



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO.622 OF 2005**

**TILAS NTHIA MURINGI .....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL LIMITED.....1<sup>ST</sup> DEFENDANT**

**LYDIAH N. WAWERU T/A PURPLE ROYAL AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Called to my attention for determination is the Notice of Motion dated 11<sup>th</sup> December 2015 seeking the following Orders:-

1. *Spent*

2. *Spent*

3. *Spent*

4. THAT a temporary injunction be issued restraining the Defendants and each of them whether by themselves, their appointed auctioneers, servants or agents or Advocates from further advertising for sale, selling by public auction or private treaty or otherwise howsoever alienating, transferring, leasing or in any other manner whatsoever interfering with ALL THA PROPERTY known as L.R No.Kajiado/Kaputiei North/346 situated in Kitengela Township pending the hearing and determination of this suit.

5. *Spent*

6. *Spent*

2. The 1<sup>st</sup> Defendant had through the 2<sup>nd</sup> Defendant advertised L.R No. Kajiado/Kaputiei North/346 (the suit property) for sale by Public Auction on 15<sup>th</sup> December 2015 but the sale did not happen as the sale was postponed by the Court on 14<sup>th</sup> December 2015 upon exparte hearing of the Notice of Motion now before Court.

3. It is common ground that certain loan facilities were granted to the Plaintiff by the Defendant Bank and a charge was created over the suit property as security therefor. The Plaintiff is the Registered owner of the Plaintiff Company.

4. Briefly stated the Plaintiff complains that the Defendants intend to sell the suit property notwithstanding that as of the date of Advertisement of the sale, there were no outstanding arrears owing from the Plaintiff to the 1<sup>st</sup> Defendant.
5. The Plaintiff also contends that the Defendant has charged illegal interest and penalty charges which breach the contract of lending, the provisions of the Banking Act, the Central Bank of Kenya Act and the Central Bank of Kenya (amendment) Act (2000). It is the Plaintiff's further assertion that alleged debt and/or exorbitant Interest and Penalties complained of is irrecoverable and gives reasons for the assertion in paragraph 20 of the Plaintiff. This Court need not set out these reasons.
6. Importantly for purposes of the Application before Court is that the 1<sup>st</sup> Defendant has issued an invalid Statutory Notice which does not comply with the provisions of the Law Act 2012.
7. Ultimately the Plaintiff prays for the following Orders:
  - a. A permanent Injunction restraining the Defendants and each of them whether by themselves, their appointed auctioneers, servants or agents or Advocates from further advertising for sale, selling by public auction or private treaty or otherwise howsoever alienating, transferring, leasing or in any other manner whatsoever interfering with ALL THAT PROPERTY known as L.R NO. Kajiado/Kaputiei North/346 situated in Kitengela Township.
  - b. ALTERNATIVELY, the public auction of the suit property scheduled to take place on 15<sup>th</sup> December 2105 be cancelled and/or postponed for a period of at least ninety(90) days.
  - c. A declaration that the 1<sup>st</sup> Defendant's statutory power of sale has not arisen and/or accrued and the intended auction is premature and illegal.
  - d. An Order directing the 1<sup>st</sup> Defendant to prepare and/or render to the Plaintiff and further to file in this Honourable Court a true, proper and accurate account of all the financial dealings conducted in the Plaintiff's mortgage account.
  - e. Damages under paragraph 17,19, 20 and 21 above.
  - f. Such other or further consequential relief as this honourable Court may deem fit and just to grant.
  - g. Costs of this suit together with interest thereon at court rates.
8. In the Application before Court, the Plaintiff has given Affidavit evidence in a bid to demonstrate that he has a prima facie case. That evidence and the entire case is challenged by the Defendants through the Replying Affidavit of Fredrick Mungathia sworn on 11<sup>th</sup> February 2016.
9. This Court has considered the application, the evidence presented and the submissions by Counsel.
10. From the evidence available and which is not seriously challenged by the Plaintiff, the advertisement for the suit property for sale was done after the Bank had served the Plaintiff with the following Notices:-
  - a. A three (3) months Notice dated 28<sup>th</sup> August 2014 under the provisions of section 90(1)(2)(3)(e) of the Land Act 2012.
  - b. A 40 days Notice dated 14<sup>th</sup> July 2015 under the provisions of section 96(2)(3) of The Land Act 2012.
  - c. A 45 day Notification of sale pursuant to the provisions of the Auctioneers Act.
11. Although the Plaintiff denies default in repayment of any money due and owing from him to the

Defendant Bank, that would not be borne out by an admission of default contained in the Plaintiff's letter of 19<sup>th</sup> August 2015 to the Bank. It was a letter in reaction to the 40 days Notice of 14<sup>th</sup> July 2015 in which the Plaintiff makes proposals to address the issue of "arrears in the Account" (the Plaintiff's own words).

12. The Bank was only willing to consider the aforesaid proposal upon reimbursement of the valuation fees of Kshs.125,300/= and Process Server's fee of Kshs.5,800/=. Those conditions were communicated to the Plaintiff by the Defendant Bank in a letter of 26<sup>th</sup> August 2015.

13. The Bank asserts that the Plaintiff did make good its proposal and only made the proposed payments on 27<sup>th</sup> November 2015 upon receipt of the Auctioneers Notice. This assertion by the Bank is not controverted by the Plaintiff and is on the face of it believable.

14. It would seem therefore that as the time of issuance of the Statutory Notices and Notification to sale, the Plaintiff was in arrears and in default of repayment of the loan. The Plaintiff was not entirely candid to Court! In addition, it is now contended by the Bank that at the time of obtaining the exparte Orders, the Plaintiff account was in arrears of a sum of Kshs.2,664,392.95 (a Statement of Account was shown to Court). The evidence produced by the Bank was again not controverted by the Plaintiff.

15. In view of the default of repayment of the loan, the Defendant bank was entitled to exercise one of the Statutory remedies available to it under the Provisions of the Land Act 2012 and the Court is not persuaded that the Plaintiff has made out a prima facie case that it was not in default.

16. However there was another complaint in respect to the validity of the Statutory Notices that were issued. The 40 days Notices of 14<sup>th</sup> July 2015 has caught my attention. I reproduce the Notice:-

**STATUTORY NOTICE TO SELL UNDER SECTION 96(2)(3) OF THE LAND ACT, 2012,  
LAWS OF KENYA**

***"PERSONAL SERVICE"***

THE TENANTS

L.R.NO.KAJIADO/KAPUTIEINORTH 346/KITENGELA- (THE PROPERTY)

INO TILAS NTHIA MURINGI – CHARGOR

We KENYA COMMERCIAL BANK LIMITED, of P.O BOX Number 48400-00100, Nairobi, the Chargee of the aforesaid property now HEREBY GIVE YOU NOTICE that the property which you are situate had been charged to the Bank by the CHARGOR who is still in default.

We also HEREBY GIVE YOU NOTICE that the Bank is proceeding to exercise its Statutory Power of Sale over the property being LR NO.KAJIADO/KAPUTIEI NORTH 346/KITENGELA unless the same is regularized by the Chargor FORTY (40) DAYS from the date of service of this Notice upon you.

TAKE NOTICE that unless the outstanding amount together with further interest that will accrue is paid to the Bank by the CHARGOR/BORROWER, FORTY (40) DAYS from the date of service of this Notice to sell, the Bank shall, after expiry of this Notice commence sale of the charged property for the recovery of the amount outstanding and remaining unpaid together with interest thereon plus all costs and other charges ensuing therefrom. For the purpose of this paragraph, the date of service shall be the same day that personal service has been effected upon you as the tenant.

TAKE FURTHER NOTICE that the sale of the charged property shall be by public auction or private treaty and any part payment or instalments made by the Chargorand/or any proposals mad

shall be received without prejudice and shall not constitute a waiver of this notice and unless the entire amount together with interest thereon shall have been received in full before then, the sale of the property shall go on such payment notwithstanding.

THIS NOTICE TO SELL is given pursuant to the terms of Section 96(2)(3) for the Land Act, 2012”.

17. That Notice was purportedly issued and served under the provisions of Section 96(2) of The Land Act 2012. These provisions provides:-

“(2) 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 the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

As at the time of issue of the Notice (and perhaps now) the prescribed form contemplated under subsection (2) has not been published.

18. What is curious about the Notice of 14<sup>th</sup> July 2015 is that it does not specify the amount demanded, it simply makes reference to ‘the outstanding amounting together with further interest that will accrue’. In addition it is silent as to what amount needs to be paid to rectify the default. This Court takes the view that where the default is the non-payment of money due under a charge, the amount to be paid to rectify the default must be stated in both the three months Notice under Section 90 of The Act and the 40 days Notice of Section 96(2) of The Act. The Notice of 14<sup>th</sup> July having failed to state that amount to be paid is defective.

19. The 40 days Notice under section 96(2) of The Land Act 2012 is an invaluable component of a Chargor’s Equity of Redemption and if the Notice is substantially defective, like here, then it compromises that right. The Chargee cannot be permitted to act on what is obviously defective.

20. Yet there is evidence of default in the repayment of the loan and it would be unjust to unduly hold back the Bank from exercising a right that is available to it under terms of the Charge and Statute.

21. For this reason the Court allows the Prayer 4 of the Motion of 11<sup>th</sup> December 2015 in the following limited way:-

i. The Bank is at liberty to serve a fresh 40 days Statutory Notice and if default persists it will be at liberty to exercise its Statutory Power of Sale but only after issuance and service of the Notice required under the Auctioneers Act.

ii. As the Plaintiff is to not wholly successful, the costs of the Application shall be borne by each party.

**Dated, Signed and Delivered in Court at Nairobi this 11<sup>th</sup> day of May, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Muchiri h/b Kangethe for Plaintiff

Nyambura for Defendants

Alex – Court clerk