



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**LAND AND ENVIRONMENT DIVISION**  
**ELC CASE NO.102 OF 2014**

**JAMES WAWERU.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....DEFENDANT**

**R U L I N G**

1. The Applicant via **Notice of Motion** dated **29.9.2014** seeks injunctive relief against Respondent to stop sale of **Ngong/Ngong/41216** pending hearing and determination of the suit. The application is based on the provisions of Order 51 Rule 1 Order 40 Rule 1, 2 and 4. Section 1A, 1B, 3A and 63(e) Civil Procedure Act.

2. The Application sets grounds (i) to (iv) on the face of the motion. It is supported by the Affidavit of James Waweru sworn on 29.9.2014. The Application is opposed by the Defendant via an affidavit sworn by Sabina Wanza a credit manager of the Defendant dated 16.10.2014. The Applicant further filed a supplementary Affidavit which he swore on 3.11.2014.

3. The Plaintiff case is that he gave Joyce Muthoni Maina his title Ngong/Ngong/41216 as a security for the loan she was being advanced by the Defendant in February 2013. The said debtor continued servicing loan up to 30.7.2014. That he came to learn that she was in arrears on about 10.9.2014 when he received a notification of sale of the property by the auctioneers for KShs.3,062,875/08. The sale was scheduled to take place on 22.10.2014. The Plaintiff after enquiry learned Joyce the debtor had left country for USA where she works and resides. He consulted the said debtor who promised to repay the debt by depositing directly into the account at the Defendant's bank.

4. The Applicant avers that he undertakes to be paying KShs.40,000/- per month to save his property in event the debtor fails to keep her promise on payment of the loan. In his further Affidavit he avers that the letters to the Debtor were not reaching him and learned of the intended sale when the auctioneer went to his residence. He pleads for a chance to redeem his property and thus seeks court to grant orders sought. To demonstrate seriousness, the Plaintiff has deposited KShs.110,000/- with the Defendant.

5. The property is the dwelling house of the Plaintiff together with his family. The Defendant response is that its right to realize security charged has crystallized owing to the default on the part of the borrowers as a result whereof the Plaintiff is liable in accordance with the terms of the guarantee. The Defendant complied fully with relevant statutory processes preceding the intended realization of the security. The Defendant avers that the default commenced in April, 2013. There have been intermittent payments

though not sufficient to regularize her account.

6. The Respondent further avers that the Plaintiff was notified of borrower's default vide letter of 28.10.2013 and statutory notice dated 31.3.2014. The Defendant further avers that the proposal of KShs.40,000/- per month by the Plaintiff is not acceptable to bank as it is far below the monthly repayment rate of KShs.119,280/- and in any event the rights under the guarantee have crystallized.

7. After going through the materials before the court, the court makes the following findings:

- It is not in dispute that the borrower is indebted to the Respondent in the sum of KShs.3,133,058.08/- as by 29.9.2014. The Plaintiff admits that fact.
- The compliance with statutory processes is not disputed by the Applicant save that he avers that he never got the letters and notices as they were being channeled via borrowers Box No.269 – 00515, and another address Box 65019, Nairobi which is not known to him.
- In the Plaint dated 29.9.2014, the Applicant seeks account to establish indebtedness of the borrower to enable him adjust and start repaying the loan to save his property.
- In the guarantee dated 22.2.2013 the Plaintiff bound himself to be liable to the upper limit of KShs.3 million in event of default of payment by the borrower.
- The default has occurred and the only ground the Applicant is raising is the issue of notice not reaching him as only borrower's address was used to channel letters. By the time the letters were posted, the borrower had relocated to USA.

8. Under paragraph 27 of the guarantee, the notices, demand etc are supposed to be served or sent/posted to guarantor. In all the affidavits sworn by the applicants, he indicates his address 269-00515. In the guarantee the address indicated to be his address is the same 269-00515 Nairobi. The notices and the letters by the bank/Respondent were channeled through the same address. The Respondent seems to have complied with the said clause 27 in the guarantee.

9. The offer for payment of the loan by the applicant is rejected by the bank on the ground that the proposed installments is far below the monthly repayment rates and in any event the amount proposed would not be able to regularize the account. The aforementioned analysis points to the absence of the prima facie case as set out in the conditions for grant of interim injunctions in **GIELLA –VS- CASSMAN BROWN CASE** and thus the court is in doubt as to the probability for success of the Plaintiff's case. However, on harm to be suffered and balance of convenience, the court finds that the Plaintiff will be one to suffer harm as the house will be sold and inconvenienced. If he has to be evicted together with his family.

10. However, he signed guarantee knowing that such eventuality would occur and he does not deny knowing the content of the guarantee. The court is alive to the following cited authorities:

- ***Msa HCC 60/2013 ZUMZUM INVESTMENT LTD. –VS- HABIB BANK LTD.***

- ***LABELLE INT. LTD & ANOTHER –VS- FIDELITY COMMERCIAL BANK & ANOTHER (2003) 2 EA 541.***

- ***ONYANGO –VS- BARCLAYS BANK LTD (2008) eKLR***

- ***MRAO LTD –VS- FIRST AMERICAN (2003) KLR 125***

- ***ANDREW WANJOHI –VS- EQUITY BUILDING SOCIETY & ANOTHER (2006) eKLR.***

- ***FRANCIS JK ICHATHA –VS- H.F.C. LTD Civil Appeal No.18/05.***

The court also is aware of its powers and discretion under Section 13(7) of ELC Act. The court is inclined to grant the applicant conditional injunction.

11. The court makes the following orders pending the hearing and determination of the suit:

1. The Applicant to regularize the account within a period of 3 months.
2. The Applicant to commence payment of the monthly installment of KShs.119,280/- with effect from May, 2015. Until payment in full of the amount guaranteed taking to account the amount already paid.
3. In default of the above conditions (1 and 2) the Respondent to sell the security.
4. The parties to comply with order 11 of Civil Procedure Rule 2010 to expedite hearing of the suit.
5. Costs to the Defendants/Respondents.

**Dated and Delivered at Machakos, this 6<sup>th</sup> day of March, 2015.**

**CHARLES KARIUKI**

**JUDGE**