**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT**

**CIVIL APPEAL CASE NO. 49 OF 2014**

**ALBERT M'MBOGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....1ST DEFENDANT/RESPONDENT**

**R. M. NGURU T/A NGURU AUCTIONEERS.....2ND DEFENDANT/RESPONDENT**

**R U L I N G**

This application is dated 2nd April, 2014 and seeks orders:-

1. ***THAT this application be certified as urgent and be heard Ex-parte in the first instance.***

2. ***THAT pending the hearing of this Application inter-partes this Honourable court be pleased to issue temporary orders of injunction restraining the 1st and 2nd Defendants, their agents, servants and/or employees or whomsoever acting on their behalf or instructions from selling, re-advertising for sale or in any other manner whatsoever from dealing with Land reference No. KIRANGANI/MUGIRIRWA/1064 and MUGUMONI/MWONGE/1209.***

3. ***THAT this Honourable court be pleased to issue orders of injunction restraining the 1st and 2nd Defendants, their agents, servants and/or employees or whomsoever acting on their behalf or instructions from selling, re-advertising for sale or in any other manner whatsoever from dealing with Land reference No. KARINGANI/MUGIRIRWA/1064 and MUGUMONI/MWONGE/1209 pending the hearing and determination of this suit.***

4. ***THAT the costs of this application be provided for.***

It is supported by the plaintiff's affidavit sworn on 2nd April, 2014 and the following grounds:

**(a)** ***THAT the 1st Defendant has engaged the 2nd Defendant to advertise and sell Land Reference No. KARINGANI/MUGIRIRWA/1064 and MUGOMONI/MWONGE/1209 by Public Auction.***

***(b) THAT the Plaintiff has not been issued with 90 days period Notice as required by the law.***

***(c) THAT the parties had settled the matter way back in 2007.***

***(d) THAT the1st defendant is now estopped from going against its arrangement with the plaintiff.***

***(e) THAT the 1st defendant's claim is time-bared.***

***(f) THAT the1st defendant's claim is bad in law and fraudulent.***

The plaintiff's case is that he had charged 4 parcels of land. He claims that along the way a dispute developed regarding penalties and interest. He avers that the parties sat down and agreed on what was payable. They agreed to sell 2 parcels of land and leave 2 parcels where the houses of the plaintiff and his sons were and that the matter rested there, although the plaintiff did not move to have the 2 remaining parcels of land discharged. However, 8 years later, the plaintiff got a notice from the 1st defendant informing him that the 2 parcels of land would be sold the next day.

The plaintiff has submitted that the statutory requirement that a notice for sale had to give the plaintiff 90 days has been ignored by the defendant. He has also submitted that the 1st defendant was claiming 4 times the borrowed money while this had been capped at 2 times the money lent. He submitted that he had a prima facie case, would suffer irreparable damage and that the balance of convenience tilted in his favour.

The 1st defendant/respondent opposed the plaintiff's application and said that the plaintiff/applicant had sued the 1st defendant vide Meru CMCC No. 290 of 2003 and that the suit had been dismissed/struck out in the year 2005. The plaintiff had challenged the dismissal vide Meru HCC Appeal No. 84 of 2003 but never took any further steps to prosecute the Appeal.

The respondent admits that 2 parcels of Land No. Karingani/Ndagani/3631 and 2320 were sold by private treaty, one in 2007 and the other in 2010. He has also denied that the Limitation of Actions Act did not apply in this matter. He has also asserted his right to well the suit lands to redeem the monies lent to the plaintiff.

He submits that there is no prima facie case and that the appellant does not stand to suffer irreparable loss. He also submits that the balance of convenience tilted in its favour as its right to exercise its power of sale had accrued.

I have carefully examined the pleadings, submissions and the authorities proffered by the parties. Having perused both the plaint and defence, I find that many of the issues canvassed by the parties can only be properly canvassed during the hearing and determination of the main suit.

In such a situation, I need not reinvent the wheel. The Court of Appeal in **Jimba Credit Corporation [1988] KLR1** opined as follows:

***"The correct approach in dealing with an application for interlocutory injunction is not to decide the issues of fact, but rather 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 facts on disputed affidavits."***

I do not wish to determine disputed issues which can only be determined after this suit has been heard. I find it necessary to preserve the suit properly pending the hearing and determination of the suit.

I, therefore, allow the application with costs to remain in the cause. The effect is that Prayer 3 in the application is confirmed.

I find it necessary to direct the parties to fully comply with orders 3, 7 and 11 of the Civil Procedure Rules within 60 days of this ruling with the plaintiff doing so within 30 days of this ruling and the defendants to do so within 30 days after service upon them of the plaintiff's compliance documents. Upon achievement of compliance, the plaintiff should set down the case for hearing within 45 days.

It is so ordered.

**Delivered in Open Court at Meru this 8th day of July, 2015 in the presence of :**

Cc. Daniel/Lilian

Parties not in Court

**P. M. NJOROGE**

**JUDGE**