



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

**ELC CASE NO. 354 OF 2015 (O.S)**

**IN THE MATTER OF LEGAL CHARGE AGAINST LAND PARCEL**  
**MBETI/KIAMURINGA/600**

**BENSON MURITHI NYAGAH.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA INDUSTRIAL ESTATE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MWANIKI NJUE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This is in respect to the plaintiff's Chamber Summons filed herein on 4th March 2016 seeking the following orders:

**1. Spent**

**2. That this Honourable Court be pleased to issue a temporary injunction against the 1st defendant restraining him from offering or advertising the property for sale by public auction being MBETI/KIAMURINGA/600 till the final determination and conclusion of this suit.**

**3. That this temporary injunction be registered with the Land Registrar Mbeere District with an order to instruct him to register the same against the subject parcel of land.**

**4. Costs of this application be provided for.**

The application is supported by plaintiff's affidavit and based on the grounds set out therein. It is the plaintiff's case that the 1st defendant has offered for sale the subject parcel of land which was to take place on **23RD FEBRUARY 2016** yet the suit is pending determination and he will therefore suffer irreparable damage.

In opposing the application, the 1st defendant filed grounds of opposition and also a replying affidavit sworn by **EDNA ADALA** its Manager Legal Services. The gist of the 1st defendant's case is that the land parcel No. MBETI/KIAMURINGA/600 (herein the suit land) was in fact sold by public auction on **23RD FEBRUARY 2016** to **FRANCIS KIVUTI MUTAKA**. Further, the 1st defendant's Manager Legal Services has deponed that it had entered into a loan agreement for the grant of Ksh. 500,000 with the 2nd defendant to be secured by a charge over the suit land registered in the names of the plaintiff who acted as a guarantor and executed a deed of guarantee (annexures **EA 1** and **EA 2**). That a charge was registered over the suit land (annexure **EA 3**) but the 2nd defendant defaulted in repaying the loan

causing the 1st defendant to issue a statutory notice of sale under **Sections 90 and 96 of the Land Act** (annexture **EA 4 (a) and (b)**). The suit land was then valued and the 1st defendant instructed an Auctioneer to recover the outstanding sum of Ksh, 415,189.13) (annexture **EA 6**). That the Auctioneer issued a Notification of Sale and Redemption Notice and as the outstanding amount remained un-paid, the sale took place on **23RD FEBRUARY 2016** outside Kenya Commercial Bank Embu town at 11.00 a.m. when the suit land was sold to one **FRANCIS KIVUTI MUTAKA** who was the highest bidder and a certificate of sale was issued (annexture **EA 9**). That the plaintiff moved to Court on **4TH MARCH 2016** vide a Certificate of Urgency which was after the sale had been concluded. That the plaintiff has failed to enjoin the purchaser which is contrary to the provisions of **Section 99 of the Land Act** and further, there is no suit filed by the plaintiff and this application is an abuse of the Court process and should therefore be dismissed.

Submissions have been filed both by the firm of **EDDIE NJIRU & CO. Advocates** for the plaintiff and **CHEGE KIBATHI & CO. Advocates** for the 1st defendant.

I have considered the application, the rival affidavits and grounds of opposition as well as the annextures thereto.

I must first determine whether there is infact a suit filed herein because counsel for the 1st defendant has submitted that there is no suit filed and therefore the orders sought are not available.

The application is premised under **Order 40 Rule 1 (a) (b) and 2 (1) and (2) of the Civil Procedure Rules** which, as far as is necessary for this ruling, read as follows:

***“Where in any suit it is proved by affidavit or otherwise –***

***a. that any property in dispute in a suit is in danger of being wasted, damages, or alienated by any party to the suit, or wrongfully sold in execution of a decree;***

***or “***

The plaintiff did not move this Court by way of a plaint but rather, he filed in this Court on **1ST DECEMBER 2015** an Originating Summons citing **Order 37 Rule 4, Sections 1A, 3A and 63 e of the Civil Procedure Act** and **Sections 103, 104 and 106 of the Land Act** seeking a determination of various questions with respect to the charge over the suit land. That Chambers Summons was drawn and filed by the firm of **EDDIE NJIRU & CO. ADVOCATES**. Somewhere along the way, the plaintiff appears to have abandoned his advocates and on **4TH MARCH 2016** he filed a notice to act in person and also filed this application. That explains why it is titled as a Chamber Summons and why the 2nd defendant, who appears to support his case, has filed a replying affidavit rather than one in support of this application. The plaintiff’s decision to act in person, as I will demonstrate shortly, may have caused him the predicament in which he now finds himself. I am satisfied however that there is a proper suit before me because an Originating Summons is one of the ways through which a suit can be instituted.

Having said so, this suit was filed on **1ST DECEMBER 2015**. By that time, and the 1st defendant does not dispute it, the Statutory Notice of Sale under **Section 96 of the Land Act** dated **17TH MARCH 2015** had long been served upon both the plaintiff as guarantor and the 2nd defendant. It is not therefore clear why it took the plaintiff upto **4TH MARCH 2016** to file this application. What is clear however is that by 4th March 2016, the orders being sought by the plaintiff had long been over-taken by events as the suit land had already been sold to one **FRANCIS KIVUTI MUTAKA** on **23RD FEBRUARY 2016** who paid a deposit of 25% of the purchase price of Ksh. 1,500,000 at the fall of the hammer at a public auction and a certificate of sale was issued. By **26TH FEBRUARY 2016**, the said **FRANCIS KIVUTI MUTAKA** had paid the outstanding balance. Therefore, the public auction having been concluded long before the plaintiff moved to this Court, there is nothing for this Court to injunct. As was held by the Court of Appeal in **ESSO KENYA LTD VS MARK MAKWATA OKIYA C.A CIVIL APPEAL No. 69 of 1991,**

***“An injunction cannot issue to restrain an event that has taken place”***

Further, it is now clear that the suit land has now been sold to one **FRANCIS KIVUTI MUTAKA** who is not a party in this suit. A Court cannot make an order that would affect the rights of a third party who has not been enjoined in the suit.

Even if the plaintiff had moved the Court in good time, it is now unanimous that an injunction will not issue restraining the mortgagee from exercising his power of sale simply because the amount due is in dispute or because the mortgagor objects to the manner in which the sale is being done. He will be restrained however if the mortgagor pays the amount due or if it is shown that the mortgagee is acting in a fraudulent or improper manner contrary to the terms of the mortgage deed. It is clear from the record herein that the plaintiff as guarantor of the 2nd defendant executed a deed of guarantee in favour of the 1st defendant which registered a charge over the suit land. It is also clear that following a default in repaying the loan, the necessary notices under ***Sections 90 and 96 of the Land Act*** were issued, the suit land valued and a notification of sale was served. There was therefore full compliance with the law. All that has not been rebutted and in his affidavit in support of this application, the plaintiff simply refers to the threat by the 1st defendant to sell his property, that there are triable issues and that he will suffer irreparable damage if the sale proceeds. His counsel has submitted that the plaintiff was not privy to the charge. That cannot be true when the deed guarantee (annexture **EA 2**) shows that it was signed by the plaintiff in the presence of an advocate. It is further submitted that no spousal consent was obtained in terms of ***Section 93 (3) (a) of the Land Registration Act*** and that the plaintiff is infact married to one **SUHURA WAVETI**. There was no affidavit from the said spouse and neither was she even mentioned in the plaintiff’s own affidavit. Counsel cannot adduce evidence from the bar including submitting that the amount claimed is ***“highly exaggerated”***. Clearly, there would have been no basis upon which an injunction would have been granted even if the plaintiff had moved to Court in good time.

Ultimately therefore, the plaintiff’s Chamber Summons filed herein on 4th March 2016 lacks merit. It is dismissed with costs to the 1st defendant.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**

**Ruling dated, delivered and signed in open Court this 1<sup>st</sup> day of February 2017**

Ms Muthike for Mr. Juma for 1<sup>st</sup> Defendant/Applicant present

No appearance for the other parties.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**