



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 396 of 2007**

JESSE MUTHIGA ALBERT ..... APPLICANT

VERSUS

EQUITY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT  
SHEFLO AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT

**RULING**

1. This is the 2<sup>nd</sup> application made by the plaintiff in this suit seeking for orders restraining in particular the 1<sup>st</sup> respondent from selling by public auction or by private treaty his property known as **NGONG NGONG/29839** pending the hearing and determination of this application. On 24<sup>th</sup> April 2009 **Okwengu J** determined a similar application in her ruling the Judge allowed the application for injunction but not in mandatory terms as the 1<sup>st</sup> respondent was ordered to serve an appropriate statutory notice in accordance with the provisions of section 74 of the Registered Land Act.
2. The applicant has now filed a chamber summons based on the grounds that the 2<sup>nd</sup> respondent has advertised the suit property for sale without serving him with the mandatory statutory notice as ordered by the court. This application is supported by the affidavit of the plaintiff which basically reiterates the facts that he was not served with the statutory notice as ordered by the court. Moreover the plaintiff has made substantial payments to the loan account amounting to Ksh.700,000/- and has made a reasonable proposal to pay the balance by monthly installments of Ksh35,000/-.
3. This application was opposed by the respondents. Counsel relied on the Replying affidavit sworn by **Ezekiah Mwanzia** on 2<sup>nd</sup> November 2009. The 1<sup>st</sup> respondent annexed to the affidavit a copy of the statutory notice dated 11<sup>th</sup> May 2009 which was addressed to the plaintiff and was sent through P.O. Box 15657 Mbagathi, Nairobi. The letter was sent by registered mail. Further to the statutory notice, the applicant was served with the notice pursuant to the Auctioneers Rules on 14<sup>th</sup> August 2009 and the property was advertised for sale. The respondents used the same address which was used in the charge document. Counsel urged the court to find the application was merely brought on the eleventh hour to wood wink the court into granting an order on the grounds

that that the applicant had been paying the loan but the applicant failed to show the court any prove of payments.

4. The principal element to determine in this application is whether the

Applicant has established a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for damages would arise and if in doubt the court would determine the matter on a balance of probability. The Court of Appeal has explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

5. The only issue raised in this application is the issue of service of the statutory notice as provided for under section 74 of the Registered Land Act. The plaintiff came to court in a previous application and the court directed he be served with a statutory notice. It is not disputed the plaintiff was granted banking facilities. He executed a charge and a second charge giving the suit premises as security for the loan. In default the 1<sup>st</sup> defendant is entitled to recover the outstanding loan through the sale of the charged property. The address used by the plaintiff in the charge document is the same address that the 1<sup>st</sup> applicant used to send the notice that is P.O. Box 15657 Mbagathi, Nairobi.

6. I am not satisfied that the applicant did not receive the notice because it was sent. The fact that the plaintiff has offered to settle the outstanding loan account by monthly installments is not a ground for granting an order of injunction. I find the applicant’s case does not meet the threshold of granting an order of injunction. In the result the application is dismissed as lacking in merit with costs to the defendants.

The sum of Ksh.150,000/- held as security by court should be released to the 1<sup>st</sup> defendant to be applied towards the loan account and the costs of stopping the sale.

RULING READ AND SIGNED ON 1<sup>ST</sup> MARCH 2010 AT NAIROBI.

**M.K. KOOME  
JUDGE**