



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

**CIVIL CASE NO. 270 OF 2009**

**EUNICE KAVINDU KIOKO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**SAMMY KIOKO MBONDO .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED...DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Applicant/Plaintiff filed **Motion** dated **18<sup>th</sup> September 2014** seeking the substantive prayer to the effect that the Defendant/Respondent together with its agents and or servants be restrained from selling by way of Public Auction or in whatever manner disposing off the Plaintiff's property known as **L.R. No. Machakos/Kiandani/3209** until hearing and determination of the same Motion dated **18<sup>th</sup> September 2014**.
2. The motion is anchored on **Order 40 (1), (2) and 3** of the **Civil Procedure Rules** and **Section 1A, 1B and 3A** of the **Civil Procedure Act**.
3. The motion is based on the ground on the face of the Motion and it is supported by the Affidavit of **Eunice Kavindu Kioko** sworn on **18<sup>th</sup> September 2014**.
4. The motion is opposed by the Defendant/Respondent via Affidavit of **Francis Komen** sworn on **21<sup>st</sup> November 2014**.
5. The Applicant's case captured in her Affidavit is that, despite the order restraining the Respondent from auctioning her property, the Respondent has threatened to auction the same. The Applicant avers that on **15<sup>th</sup> September 2014** the auctioneer gave her notification of sale dated **30<sup>th</sup> July 2014**. She avers that she was never served with notice and only came to know about it on **15<sup>th</sup> September 2014** when it was given to her. She avers that the orders of injunction of **23<sup>rd</sup> July 2012** have not been vacated. She states that the matter was for hearing on **30<sup>th</sup> May 2013** but it was taken out by the court and thereafter tried to fix case twice but the court diary was closed.
6. Though not in the deponed evidence, in the ground on the motion, the Applicants state that the Defendant failed to supply bank statements as ordered by the court.
7. The Respondent in **Francis Komen** affidavit is to the effect that the orders of **23<sup>rd</sup> July 2012** were of a span varying from **23<sup>rd</sup> July 2012** to **31<sup>st</sup> December 2013**. The Applicant was to get the matter heard before the lapse of the year 2013 and only one date of **30<sup>th</sup> May 2013** was taken by the Plaintiff and no other date thereafter was fixed for hearing.
8. The Respondent avers that the orders of **23<sup>rd</sup> July 2012** lapsed on **31<sup>st</sup> December 2013** and there was nothing to be vacated. He further avers that, there is nothing on record to prove that Civil diary was closed as alleged and in any event, if that was the case, the Applicant should have

- sought extension of the orders before they lapsed.
9. Further, the Respondent avers that the application as pleaded is incapable of being granted as it has no substantive orders sought and in any case it is res judicata.
  10. The Respondent prays for the dismissal of the application to enable the Respondent to realise its security.
  11. After listening to the submissions and perusing the Affidavits, I find the following issues emerge:
    - i. Whether the orders of 23<sup>rd</sup> July 2012 subsist after the lapse of year 2013 without suit being heard?
    - ii. Whether application sought is capable of being granted?
    - iii. What is the order as to costs?

12. The orders of **23<sup>rd</sup> July 2012** were given for a span ending in the **year 2013**. Though the court did not specifically state, the same ought to have been in tandem with **Order 40 Rule 6 Civil Procedure Rules 2010** which is to the effect that:

*“Where suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”*

In our case the orders were issued on **23<sup>rd</sup> July 2012** and thus under the rules they would have lapsed on **22<sup>nd</sup> July 2013** but for the orders of the Judge directing otherwise, their span extended to **31<sup>st</sup> December 2013**. Then the next question is that:

Do orders lapse automatically upon lapse of their live span or the court has to formally discharge or order them to lapse?

13. The provisions of **Order 40 rule 6 Civil Procedure Rule 2010** is in peremptory shape **“SHALL LAPSE”**. The rules do not specify or stipulate that the court has to issue a formal order to declare them to be lapsed. If the rules were intended to say so, nothing could have been easier than to add words to that effect. It is this court’s finding that the reason the court was given discretion to extend the same, is because they automatically lapse in absence of any extension.
14. The Applicants fixed the suit once for hearing and to date no other hearing date of the suit was fixed. If the diary was closed as alleged in 2013 (though no evidence is adduced) nothing could have been easier than to move the court to extend the orders prior to **31<sup>st</sup> December 2013**.
15. The Applicants have waited until **14<sup>th</sup> November 2014** after being served with notification on **15<sup>th</sup> September 2014** of sale to file application to stop sale. Equity does not aid indolent is a golden maxim of Equity. Why did the Applicants wait until they were woken from their slumber by the Respondent?
16. The Applicants allege that they were not supplied with statement of account as ordered by the court. The order was granted on **23<sup>rd</sup> July 2013**. No effort to demand or even move court to compel the Respondent to comply with Order of **23<sup>rd</sup> July 2012**.
17. The application filed seeks orders pending interparte hearing. The presumption is that orders of **23<sup>rd</sup> July 2012** were alive or that exparte orders were to be granted!
18. Then the question is, then what after interparte hearing? The court signalled the defect from the moment matter was lodged but the Applicant’s counsel did not bother to rectify the apparent defect on the same. The court cannot suo moto amend pleadings for the party nor invoke **Article 159 (2) d** of the **Constitution** and **Order 3A Civil Procedure Act** to favour a party in the circumstances.
19. The Applicants are not even alleging that they have paid over **Ksh.2 million** debt outstanding secured by the suit property. The same issue is totally ignored raising doubt whether the Applicants have even a prima facie case with probability of success in terms of the principles of grant of interim injunction vide case of **Cassman Giella versus Brown Authority**.
20. The upshot of the foregoing, the court finds no merit in the application and makes the following orders:

1. Application dated 18<sup>th</sup> September 2014 is hereby dismissed.
2. The Respondent is awarded costs of the application.

**DATED, SIGNED and DELIVERED at MACHAKOS this 1<sup>ST</sup> day of DECEMBER , 2014.**

**CHARLES KARIUKI**

**JUDGE**