



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CIVIL CASE NO 315 OF 2017**

**1. GOLDEN SERVICES ORGANIZATION**

**2. KANG'ALIKYA MALUKI**

**3. IBRAHIM MURITHI MAGIRI**

**4. PAUL JESSEE MUNGATIA.....PLAINTIFFS**

**VERSUS**

**SIDIAN BANK LIMITED.....DEFENDANT**

**RULING**

1. For determination is the Notice of Motion dated 10<sup>th</sup> September 2018 brought under the provisions of Order 40 of the Civil Procedure and Section 1A, 3, 3A and 63(e) of the Civil Procedure Act. The Orders sought are:

**1. Spent**

**2. Spent**

**3. Spent**

**4. That pending the hearing and determination of this suit an order of injunction does issue restraining the Defendant, their servants, auctioneers, licensees, agents or any other persons acting on their behalf from howsoever advertng for sale, selling, acting, alienating, transferring, disposing, dispossessing or in any way interfering with right of ownership and proprietorship to LR. NO.MOMBASA/SHANZU SQUATTER/1464, TITLE NUMBER GATURI/GITHIMU/5556,, TITLE NUMBER KILIFI/KIJIPWA/369 & CR 21195 /1(LR, NO. MAINLAND NORTH/111/1512).**

**5. THAT this Honourable court be pleased to make such other orders as it may deem just and expedient in this suit.**

**6. That the defendants do bear the costs of this suit.**

2. The application is supported by the grounds on the face of it inter alia that the defendant has never issued the 90 days statutory notice and or the 40 days redemption notice. Secondly that the defendant has never carried out a valuation on the suit property as required by law.

3. The Application is further supported by the affidavit of Trifosa Ncororo Jesse, she deposed at paragraph 5 that no form of notice has been served or received by any of the plaintiffs on **PLOT NO.SHANZU SQUATTER/1464, GATURI/GITHIMU/5556 OR KILIFI/KIJIPWA/369**. She deposed further the defendant had not complied with the Pre-trial directions as directed on 14<sup>th</sup> June 2018 to enable the suit proceed for hearing on 20<sup>th</sup> November 2018. Instead the defendant orchestrated an illegal sale of one of the charged properties being **MN/111/1512** set for 26<sup>th</sup> October 2018 so as to scuttle the hearing. She urged the court to grant the orders sought.

4. The Application is opposed via the replying affidavit of Agnes Wanja Mwara sworn on 4<sup>th</sup> October 2018. Ms. Agnes began by referring to the orders given by this court on 7<sup>th</sup> February 2018 granting injunction on condition that fresh statutory notices in respect of the charged properties were properly served on the Plaintiffs. That following this ruling, the bank issued fresh notices dated 8<sup>th</sup> February 2018. The Respondent went further to depose the steps they took in serving the notices as outlined the requisite statutory notices and carried out a valuation of the suit property. Ms. Agnes deposes further that the plaintiffs suspicions are unreasonable and without factual basis. That it is the Plaintiffs who have failed to meet their obligations of paying the monthly repayments due and owing to the bank as further directed by

the ruling delivered on 7<sup>th</sup> February 2018 as shown in the customer's statement of accounts annexed as "SBL - 2". She urged the court to dismiss the application.

5. The parties rendered oral submissions in support of the motion. In summary Mr. Kirimi submitted that no proper notice was served as the certificate of posting dated 19<sup>th</sup> March 2018 did not indicate where the letter was posted. Secondly that the 40 days' notice issued in May 2018 was issued prematurely. Mr. Kirimi submitted further that the letter to the valuer was not acknowledged as received and no valuation report has been attached. That the plaintiffs have a claim of over Kshs.140 million against the defendant. That they have shown a prima facie case and the balance of convenience tilts in favour of the orders being granted.

6. Mr. Mogambi in response submitted that the replying affidavit contains the statutory notices issued. That the email sent the soft copy of the letter on 12<sup>th</sup> February 2018 while the hard copy was posted on 19<sup>th</sup> March 2018. That the sale has not been effected outside the time limit set by the Act. That the bank already instructed a valuer which valuation can be ready any time before the sale is done. He continued that it is apparent the applicants are in arrears and urged the court to dismiss the application. That the bank can always re-issue a fresh 40 days' notice.

7. The principle for granting the equitable relief of injunction is well set out in the case of **Giella vs Cassman Brown**. Have the plaintiffs demonstrated a prima facie case? The plaintiffs have not denied owning the defendant monies from the advances made to them. They have not denied falling into arrears. Their complaint is that the bank intends to sell without following the procedure set out in the law i.e. serving the 90 days' notice; 40 days redemption notice and undertaking a valuation of the property before the sale.

8. The defendant on its part stated that for the 90 day notice, an advance soft copy was sent to the 1<sup>st</sup> plaintiff's email. Receipt of such email has not been denied. Further that the hard copy of the letter was sent on 19<sup>th</sup> March 2018 and copy of postage is stamped by Postal Corporation of Kenya. In the list of recipients of the letters dispatched includes the plaintiffs to an address of P. O. Box 16505 – 80100 Mombasa provided. Again the plaintiffs have not denied that this is their postal address. The 40 days' notice was also issued on 18<sup>th</sup> May 2018 and posted on 23<sup>rd</sup> May 2018 through the same address. The copy of the 45 redemption notice issued by the auctioneer is indicated to have been affixed at the gate/door of the charged property.

9. The Plaintiffs agree that if the letter was posted on 19<sup>th</sup> March 2018 then the 90 day period would expire on 19<sup>th</sup> June 2018. The applicants are unhappy that the 40 days' notice was issued before the 19<sup>th</sup> June 2018. However, given that the auctioneer's notice was served on 9<sup>th</sup> August 2018, I do not see the issuance of the early notice as invalidating the whole process. This is because from 20<sup>th</sup> June to 30<sup>th</sup> July 2018, the 40 days period is taken care of. I am therefore satisfied that the defendant complied with the procedural requirements of the law before advertising the property for sale that was to take place on 26<sup>th</sup> October 2018. Thus the reason and/or ground advanced by the applicant to grant the injunction fails.

10. On balance of convenience the applicant submitted it tilts in their favour. I have considered both sides' argument and I am persuaded that the balance of convenience does not tilt in the applicants favour. I take this position based on the deposition made by the respondent that since February 2018 when the applicants obtained injunctive reliefs they have not made a single payment and the debt as at the time of arguing the application had risen to Kshs.28,772,082. Since the injunctive order of 7<sup>th</sup> February 2018 did not prevent the applicants from undertaking their obligations or repaying the loan, I find the applicant are seeking equitable remedies with unclean hands. It would have been good to attempt setting over a portion of the debt by paying the due monthly installments.

11. Lastly on irreparable loss, the applicants can always be compensated by an award of damages if their suit succeeds since the value of the property is discernible. In conclusion, I reach a finding that the application falls below the threshold for qualification of grant of interlocutory injunction. The same is dismissed for lacking in merit with costs to the defendant/respondent.

**Ruling delivered, dated and signed at Mombasa this 14<sup>th</sup> day of December 2018**

**A. OMOLLO**

**JUDGE**