



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

**AT MOMBASA**

**CIVIL SUIT NO. 1 OF 2014**

**FREDRICK GITONGA MURUTHI ..... PLAINTIFF**

**-VERSUS-**

**EQUITY BANK LIMITED ..... DEFENDANT**

**RULING**

1. Before me is Notice of Motion dated 3<sup>rd</sup> January 2014. The Plaintiff/Applicant seeks injunction to restrain the Defendant from selling his charged property **LR No. 3336/SECTION VI/MAINLAND NORTH [C.R. 15825] (the property)**.
2. Plaintiff does not deny that he is indebted to the Defendant. He has pleaded in his Complaint that he obtained a loan from Defendant and offered the property as security. He admitted being unable, due to financial constraints, to keep up with his repayment of that loan. He pleaded that he tried to engage Defendant to renegotiate the terms of repayments but that the Defendant declined. The Defendant on its part denies that such approaches were made. Plaintiff admits having been served with 45 days Notification of Sale by the Auctioneer. The only prayer in Plaintiff's Complaint is for permanent injunction.
3. By his Notice of Motion Defendant seeks injunction supported by an affidavit which repeated his pleading. As rightly submitted by the Defendant, the Plaintiff by prayer No. 2 of Notice of Motion sought injunction "**pending the hearing and determination**" the Notice of Motion. Although Defendant submitted that Plaintiff is bound by his pleadings and was therefore not entitled to an interlocutory injunction pending the hearing of the suit I would invite Defendant to consider prayer No. 1 of that Notice of Motion. Granted, the prayer could have been drafted in more clearer terms but I believe what Plaintiff sought by that prayer was an injunction pending the hearing of this suit. That being my finding I do distinguish this case with the one relied upon by Defendant, namely **ASIA RESOURCES (K) EPZ LIMITED [2005]eKLR** where the Judge stated-

**"The Application for injunction is now spent as the application is already heard and determined. As the application was similarly worded in Southern Credit Banking Corp Ltd – Vs- Charles Wachira Ngundo HCCC No. 1780 of 2000, Onyango Otieno J had this to say – It will be seen from the above that the main application is seeking injunction to be granted only until this application is heard and determined inter partes. Clearly, this prayer which is the main prayer in this application was presupposing that another prayer possibly for injunction pending the finalization of the suit which was to be heard and determined inter partes was made in the application. No such prayer for injunction pending the determination of this suit**

was brought .... I do not think I can draft a prayer for a party and sit to decide on that prayer. I can only decide on prayers before me. There is no prayer before me seeking injunction pending the determination of this suit. The prayer before me is injunction pending interpartes hearing of the application. The application has been heard interpartes and I have nothing more before me to decide upon. As I cannot make decisions on a matter or prayer not before me this application has by its very wording ceased to exist, I do dismiss it with costs to the Respondent.”

4. Defendant relied on the Replying Affidavit of AUGUSTUS A. A. CHEKULWA of 30<sup>th</sup> January 2014. The deponent stated that Plaintiff applied a loan of Kshs. 8 million from Defendant by his application dated 5<sup>th</sup> December 2011. The loan after it was approved was secured by the property. That Plaintiff defaulted in his repayment which led Defendant to make demand by letter dated 14<sup>th</sup> January 2013. That letter gave Plaintiff three months to pay Kshs. 8,417,301.60 to Defendant. Defendant sent another letter dated 14<sup>th</sup> June 2013. Again that letter gave Plaintiff three months notice to pay Kshs. 8,702,495.95. The second Statutory Notice stated that the Notice was by virtue of Transfer of Property Act 1882 (**now repealed**) and Section 90 of The Land Act 2012. It is the Defendant view that Plaintiff’s Notice of Motion is not merited and that Plaintiff is using the Court to escape or delay his obligation under the charge. Although Defendant stated that it was also relying on another affidavit annexing a Valuation of September 2013, I did not sight such affidavit on the Court file.
5. My decision on Plaintiff’s Notice of Motion will be based on whether or not the Defendant complied with the provisions of the Land Act (**the Act**) when it set in Motion its realization of its security.
6. The first stage when a chargee decides to realize its security is as set out in Section 90 of The Act. Section 90 provides that when there is default for one month the chargee may serve a Notice which Notice must adequately inform chargor of matters set out in Section 90(2) (a) to (e). It is important to reproduce that Subsection as follows-  
  
**“(2) The Notice required by subsection (1) shall adequately inform the recipient of the following matters-**
  - a. **the nature and extent of the default by the chargor;**
  - b. **if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**
  - c. **if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**
  - d. **the consequences that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this Section in accordance with the procedures provided for in this sub-part; and**
  - e. **the right of the chargor in respect of certain remedies to apply to the Court for relief against those remedies.”**
7. That Section clearly lays a burden for the chargee to inform the chargor about his default and the remedies available to him. Section 90(2) (b), for example, requires chargee to inform chargor the amount that needs to be paid to rectify the default. What I understand from that requirement is that chargee should inform chargor what aspect of the loan represents the default and which amount should be paid within three months. The chargee should also in such Notice inform

chargor consequences of failure to rectify that default. Looking at Defendant's letter of 14<sup>th</sup> January 2013 falls far short of the requirements of Section 90(2).

8. Further Section 90(3) provides chargee may, amongst other remedies, sell the charged property two months after the Notice.
9. Section 96 of the Act requires before chargee exercises Power of Sale to give a Notice to chargor of intent to sell and chargee cannot complete any sale within 40 days of that Notice. Such Notice has to be served on holder of the land, holder's spouse and any person with a right to enter or use the land amongst others. Defendants second Notice to Plaintiff dated 14<sup>th</sup> June 2013 again falls short of the requirements of Section 96.
10. What then should this Court order in view of the above finding. The just order to make is to grant a limited injunction to enable Defendant, if the default continue to issue Notice that comply with the Law. In reaching that decision I am guided by the case **NATIONAL BANK OF KENYA LIMITED –Vs- SHIMMERS PLAZA LIMITED (2009)eKLR** where Court of Appeal stated-

**“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”**

11. In conclusion the following are the orders of the Court-

- a. **An injunction is hereby granted restraining the Defendant, its servants or agents from selling in realization of its security of L.R. No. 3336/SECTION VI/MAINLAND NORTH [C.R. 15825] until such time the Defendant shall issue the Plaintiff with Statutory Notices which Notices shall be in compliance with the Law.**
- b. **Once such a Notice which complies with the law is issued and takes effect the injunction in (a) above shall be vacated.**
- c. **The Costs of Notice of Motion dated 3<sup>rd</sup> January 2014 shall be in the cause.**

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**