice."**

[21] The case of that **National Bank of Kenya Ltd v Shimmers Plaza Ltd [2009] eKLR** was cited by the 1st Defendant to support the argument that, should the court be inclined to grant a temporary injunction on the ground that statutory notices were not served, it should be made conditional to compliance. Here below is what the Court of Appeal had to say on the point:

**"... An injunction is an equitable and discretionary remedy. The duration of an order for injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the Court is inclined to grant an interlocutory injunction order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit. In the result, we allow the appeal, set aside the order of injunction in terms of the superior Court and substitute therefore an order for injunction thus; "The Defendant/Respondent be and is hereby restrained by itself or its authorized agents, servants or employees from selling, disposing off, transferring or otherwise dealing with Plaintiff's property known as Title Number IR No. 55525 (LR No 1870/IX/128 situate in Westlands, Nairobi until such time as the Defendant/Respondent shall have served the Plaintiff with a valid statutory notice in accordance with the law.""**

[22] It is pertinent to mention that, from the facts hereof, service of the statutory notices is not the only issue. As has been noted above, the Plaintiff denied having signed the Charge, he denied any knowledge or dealing with the Borrower; and his wife also denied having given the spousal consent. In the premises, it is necessary for all these issues to be tried and resolved at the hearing. In the premises, I would allow the Plaintiff's application dated 1 July 2016 and grant the order asked for in **prayers 3 and 5** thereof, namely **THAT**;

**[a] pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defenants, their agents, servants employees or any other person claiming under them from selling, transferring, disposing off, alienating, attaching, auctioning, using or in any other way dealing with the Plaintiff's Title Number Loc.5/Ngurwe-ini/396 Kiawanjeru-Gaichanjiru.**

**[b] Costs of the application to be in the cause.**

It is so ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY, 2017**

**OLGA SEWE**

**JUDGE**