



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL CASE NO.60 OF 2012**

**ISAAC KIPKOSKE ARAP KIGET.....PLAINTIFF**

**VERSUS**

**TRANS NATIONAL BANK LTD.....1ST DEFENDANT**

**ISAAC LANGAT T/A M/S**

**KOLATO AGENCIES.....2ND DEFENDANT**

**RULING**

This ruling is the outcome of two applications, one dated 20th July 2012 and the other is dated 20th February 2013. In both applications, **Isaac Kipkoske Arap Kiget**, the Plaintiff/Applicant, mainly prays for an order of interlocutory injunction to restrain **Transnational Bank Ltd** and **Isaac Langat T/A Kolato Agencies**, the 1st and 2nd Defendant/Respondents respectively from offering for sale, advertising, selling, auctioning, disposing, transferring, alienating or in anyway dealing with or interfering with Title **no.7288/10(L.R.no.6346/1)** Sotik Township hereinafter referred to as the suit land pending the hearing and determination of this suit. The Applicant also asked for costs. The first application was filed together with the suit but before it could be set down for hearing the 2nd Defendant issued a second notification of sale thereby prompting the Plaintiff to file the second application. Both applications were consolidated for hearing and determination. When the applications came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have them disposed of by way of written submissions.

I have considered the grounds set out on the face of the Motions and the facts deponed in the affidavits filed in support and against the Motions. I have further considered the written submissions. The substantive suit is expressed in the Plaint dated 20th July 2012. The Plaintiff states that he entered into an agreement with the Defendant whereof he guaranteed Ernest Kipngetich Koskey financial facilities in which the Plaintiff executed a charge dated 30th April, 2010 for Kshs.1,000,000 and a further charge dated 13th October, 2010 for Kshs.2,700,000 over the suit land. The Principles for granting orders of injunctions are well settled. They were restated in the case of **Giella =Vs= Cassman Brown & Co.Ltd (1973) E.A 358**. **First** an applicant must show that he has a *prima facie* case with a probability of success. **Secondly**, the applicant must also show that unless the order is given he might suffer irreparable loss and **thirdly**, that when the court is in doubt it will decide the application on a balance of convenience.

It is the submission of the Plaintiff that when the suit comes up for hearing, he will show that the Defendants issued defective notifications of sale by public auction while at the same time entering into a consent with the Plaintiff to pay the debt by way of installments. It is the Plaintiff's submission that the 1st Defendant is estopped from exercising its statutory power of sale because the Plaintiff has continued to repay the loan which amount the 1st Defendant has failed to disclose. The Plaintiff further argued that he will be able to show that the Defendants failed to specify the time and that the notice is less than three (3) months. It is further alleged that the second notification of sale was not served by the 1st Defendant and that the 2nd Defendant has not fully complied with the Auctioneers Rules of 1997, by failing to give the Plaintiff the requisite 45 days notice of redemption. The Defendants opposed the Plaintiff's arguments and urged this court to dismiss the motions as lacking in merit. It is stated that the Plaintiff was required to pay a monthly sum of Kshs.98,579 as per the charge documents but on 25/06/2012 the Plaintiff wrote to the 1st Defendant praying for accommodation further and proposed to pay Kshs.500,000 by 30th June 2012 and a further sum of Kshs.500,000 by 31st July 2012. The Plaintiff's request was accepted but he failed to honour the deal prompting the Defendants to issue a 45 days redemption notice. The Defendants further argued that the Plaintiff did not service the loan as agreed but at times attempted to make payments infrequently and often below the agreed amounts. The Defendants accused the Plaintiff to use this court as a means of not making good his obligations to the bank. I have carefully perused the statutory notices served upon the Plaintiff and I find the same not defective as alleged by the Plaintiff. It is trite law that when the Statutory Notice of sale has validly arisen that power remains and any subsequent registration to pay or make part payment or arrears resulting to the cancellation of an auction does not take away the 1st defendant's Statutory Power of sale once it has acquired. In my humble view, I find the Plaintiff having failed to show that he has a *prima facie* case with a probability of success.

The Plaintiff has also argued that unless he is given the orders he would suffer irreparable loss. It is stated that the Plaintiff is an old man who is sick and that the suit property comprises his matrimonial home which he may lose. With respect, I find no justification in this argument because when the Plaintiff pledged title to the suit land as a collateral, he was made aware of the resultant consequences of a default in payment. The Plaintiff acknowledged that fact by appending his signature to the charge documents to bind himself. He cannot now turn around and claim that the agreement he bound himself will render him a destitute. Courts are not there to rewrite agreements for the parties.

Since I am not in doubt, I will not consider the principle of convenience.

In the end, I find no merit in the two motions. They are both ordered dismissed with costs to the 1st Defendant.

**Dated, Signed and delivered in open court this 7th day of March 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of**

**Mr. Mutai holding brief for Mr. Matwere for the Plaintiff**

**Miss. Maritim for Defendants**