



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 655 OF 2013**

**NGECHA PROPRIETORS LIMITED .....PLAINTIFF/APPLICANT**

**VERSUS**

**ECOBANK (K) LIMITED .....DEFENDANT/RESPONDENT**

**RULING**

The matter coming up for determination is the Notice of Motion dated 31<sup>st</sup> May, 2013 brought by the Plaintiff herein *Ngecha Proprietors Ltd* seeking for these Orders against the Defendant.

- a. *That an injunction be and is hereby issued against the Defendant/Respondent restraining them whether by themselves, their agent and/or servant or whomsoever from transferring or registering the transfer of the suit property until the final determination of this suit.*
- b. *That an order be and is hereby issued to the Registrar of Titles forbidding the registration of any transfer or dealing in respect of the suit property to any person until the final determination of this suit.*
- c. *That costs of this application be provided for.*

The application was premised on the following grounds:

That the plaintiff and the Defendant reached an agreement whereby the Plaintiff was to liquidate agreed indebtedness to the Defendant of **Kshs.1600,000/=** in two instalments of **Kshs 900,000/=** and **Ksh.700,000/=** respectively. Further, that pursuant to the said agreement, the Plaintiff paid the Defendant **Ksh.900,000/=** on 17<sup>th</sup> May 2013 and promised to pay and was able and willing to pay the balance of **Kshs.700,000/=** on or before the 15<sup>th</sup> day of June, 2013;. However, notwithstanding the said agreement the Defendant instructed court brokers to advertise and they did advertised for sale by public auction the suit property on 20<sup>th</sup> May, 2013 and sold the suit property on 23<sup>rd</sup> May, 2013. It was alleged that the said Public Auction, of the suit property was clearly breach of the agreement that the Plaintiff and defendant had reached in settling the matter.

The application was also supported by the Affidavit of **Joseph Siro Mosioma**, who averred that he is the Managing Director of the Plaintiff and duly authorized by the Plaintiff to represent it in the proceedings as evidenced by annexure **JSMI**. He further averred that the Plaintiff holds account **No.CA-**

**06-10000127**, with the Defendant at the Westminster Branch, Nairobi, and Plaintiff deposited **Ksh.900,000/=** as part settlement of the deposit on 17<sup>th</sup> May, 2013 as per **JSM2**. It was his contention that Plaintiff had borrowed **Ksh.750,000/=** from Defendant in the year 2004 and Plaintiff account became withdrawn and thereafter Plaintiff deposited a Certificate of title of the suit property with the Defendant, upon which the Defendant registered a memorandum of charge as security for the overdraft. Thereafter, on 17<sup>th</sup> May 2013, the plaintiff deposited **Kshs.900,000/-** towards payment of the debt as evidenced by **JSM 4(a) & 4(b)**.

However, the Defendant advertised for sale the suit property on 20<sup>th</sup> May 2013 and sold it by public auction on 23<sup>rd</sup> May 2013. He further averred that after he complained to the management, he was promised that the sale would be cancelled but the same has not been done to date and thus this application.

The Defendant opposed the application and one **Mr.Protas Inziani Khasiani**, swore a replying affidavit in opposition to this Notice of Motion. He averred that the Plaintiff defaulted in repayment of the overdraft facilitates and as a result, the Defendant obtained leave from Court vide **HCCC No. 588 of 2012 ( OS)** to sell the suit property.

He further averred that the Plaintiff was served with the Statutory Notice dated 26<sup>th</sup> November, 2012 and the Plaintiff failed to repay the facility within the statutory period. Therefore upon expiry of the period, the Defendant through Valley Auctioneers served the Plaintiff with redemption Notice, the notification of sale and the advertisement Notice. The Respondent further contended that the Plaintiff was advised in the Statutory Notice that any settlement proposal made by them was to be received without prejudice to the Notice given and was not a waiver of the Notice. It was further alleged that the amount due was Kshs.1.6 million which Plaintiff was to pay in full and final settlement.

However, he deposited **Kshs.900,000/=** on 17<sup>th</sup> May, 2013 with proposal to pay a balance of **Kshs.700,000/=** on 15<sup>th</sup> June 2013. It was his contention that the said proposal was not accepted by the Defendant and the sale went on as advertised. He urged the court to dismiss the applicant's application.

The parties herein consented to canvass this application by way of written submissions. I have carefully considered the pleadings and annexures thereto and the written submissions and I make the following findings:-

There is no doubt the applicant herein was the registered owner of the property as at 17<sup>th</sup> may 2013 when Kshs 900,000/= was deposited in the account of the Defendant herein. There is also no doubt that the Plaintiff had obtained a loan facility from the Defendant in the year 2004. The Plaintiff account became overdraft and as at 17<sup>th</sup> may 2013, the amount due was **Kshs.1,600,000/=**.

There is also evidence that the Defendant had obtained leave to sell the suit property in November, 2012. However, the Plaintiff deposited **Kshs 900,000/=** on 17<sup>th</sup> May, 2013. That was a few days before the suit property was advertised for sale. Plaintiff has averred that he talked to the management of the Defendant who allowed the Plaintiff to settle the debt in two instalments. That allegation has however been disputed by the Defendant. The Defendant received the amount of **Kshs 900,000/=** before the sale was advertised. The Defendant did not inform the Plaintiff that it had rejected the proposal and/or returned the money paid to it by the Plaintiff. The Defendants action therefore smacked of bad faith.

The applicant has sought for injunctive orders which are equitable remedies which are granted at the discretion of the court. However, the said discretion must be examined judicially.

In considering whether or not to grant the Orders sought herein, I will be guided by the findings in the case of **Giella Vs Cassman Brown ( 1973) EA 358** which case established the conditions to be satisfied before an injunction order is issued. These principles are:-

- a. *The applicant must establish that he has a prima facie case with probability of success.*
- b. *The applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c. *When the court is in doubt, to decide the case on a balance of convenience.*

Has the applicant herein established any of the stated conditions to warrant the court issue him with the Orders sought?.

The applicant herein is the registered proprietor of the suit property. The applicant was indebted to the Defendant to the tune of **1,600,000/=** . The Plaintiff's property was advertised for sale despite the fact that Plaintiff had deposited **Kshs.900,000/=** just before the advertisement. The defendant received the money and did not inform the plaintiff that it had rejected its proposal. I find that the plaintiff herein has a prima facie case with probability of success.

On the second condition, the Plaintiff property has been sold,, though Plaintiff had already paid *Kshs 900,000/=* to the Defendant. If the suit property is registered in the name of the third party, the Plaintiff stands to suffer irreparable loss which cannot be compensated by an award of damages.

The Plaintiff herein had demonstrated good faith by making a deposit of **Ksh.900,000/=** towards settling a debt of

**Ksh. 1.600,000/-**. The balance of convenience tilts in favour of the applicant.

Having now considered the Notice of Motion dated 31<sup>st</sup> May 2013 in totality, the court finds it merited and I allow the same in terms of prayers No. 2 and 3. The applicant is also entitled to costs of this application.

It is so ordered.

Dated, Signed and delivered this **10<sup>th</sup>** day of **June, 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

Mr Ombete for the Plaintiffs/Applicants

Mr Mugisha holding brief for Bundotich for Defendant/Respondent

Kabiru: Court Clerk

**L. GACHERU**

**JUDGE**