REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 386 OF 2014

GITIMU JAMES GATHU…….…….....1ST PLAINTIFF/APPLICANT

CATHERINE WANGECHI GITIMU…….....2ND PLAINTIFF/APPLICANT

EXPRESS PIONEER SUPERMARKETS LTD…….3RD PLAINTIFF/APPLICANT

VERSUS

BUSINESS PARTNERS

INTERNATIONAL KENYA LTD….....DEFENDANT/RESPONDENT

RULING

1. Before the Court for its determination are two (2) applications brought by the 1st and 2nd Plaintiffs dated **2nd February 2016** and **5th May 2016**. Both applications were brought under **Section 3A,** of **the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Sections 90, 91(2), 96(2), (3)(c) & (f), 97(2), 103(1)(b), 104(2)(a) & (b), 105, 106(1)(b) & (2) of the Land Act No 6 of 2012**,**Order 40 Rules 1, 2, 3 & 5 of the Civil Procedure Rules,** and all other enabling provisions of the law. The Applicants sought for orders *inter alia*, that an injunction be issued against the Defendant, whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with **LR No RUIRU/KIU BLOCK 3/1185** (hereinafter referred to as the suit property) pending the hearing and determination of the suit filed on **5th September 2014.** Both applications were supported by the affidavits of the 1st Applicant herein, **Gitimu James Gathu** on **2nd February 2016** and **5th May 2016,** respectively. Therein, it was deposed to that the Court had on **17th February 2016** issued conservatory orders that were to be in force until **31st May 2016**, and further, that the Defendant had unlawfully purported to advertise the sale by auction of the suit property. It was thus averred that it was imperative that the suit property be conserved pending the hearing; and that in any event, no prejudice would be occasioned to the Respondent should the orders sought be issued.

2. The applications were objected to by the Respondent in its Replying Affidavit sworn on **5th May 2016** by **Sally Gitonga**, the Respondent's Country Manager for Kenya. The deponent conceded therein that there indeed were conservatory orders issued on **17th February 2016** but contended that the same lapsed

on **5th April 2016** and that the same were never extended, contrary to the allegations by the Applicants. It was deposed to that, in the circumstances, the scheduled sale by public auction of the suit property on **17th May 2016** was valid. Further, it was averred that the instant application lacked merit as the Applicants had not met the conditions laid down in law in granting an injunction; and, that the prayers sought could not be issued where there was an admission of debt; where the statutory notices had been issued; and where there was a clear default in respect of an agreement on the payment of the debt.

3. The Court has considered the arguments and averments made by the parties herein within the backdrop of the documents filed herein by the parties and the proceedings of the Court to date. The issue for determination emanates from the application dated **2nd February 2016** and the subsequent actions by the Respondents on **28th April 2016** that necessitated the filing of the further application by the Applicants on **5th May 2016**.

4. On the **17th February 2016**, the Court heard the parties on the application dated **2nd February 2016** brought under Certificate of Urgency by the Applicants, and after considering the representations made by Learned Counsel, the Court made the following orders;

"The application dated 2nd February 2016 is hereby stood over to 5th April 2016 for further directions. The Respondents to file and serve their replying affidavit within the next seven days. Interim orders granted as prayed in prayer (2) pending further directions on 5th April 2016. The question of advertisement costs and Auctioneers fees is deferred to 5th April 2016."

5. On **13th May 2016**, at the hearing of the application dated **5th May 2016,** the Applicant indicated that the Court did not sit on **5th April 2016** and that they had therefore taken the initiative to have the said application set down for hearing on **31st May 2015**. It was the Applicants contention that the Respondent had, on **28th April 2016,** before the hearing of the application on **31st May 2016**, advertised for the sale of the suit property through public auction that was slated to be conducted on **17th May 2016**. Apprehensive of the Respondent's actions and turn of events, the Applicants filed the application of **5th May 2016,** and at the hearing of the application, the Court rendered itself thus;

"Everything considered, I am satisfied that in the circumstances herein, the interests of justice would be served by the stay of sale. It was not the Applicants fault that their application could not be heard on 5th April 2016 as had been scheduled. Accordingly, I would grant prayer (2) of the Notice of Motion dated 5th May 2016 pending hearing inter-parties on 31st May 2016. The Respondents have 7 days to file a response as prayed."

6. As has been noted, the Court was to be moved on **5th April 2016** for the further orders as it had directed on **17th February 2016**. The interim orders issued then were to subsist, as according to prayer (2) of the application dated **2nd February 2016,** which stated, *inter alia*;

> *"**2. THAT pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with LR No RUIRU/KIU BLOCK 3/1185 on 23rd February 2016 or any other day until this application is heard and determined."***

7. The orders of the Court were therefore, to exist up to the hearing and determination of the application dated **2nd February 2016**. The further orders that the Court was to issue on **5th April 2016** were not issued as the Court was not sitting, and further, that in the said circumstances, the application could not be heard on that date. By inference, and as further illustrated in the Ruling made on **13th May 2016**, it was

not the intention of the Court to abate the orders that it had issued on **17th February 2016**. In the premises, the Respondent, in advertising for sale the suit property on **28th April 2016,** acted in disregard of the orders of **17thFebruary 2016.** The orders of the Court subsisted as at that date, and would have subsisted until the hearing of the application on **31st May 2016**. Hence, in accord with the order issued by this Court on **13th May 2016**, it my view that it would be in the interest of justice that the sale be stayed, pending the hearing of the application.

8. That having being said, the instant applications were made pursuant to the provisions of **Order 40 Rules 1,2,3 & 5 of the Civil Procedure Rules**, as well as **Sections 90, 91(2), 96(2), (3)(c) & (f), 97(2), 103(1)(b), 104(2)(a) & (b), 105 and 106(1)(b) & (2) of the Land Act.** One of the issues that the Applicants had highlighted in their application was that the figure which had been indicated as outstanding was disputed, and that they had not been furnished with statements of account to verify the sum claimed. I however note that these are matters that were conclusively dealt with by **Kamau, J** in her Ruling of **23rd February 2015** in respect of the Applicants' previous application dated **4th September 2014**. The averments made in the instant application were similarly in contention in the previous application, to wit, that there was no compliance with the relevant provisions of **the Land Act**, in that, statutory notices had not been issued to the Applicants as by law required.

9. With regards to the issues reiterated in the previous application, the Court had held that the notices issued by the Respondent presumably in conformity with **Sections 90(1) & (2)(a),(b), (d) & (e) and 96(1) & (2) of the Land Act**, were not in compliance with the said provisions of the law, and that therefore, the notices issued on **6th**and **25th February 2014** were unprocedural. Further, the Court had held that the Respondent, having failed to strictly comply with the provisions of the law, was at liberty to re-issue the said statutory notices, which issue the Court further noted was not in contention, but which ought to have been addressed by the parties. The Court, accordingly, dismissed the Applicants application on the grounds that the chargee could not be restrained from exercising its statutory power of sale if the same had crystallized, granted that the Applicants were, from the evidence placed before the Court, indebted to the Respondent.

10. In view of the foregoing, it is apparent to me that the issues raised in the applications dated **2nd February 2016** and **5th May 2016** are indeed *res judicata* and are accordingly precluded by **Section 7 of the Civil Procedure Act**. The said provision reads;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Further at Explanation (4) it is provided that;

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

11. That the law of *res judicata* applies with equal force to applications as it does to suits is not in doubt. In **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996**, it was held *inter alia* that;

"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation... .once an application for injunction

within a suit has been heard and determined under the principles as laid down in Giella vs. Cassman-Brown, a similar application cannot be brought unless there are new facts not brought before court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling. Such cases, of course, must be very few and far in between...*"* (Emphasis added).

12. In dismissing the Applicants' application dated **4th September 2014**, the Court made it clear that the Respondent was at liberty to re-issue statutory notices that were in accord with the Land Act. In its Replying Affidavit sworn on **26th May 2016**, the Respondent made averments as to the inaptness of the application, without demonstrating whether they had complied with the directions issued by the Court in the Ruling dated **23rd February 2015**. Thus, the Respondent has not shown that it complied with the provisions of **Sections 90(1) & (2)(a), (b), (c) & (e)** as read together with **Sections 96(1) & (2) of the Land Act**. The Auctioneers Notification of Sale was just one of such notices and the Court made it clear in its Ruling aforementioned that such a notice was pointless if the prior notices were not served in accordance with **Sections 90 and 96 of the Land Act**. It is evident that there are no new facts that have been brought to the Court's attention since the Ruling of **23 February 2015**.

13. In the result, it is my finding that the applications dated **2nd February 2016** and **5th May 2016** are *res judicata* and the same are hereby dismissed with costs to the Respondent. Further, it is hereby reiterated for the avoidance of doubt that the Respondent is at liberty to proceed with the exercise of its statutory power of sale, upon re-issuance of appropriate notices as set out in **the Land Act, 2012** and as directed by the Court in the Ruling of **23rd February 2015.**

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 9th DAY OF SEPTEMBER 2016.

OLGA SEWE

JUDGE