



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

**AT MOMBASA**

**CIVIL CASE NO. 10 OF 2013**

**EDWARD MWONGERA MPUATHIA .....PLAINTIFF**

**VERSUS**

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

**T/A GARAM INVESTMENT ..... 2ND DEFENDANT**

**RULING**

By way of a Notice of Motion application dated the 21st day of February, 2013 and expressed to be brought under section 1A and 1B of the Civil Procedure Rules and order 40 rules 1(a) and (b); 4(1) and 8 of the Civil procedure Rules, the applicant seeks, an interlocutory injunction restraining the Respondents/Defendants from selling and or disposing of or alienating the applicants piece of land LR No. ABOTHUGUCHI/KATHERI/3881 by way of public auction scheduled for 22nd March, 2013 or otherwise in any way whatsoever interfering with the applicants user and enjoyment of the said parcel of land pending the hearing and determination of the suit.

The grounds are that sometimes in October, 2008 while the plaintiff was in the employment of the 1st Defendant/Respondent he obtained a loan of Ksh. 1.1 million which was secured by the bank by way of a charge over his property LR ABOTHUGUCHI/KATHERI/3881.

That the Applicant continued to service the loan till sometimes in September 2012 when done to economic hardships he defaulted.

Subsequently the 1st Defendant instructed the 2nd Defendant to realize the said security by way of a public auction but the bank had not served the Plaintiff/Applicant with the statutory notice or complied with the requirements of section 90 of the Land Act 2012 or supplied him with complete statement of accounts.

The application is supported by the affidavit of the plaintiff Edward Mwongera Mpuathia in which he disputes the amount due and owing and which is indicated by the Defendants as Ksh. 1, 233,840/= whereas the Principal amount borrowed was Ksh. 1, 100, 000/= and considering that he had made substantial repayments.

On 21st February, 2013 when the matter was heard *ex parte* interim interlocutory orders of stay were granted for 14 days only. On 7th March, 2013 the interim orders were extended. Same were also extended on 24th April, 2013 to 8th May, 2013. There were no further extensions since Counsel for the Applicant Mr. Oguk submits that the mistake to fix the matter for interpartes hearing in time should not

be visited on his client as it was a mistake of Counsel.

He also attributes the confusion on the shortage of Judges in the station. The main thrust of the application for orders of an interlocutory injunction restraining the Defendants from selling the plaintiffs charged property.

The applications are opposed. The grounds are to be found in the affidavits of Teresa Mwangi the 1st Defendants recovery officer.

In the present case the Applicant does not deny having defaulted in payments with effect from the month of September, 2012 which default he attributes to prevailing economic circumstances.

In his affidavit he alleges that his parents have paid a substantive amount towards the debt. That in total Ksh. 934, 676/= has been paid.

It is the contention by the applicant that he does not understand where the sum at Ksh. 1, 233, 840/= is derived from.

The doctrine enunciated in the celebrated case of **Giela Vs- Cassman Brown and Company 1973 E.A.C.A** is that in considering an application for interlocutory injunction the Court has to be satisfied that the applicant has a prima facie case with a probability of success.

Secondly, whether he can be compensated by way of damages and thirdly the Court should weigh the matter on a balance of convenience.

On the issue of a prima facie case. The applicant does not deny defaulting on the loan payments. He has not indicated of how he intends to make the repayments. He has indicated that his parents have made substantial payments towards offsetting the loan balance but no such records have been made available. The Applicant does not seem to have factored the issue of interest rates accrubale on the loan of Ksh. 1 million since 2008.

The applicant maintains that he was not served with a Statutory Notice. The Defendant/Respondent recovery officer in her affidavit has deponed that service was by way of registered post and annexed to the affidavit is a copy of the Statutory Notice dated 19th September, 2012 and a certificate of posting.

I find no prima facie case with a probability of success has been shown by the plaintiff.

Secondly, are damages adequate compensation? The 1st Defendant is a Bank. It has not been shown that it would not be in a possession to compensate the applicant in the event the suit is determined against it.

On the issue of balance of convenience the plaintiff was offered an opportunity to restructure the payments. He does not appear to have taken this offer seriously. He has also since exparte orders were granted to him on 21st February, 2013 have had enough time to address the issue of the loan repayment. I find the balance of convenience tilts in favour of the Defendants.

I find the application by way of Notice of motion dated 21st February, 2013 has no merit and its dismissed with costs to the Defendants.

Ruling delivered dated and signed in open Court this **5th** day of **February, 2014**.

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**M. MU YA**

**JUDGE**

**5TH FEBRUARY, 2014**

**In the presence of:-**

Learned Counsel for the Applicant Mr. Khisa holding brief Oguk for the Applicant.

Learned Counsel for the Defendants absent

Court clerk Mr. Musundi

**M. MUYA**

**JUDGE**

**Mr. Khisa:** We pray to be furnished with a copy of the ruling.

**Court:** Same to be furnished to the Plaintiff.

**M. MUYA**

**JUDGE**

**5TH FEBRUARY, 2014**

**4:30 P.M.**

**Mr. Khisa:** We have realized that we did not make an application for stay of execution. A formal application to be made and same to be served on the Defendants. **Mention 6th February, 2014.**

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**M. MUYA**

**JUDGE**

**5TH FEBRUARY, 2014**