

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 561 OF 1994

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

CATHERINE NJAMBI THAGICHU...1ST DEFENDANT

JOHN T. GAKIJNA.....2ND DEFENDANT

RULING

1. By an Application dated 21st October 2013, the Plaintiff (Applicant) sought two main prayers, that-

(a) the orders of injunction granted by the Honourable Court on 11th November 1998 be lifted,

(b) directions on the attachment of motor vehicle registration No. KAA 943E which was never accounted for by Gulf Auctioneers be given to enable parties move forward,

2. The application was supported by the affidavit of the Plaintiffs Nakuru Branch Bank Officer, Isaac Gachiri Gitau, sworn on 21st October 2013. It was heard *ex-parte* in the first instance on 4th December 2013, certified as urgent and listed for *inter-partes* hearing on 6th December 2013. The Applicant was directed by the court to serve the Defendants.

3. In the affidavit of Kamonjo Kiburi Counsel for the Plaintiff, sworn on 6th December, 2013, it is alleged that the Defendants' Firm of Advocates, M/s Karanja Mbugua & Company Advocates, was served with the application on 5th December 2013 which they accepted by stamping and signing on the front side.

4. I have considered the application and affidavit sworn in support thereof. The orders issued on 11th November 1998, which the Plaintiff seeks to be lifted in essence restrained it from selling or otherwise alienating the Defendants' parcels of land BAHATI/BAHATI BLOCK 1/1224, SOLAI/NDUNGIRI BLOCK 3/769 and 2/391 in satisfaction of the judgment for Kshs. 1,917,954.30/= entered in favour of the Plaintiff against the Defendants herein pending the hearing and determination of this suit.

5. The Plaintiff has nonetheless acknowledged that the said sum has already been satisfied partially through the sale of the Second Defendant's motor vehicle registration number KAA 943E. However, the proceeds of the sale were not accounted for by Gulf Auctioneers who sold the same on behalf of the Plaintiff. It therefore seeks directions of the court in this regard.

6. Taking into account the nature of the dispute between the parties and orders sought by the Plaintiff, it is imperative that the Defendants be given a chance to be heard before any orders can be issued on the way forward by the court. In the instant case, I am not satisfied on the evidence of the Return of Service by the Plaintiffs Counsel that the Defendants were served with the application or notified of the hearing date. Whereas Counsel for the Plaintiff deposed that they served the Defendants' Firm of Advocates who accepted service, stamped and signed on the front page of the application, the affidavit of service filed herein does not bear out this fact as the page so stamped and signed has not been annexed thereto.

7. For the court to proceed and grant the orders sought in the absence of the Defendants it must be satisfied that they were aware of the application but nonetheless failed to file their responses. Having entertained doubt, I decline to grant the orders sought herein and direct the Applicant to serve the Defendants' Counsel with the application dated 2JS1 October 2013 afresh. Hearing dates for the same shall be taken at the registry.

Dated, signed and delivered at Nakuru this 6th day of June, 2014

M J ANYARA EMUKULE

JUDGE