



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**ELC NO. 83 OF 2013**

**JOTHAM GIKUNDI.....1ST PLAINTIFF**

**HENRY NTOMBALI M'IBUTU.....2ND PLAINTIFF**

**VS**

**K-REP BANK LIMITED.....1ST DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT**

**RULING**

1. This application is dated 13th March, 2013 and seeks orders;-

***(1) That this application be certified urgent and the same be heard exparte in the first instance.***

***(2) That an order of temporary injunction do issue restraining the defendants, whether by themselves or through their employees, agents, servants or anyone else acting at their behest from proceeding with the intended sale by public auction of L.R No. Nyaki/Kithoka/691 scheduled for 22/3/2013 pending the inter-partes hearing of this application.***

***(3) That an order of temporary injunction do issue restraining the defendants, whether by themselves or through their employees, agents, servants or anyone else acting at their behest from proceeding with the intended sale by public auction of L.R No. Nyaki/Kithoka/691 scheduled for 22/3/2013 pending the hearing and determination of this application.***

***(4) That an order of temporary injunction do issue restraining the defendants, whether by themselves or through their employees, agents, servants or anyone else acting at their behest from proceedings with the intended sale by public auction of L.R No. Nyaki/Kithoka/691 scheduled for 22/3/2013 pending the hearing and determination of this suit.***

***(5) That costs of the application be provided for.***

2. The application states that it is filed under Order 40 Rule 2 (1) of the Civil Procedure Rules, 2016.

3. The application is supported by the affidavit sworn by the 1st plaintiff/applicant on 13th day of March, 2013 and has the following grounds;-

***1. That the 1st plaintiff took out a financial facility of Kshs 2,500,000/= with the 1st defendant that was secured by a legal charge over the 2nd plaintiff's parcel of land L.R NO. NYAKI/KITHOKA/691 and a personal guarantee and indemnity executed by the 2nd plaintiff in***

*favour of the 1st plaintiff.*

*2. That the 1st plaintiff has been servicing the facility as stipulated in the letter of offer.*

*3. That the 2nd defendant has notified the plaintiffs of its intention to sell the suit land by public auction on 22/3/2013 acting on the instructions of the 1st defendant.*

*4. That the intended sale is premature, illegal and irregular as the mandatory statutory notice has not been issued by the 1st defendant and hence the power of sale has not crystallized.*

*5. That the 1st defendant has substantially deviated from the agreed terms as set out in the letter of offer and wrongfully confiscated the log book to the 1st plaintiff's vehicle.*

*6. That in the event that the said sale is conducted, the plaintiffs will inevitably suffer irreparable loss and damage that cannot be compensated in damages.*

*7. That it is in interest of justice and fairness that the instant application is sought.*

4. The application was canvassed by the parties by way of written submissions.

5 In their submissions, the plaintiffs have told the court that the 1st plaintiff obtained a financial facility in the sum of Kshs 2,500,000/= from the 1st defendant and secured the facility through a legal charge over the 2nd plaintiff's parcel of land L.R NO. NYAKI/KITHOKA/691. There was also a personal guarantee and indemnity executed by the 2nd plaintiff in favour of the first plaintiff.

6. The plaintiffs have told the Court that the 1st plaintiff serviced the loan facility regularly in accordance with the terms and conditions of the letter of offer.

7. The plaintiffs say that out of the blues and in breach of terms and conditions of the apposite offer, the 1st defendant instructed the 2nd defendant to sell the 2nd plaintiff's land which has secured the facility granted to the 1st plaintiff.

8. The plaintiffs also aver that the 1st defendant irregularly confiscated a logbook for the 1st plaintiff's vehicle without notice. The plaintiffs have told the court that the terms by which the plaintiffs and the 1st defendant were bound did not provide for such confiscation even in the event of default.

9. The plaintiffs state in a laconic manner that the required statutory notice was not issued to them.

10. The plaintiffs opine that for the reasons they have given the intended sale of the suit land is illegal.

11. The plaintiffs state that they have satisfied the conditions required for the grant of an injunctive order as enunciated by the classic case of *GIELLA VERSUS CASSMAN BROWN AND CO LTD (1973) EA 358*.

12. They say that their suit has a high probability of success as the intended action to sell the suit land is illegal.

13. The plaintiffs state that they stand to suffer irreparable harm not compensable in damages if the injunctive order they seek is not granted.

14. The plaintiffs assert that the balance of convenience should be deemed to tilt in their favour as the intended sale of the suit land was illegal.

15. The plaintiff's have proffered the following cases in support of their assertions;-

**1. NAIROBI CIVIL APPLICATION NO. 94 OF 2014(UR77 OF 2014)**

**HASHMUKHLAL VIRCHARD SHAH AND 2 OTHERS VERSUS INVESTMENTS AND MORTGAGES BANK LIMITED [2014] E KLR.**

**2. NATIONAL BANK OF KENYA LIMITED VERSUS SHIMMERS PLAZA LIMITED [2009] E KLR.**

**ABDULGADER SHARIFF SAKES AND ANOTHER VERSUS SOUTHERN CREDIT BANKING CORPORATION LIMITED AND DALALI TRADERS – MOMBASA CIVIL SUIT NO. 245 OF 2010.**

16. In all these cases injunctive orders were granted.

17. The application is opposed by the respondents who say that land parcel NO. NYAKI/KITHOKA/691 had been used to register a legal charge to secure a sum of Kshs 2,500,000/= advanced to the 1st plaintiff.

18. They state that the 1st plaintiff miserably failed to service the apposite loan.

19. They laconically state that they had written to him many times but he failed in his duty to service the apposite loan.

20. As a result, the 1st defendant decided to give instructions to the 2nd defendant to sell the suit land by way of public auction.

21. The defendants assert that the required notice was given and upon expiry of 90 days, they were entitled to recover the money advanced to the 1st plaintiff through the sale of the 2nd plaintiff's land (which had been offered as security).

22. The defendants have framed the issues for determination as;

***(I) Whether the 1st plaintiff/applicant obtained financial facilities from the 1st defendant/respondent secured by a legal charge over L.R NO. NYAKI/KITHOKA/691 and whether the 1st plaintiff/applicant made repayments as per the loan agreement.***

***(ii) Whether the right for the 1st defendant/respondent to exercise its statutory power of sale over the secured property has accrued and whether the plaintiffs/applicants were duly served with the requisite (3) months statutory notice by the 1st defendant/respondent before instructions were given to the 2nd defendant/respondent.***

***(iii) Whether the Plaintiffs/Applicants have established a proper case for granting of injunctive orders.***

23. The defendants say that it is not controverted that the 1st plaintiff' obtained a loan from the 1st defendant which loan was secured by a charge over the suit land.

24. The defendants also assert that the requisite three months notice was given to the Plaintiffs by the 1st Defendant/Respondent before it issued instructions to the 2nd Defendant/Respondent to sell parcel No. NYAKI/KITHOKA/691 by way of public auction.

25. The defendants have argued that the plaintiffs have not established a proper case for granting of injunctive orders.

26. In support of their assertions, the defendants have proffered the following authorities.

**1. ANDREW MURIUKI WANJOHI VERSUS EQUITY BUILDING SOCIETY LTD AND 2 OTHERS [2006] e KLR.**

**2. JOSEPH MULI KULI VERSES HOUSING FINANCE CO. OF KENYA LTD [2006] e KLR.**

**3. JULIA WANGACHI NJUNGE VERSES HOUSING FINANCE CO. LTD AND ANO [2005] e KLR.**

27. In all the three cases proffered as authorities by the defendants, the orders sought were denied and the applications were dismissed.

28. I have carefully considered the parties' pleadings and the authorities they have proffered in support of their propositions.

29. The authorities proffered by the parties are good authorities and law in their circumstances.

30. No one case is congruent to another in a veritable degree of exactitude. The circumstances of every case must be taken into account before a court can determine whether or not to grant injunctive orders. The discretion to award such orders must be carried out judicially and must eschew caprice and bias.

31. The submissions proffered by the parties evince diametrically opposed positions. It is the plaintiffs' word against that one of the defendants. The competing positions taken by the parties leave no doubt that there is a plethora of disputed facts in their submissions.

32. I need not reinvent the wheel. The Court of Appeal in the case of MBUTHIA VERSUS JUMBA CREDIT CORPORATION elucidated erudite guidance to courts when they are considering the grant or non grant of injunctive orders. JUSTICE PLATT, JA, opined as follows;

**“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court Judge in this case had gone far beyond his proper duties and made final findings of facts on disputed affidavits.”**

33. I do not wish to delve into determination of disputed issues.

34. It is instructive that the plaintiffs in their plaint seek the following orders against the defendants jointly and severally.

***(a) A declaration that the intended sale by public auction of L.R NO. NTIMA/KITHOKA/692 is premature, irregular and unlawful.***

***(b) An order of permanent injunction do issue restraining the defendants, whether by themselves or through their employees, agents, servants, or anyone else acting at their behest from proceeding with the intended sale by public auction of L.R NO. NYAKI/KITHOKA/691.***

***(c) Costs of the suit and interests.***

35. I do not unequivocally state that interlocutory orders which have the effect of substantively concluding a suit can not be granted in veritably apposite circumstances. But this can only be done in exceptional cases. This is not one of such cases.

36. Refusing to grant the injunctive orders sought will be tantamount to finding that the intended sale by public auction of L.R NO. NYAKI/KITHOKA/691 is mature, regular and lawful.

37. I do find that it is necessary and proper that disputed issues evinced by the pleadings and submissions in this application be ventilated in the main suit.

38. Weighing the relative weight of the parties propositions, I will tilt towards the weight of the plaintiff's/Applicants assertions. This will preserve the suit land pending hearing and determination of this

suit.

39. In business, time is of the essence. This suit should be heard and determined expeditiously. The plaintiffs on their part are advised to endeavor to continue to meet their contractual obligations in accordance with the terms and conditions they agreed with the 1st defendant.

40. To expedite the hearing and determination of this suit, the following orders are issued:-

***1. The plaintiff should comply with Order II of the Civil Procedure Rules, within 30 days after delivery of this ruling.***

***2. On their part, the defendants should comply with Order II, Civil Procedure Rules, within 30 days after they are served with the plaintiffs' compliance documents.***

***3. Should the plaintiffs fail to comply with Order II of the Civil Procedure Rules, the defendants should nevertheless comply and list the matter for directions before this court.***

***4. Upon achievements of compliance, either party with proper notification to the other party or both parties by consent, are directed to obtain a date for directions during which date directions apposite to the hearing of this suit will be issued.***

41. For avoidance of doubt an order of temporary injunction is issued, restraining the defendants, whether by themselves or through their employees, agents, servants or anyone else acting at their behest from proceeding with the intended sale by public auction of L.R NO. NYAKI/KITHOKA/691 pending the hearing and determination of this suit.

42. Costs shall be in the cause.

43. It is so ordered.

**Delivered in open court at Meru this 7th day of December, 2016 in the presence of:-**

**C.A: Daniel/ James**

**Thangicia for Respondents**

**Miss Nyaga for the Applicants**

**P. M. NJOROGE**

**JUDGE**