



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 53 OF 2015**

**GEM CM CONSTRUCTION LIMITED.....1<sup>ST</sup> APPLICANT**

**ERIC MUGAMBI KINYUA.....2<sup>ND</sup> APPLICANT**

**JUSTUS KINYUA NKANATA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**BANK OF AFRICA LIMITED.....RESPONDENT**

**R U L I N G**

1. The suit herein was filed contemporaneously with the application on 13:07:15. The application is brought under order “**40 Rule 1 and 2, Order 51 Rules 1 and 2 of the Civil Procedure Rules 2010, Section 78(1), Section 85 (3), Section 97(2), and Section 103, 104, 105, and 106 of the land Act Section 1A and 1B Section 51 Rules 1 and 2 of the Civil Procedure Act and all enabling provisions of the law**”.
2. The applicants are seeking to be granted orders of temporary injunction “**restraining the Defendants whether by itself its agents, servants and/or employees from selling or offering for sale, transferring charging leasing, pledging, or in any other way alienating or disposing of the property known as Title Number Ngushishi /Settlement Scheme/442 and Title Number Ngushishi/Settlement Scheme/468 – Meru**”.
3. The grounds in support of the application are stated on the face of the application. There is also a Supporting Affidavit of one Martin Kinoti, (the director of 1<sup>st</sup> Plaintiff) sworn on behalf of the Plaintiffs.
4. The application is opposed via the affidavit of one Felix Muhati who is the recovery officer of the defendant.
5. The Application has remained pending for a period of about 2 ½ years. Interim Orders of injunction were granted on 14: 07:15 and were re-issued on 21:07:15. Thereafter, the orders would be extended now and then up to 06:04:16.
6. The application was only revived by another application of 27:3:17 filed by Defendant.
7. The file is already aged and some proceedings are torn, however, parties allege that directions were given for the application filed on 13:07:15 to be canvassed by way of Written Submission. Such Submissions have been duly filed.

8. I have carefully considered the pleadings and the Submission advanced herein.

9. The brief history of the case is that 1<sup>st</sup> Plaintiff took a loan from Defendant where by some of the securities were two parcels of land respectively owned by 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. It is those parcels of land that were set to be sold and the applicants are seeking orders to stop the said sale. Martin Kinoti has also stated that he is the director of the 1<sup>st</sup> Defendant.

10. There are pertinent facts that appear not to be disputed.

11. The first one is that 1<sup>st</sup> Plaintiff was advanced banking facilities which facilities were restructured now and then. The letters of offer have been availed as annexures by the Defendant. Applicants too have availed the letters of 03:06:13 and 24:07:13. The amount offered on 03:06:13 was Sh. 8,266,203 consisting of an overdraft, contract finance and a term loan.

12. The security for the loan consisted interalia of:-

i. A first legal charge over property title No Ngushishi Settlement Scheme/442 owned by Eric Mugambi who is the second Plaintiff.

ii. A first legal charge over property title No. Ngushishi/Settlement/468 owned by Justus Kinyua Nkanata who is the 3<sup>rd</sup> Plaintiff.

13. It is quite apparent that there was default. This fact is captured in paragraph 7 of the Plaint as well as in documents on record where applicants are seeking more time to pay the loan.

14. What appears to be before me are two issues:-

i. Whether the alleged valuation conducted on 30:07:14 was in compliance with the law.

ii. Whether the properties No. Ngushishi/ Settlement/ 442 and 468(hereinafter referred to as the suit properties) are matrimonial property.

15. In an application for an interlocutory injunction, the onus is on the applicants to satisfy the Court that the injunction should be granted. The test for granting an interlocutory injunction are as set out in the case of ***Giella Cassman Brown & Co. (1973)EA*** where the principles therein are as follows:-

16. Firstly, the applicant must show that he has a prima facie case with a reasonable probability of succeeding upon a trial.

17. Secondly that in the event that injunction is refused, he stands to suffer loss on damage of such nature and magnitude that damages will not be an adequate compensation

18. Finally, that the mischief likely to result to applicant should the injunction be refused outweighs that which result to the opposite party should it be granted.

19. On the issue of Valuation, Applicant contend that the valuation conducted by Zenith management valuers on 01:08:14 was contrary to requirements of the law, Section 97(2) 2 of the land Act.

20. Apparently all the other steps had been taken by the Defendant including the Notice under Section 90(2) and 96 of the land Act.

21. The Respondent admits that they caused the Valuation Report to be availed. However, they aver that all they wanted was to ascertain the open market value of the property and the same was not part of the process initiated by the issuance of the statutory Notices. Respondent avers that they intended to cause a Valuation of the property to be carried out after the expiry of the Notice to sell, as that is when the right to

sell could have accrued.

22. The terms of Reference in the Valuation Report by Zenith Valuers dated 01:08:14 states as follows:-

**“duly instructed by the managers, debt recovery unit, Bank of Africa Limited,.....we inspected the above referenced property with a view to advising as its current open market value for forced sale purposes only..”**

23. These terms of reference are hence in tandem with the arguments advanced by the Respondent. No evidence has been advanced by the applicants to indicate that this is the report which was to be used in compliance with section 97 (2) of the land Act. The application hence cannot succeed on the ground that there was no proper valuation.

24. On the issue that the Suitland is matrimonial property, I make reference to the case of *Mrao Limited vs First African Bank of Kenya Limited Civil Appeal No. 39 of 20002* where the court held that:-

**“a prima facie case .... Is a case which on the material presented to the court, a tribunal property directing itself will conclude that there exists a right which has apparently been infringed.....**

25. The first point of call is **“the material presented before the Court”**. An injunction is a discretionary remedy granted on the basis of evidence and sound legal principle.

26. What evidence have the applicants presented to show that the suit land is matrimonial property?

27. The Valuation Report by Gimco Ltd availed by the applicant basically indicated that the Suitland is used for horticultural farming and the land is under irrigation. The produce from these farms are marketed out of the county through Finlays Limited. This evidence tends to show that the land is used for commercial farming.

28. No other evidence has been availed on how the Suitland is utilized. I am therefore unable to determine that the suit land is matrimonial property in so far as the material presented before me is concerned. Therefore, the application cannot succeed on the ground that the suit land is matrimonial property.

29. There are also two more aspects of the case that I have interrogated.

30. The first one is on the issue of admission of the debt and the commitment made by the applicants to clear the debt. In paragraph 22 of the Plaint it is stated that:-

**“The Plaintiff is willing to settle the outstanding loan facility balance due to the Respondent within a period of SIX MONTHS within which time the applicant will have paid the full amount due to the Respondent in full”**

31. This statement is again captured in Paragraph 17 in the witness statements of all the 3 Plaintiffs. It is also captured in paragraph 16 in the grounds in support of the application and in paragraph 21 in the Supporting Affidavit of Martin Kinoti. The Applicants have had not six months but two and a half years. There is not the slightest evidence to show that applicants complied with their own request to pay all outstanding debts within 6 months from 10:07:15 or at all.

32. The applicants have therefore not approached the Court in good faith since this issue was not captured even in their Submissions filed on 18:03:16.

33. Secondly, the Court has considered the duration this application has been in court and the conduct of the applicants in the prosecution of this application. The application has been pending in court for the last 2 and a half years. Before I handled this file in early April, 2017, the records indicate that the matter was last in court on 21:03:16. The applicants made no move to have the application finalized. It is the

Respondent who took steps and filed the application of 27:03:17 beseeching this Court to give directions on the final determination of the present application (of 13:07:15).

34. An injunction being a discretionary remedy is anchored on equity. Equity aids the vigilant and not the indolent.

35. Order 40 rule (6) of Civil Procedure Rules provides that:-

**“ where a 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”**

36. This is a situation whereby the applicants obtained orders of injunction on 14:07:15 which orders appear to have remained in force all this time. Granting an injunction at this stage of the suit would not be in tandem with the aforementioned provisions of the law.

37. All in all, I find that the application has not met the criteria set forth in *Giella vs Cassman Brown*.

38. I proceed to make the following orders:-

**1) The application of 27:03:17 is hereby marked as spent with no orders as to costs.**

**2) The application filed on 13:07:15 is hereby dismissed with costs to Respondent.**

**3) Any Interim Orders of Injunction granted in this matter are hereby discharged.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 21<sup>ST</sup> FEBRUARY, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet

No appearance for plaintiffs

Gichuki H/B for Owiti for Defendant present

**HON. L. N. MBUGUA**

**ELC JUDGE**