



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI HIGH COURT**  
**COMMERCIAL & ADMIRALTY DIVISIONS**  
**CIVIL SUIT NO 620 OF 2015**

**GERISHON MBUGUA KANG'ETHE.....PLAINTIFF**

**VERSUS**

**HFC LIMITED.....DEFENDANT**

**RULING**

1. For the determination of the Court is the Plaintiff's application dated and filed on 10<sup>th</sup> December 2015. The application is brought pursuant to the provisions of **Order 50 Rule 6 and Order 51 Rule 1** of the Civil Procedure Rules, as well as Sections 1A, 1B, 3A and 95 of the Civil Procedure Act and Section 104 of the Land Act. In the application, the Applicants ought the following orders *inter alia*;
  2. **Spent.**
  3. **THAT pending the hearing and determination of this application *inter-partes*, a temporary be and is hereby issued restraining the Defendant/Respondent (hereinafter "the Respondent"), its servants, employees and/or agents for advertising for sale, selling, entering into, accessing, alienating, transferring, interfering and/or in any manner whatsoever altering or dealing with the Applicant's property known as LR No 12140/80 MugugaKiambu.**
  4. **THAT pending the hearing and determination of this suit *inter-partes*, a temporary be and is hereby issued restraining the Defendant/Respondent (hereinafter "the Respondent"), its servants, employees and/or agents for advertising for sale, selling, entering into, accessing, alienating, transferring, interfering and/or in any manner whatsoever altering or dealing with the Applicant's property known as LR No 12140/80 MugugaKiambu.**
  5. **THAT time within which to comply with the Notification of Sale herein be and is hereby extended and/or enlarged by a period of ninety days.**
  6. **THAT the Applicant be and is hereby granted a period of ninety (90) days within which to settle the entire outstanding loan amount owed to the Respondent.**
  7. **THAT this honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.**
  8. **THAT the costs of this application be provided for.**
- 
2. The application was premised upon the grounds reiterated in the application; that the Applicant was well and fully aware of the default in the repayments towards the settling of the loan amount owed to the Respondent.
  3. It was further stated that the Applicant had duly serviced the loan for the last six (6) years, and that

there had been a crisis in the recent past, making repayments due to the Respondent untenable. He therefore, sought indulgence of the Court for extension of the notice period under the Notification of Sale to allow him to settle the entire outstanding amount due and owing to the Respondent. The application was further supported by the Applicant's affidavit deposed to on even date, and which contents reiterated the grounds adduced.

4. In opposing the application, the Respondent filed its Grounds of Opposition on 17<sup>th</sup> December 2015. Therein, it was contended that the Applicant had not established a *prima facie* case on account of the admission of indebtedness to the Respondent, and further, that the Applicant sought an extension of time, which cannot be granted as the Court would unilaterally be re-writing the contract/agreement between the parties. It was averred that the Respondent had not committed any illegality or acted with unreasonableness in seeking to exercise its statutory power that had accrued.
5. I have considered the dispositions made by either parties, their averments and submissions, both in support of and in objection to the instant application. The tenets in the cases of **Giella v Cassman Brown & Co Ltd (1973) EA 358**, as well as **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** are applicable in such an application in which a party seeks an injunctive relief against another party.
6. The principles need not be reiterated, save to state that the award of such relief is discretionary upon the Court upon a thorough scrutiny and consideration of the prevailing circumstances of the matter.
7. It is not in doubt that the Applicant had borrowed certain facilities from the Respondent, and in which he had defaulted in repaying. There was an admission of debt and failure by the Applicant in repaying the said debt. He pleaded for the Court's intervention in seeking to extend the mandatory and statutory time limits for notice as provided under Section 96(1), as read with Section 96(2) of the Land Act, and further provided under Rule 16 of the Auctioneers (1997) Rules.
8. The Applicant approached the Court, seeking an extension of the Notification of Sale dated 5<sup>th</sup> October 2015 for a further period of six (6) months to allow him time to re-organize and settle the entire claimed amount. At the time of the filing the instant application, and in granting an interim injunction pending the hearing of the application *inter-partes*, the Court ordered the Applicant to deposit a sum of Kshs 50,000/- before the hearing of the application on 18<sup>th</sup> December 2015.
9. Further to the said deposit, the Applicant submitted that he had previously deposited a sum Kshs 400,000/- in November 2015. There was no objection recorded by the Respondent in this regard.
10. The Applicant has explained his predicament to the Court, and has sought to invoke its jurisdiction as bestowed upon it vide Section 104(4)(c) of the Land Act. This provision, as read together with Section 106(2)(b) and (3)(b) & (g) thereof, confers upon the Court the power to re-open a charge, in consideration of prevailing circumstances.
11. The circumstances that were prevailing at the time were that the Applicant's dues as a consultant to Apex Projects Limited has been suspended pending investigations over alleged corruption scandals at the National Youth Service. He further stated that, due to this inadvertence and delay in payment, he had been unable to make his repayments to the Respondent.
12. These circumstances would be a mitigating factor in allowing an application for injunction, albeit on conditional grounds. As reiterated in **Suleiman v Amboseli Resort Ltd (2004) eKLR** cited with approval by Gikonyo, J in **SophyNjiiri v National Bank of Kenya Ltd & Another (2015) eKLR**, it is for the Court to consider and always opt for the lower risk rather than the higher risk of injustice that may be occasioned to either party in a suit. In his rendition, Ojwang, Ag. J in **Suleiman v Amboseli Resort Ltd** (supra) reiterated that;
  - a. ***“Traditionally, on the basis of the well accepted principles set out in the Court of Appeal in Giella v Cassman Brown, the Court has had to consider the following questions before granting injunctive relief.***
    - I. Is there a prima facie case;
    - II. Does the applicant stand to suffer irreparable loss;
    - III. On which side does the balance of convenience lie?
  - b. ***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.”***

13. It would not be an exercise in re-writing the agreement for the parties, as alleged by the Respondent, if the Court were to intervene, in consideration of the circumstances, and extend the time limit provided under Section 96(2) of the Land Act, as read together with Rule 16 of the Auctioneers (1997) Rules.
14. It would, in adopting a more pragmatic and reasonable approach, intervene and allow the prayer for extension of the notification period for a further six (months), and further, provide sufficient time to the Applicant to settle the amount as claimed. It therefore follows that the reasoning adopted by the Court in **Sophy Njiiri v. National Bank of Kenya & Another** (supra), as well as the rendition of Mabeya, J in **Singh Gitau Advocates v City Finance Bank Limited (2013) eKLR**, that the Court would hereby allow the Plaintiff’s application, albeit conditional, and predicated upon the following conditions;
- a. That subject to the conditions as set out below, the Court allows the instant application, and issues a temporary injunction in favour of, and in terms, as set out in the application;
  - b. That the Applicant shall on 31<sup>st</sup> March 2016, pay to the Respondent the sum of Kshs 1,659,629.02/-
  - c. That the balance of Kshs 5,000,000/-, including interest accruing thereon, shall be paid in five (5) equal installments every 5<sup>th</sup> of the succeeding months; if it falls in non-working day, the next working day after 5<sup>th</sup> of the month.
  - d. That in default of any installment, the entire sum shall be due and payable and execution to issue.
  - e. The Applicant shall pay the Auctioneers charges to be either taxed or agreed upon amongst the parties.
  - f. That the Applicant shall bear the costs of this ***application***.

**Dated, signed and delivered in court at Nairobi this 4<sup>th</sup> day of March, 2016.**

.....

**C. KARIUKI**

**JUDGE**