



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**  
**KAJIADO LAW COURTS**  
**CIVIL SUIT NO 513 OF 2017**

**CAROLINE KERUBO ONGAGA.....PLAINTIFF/ APPLICANT**

**VERSUS**

**JOSEPH MUNGAI GIKONYO t/a**

**GARAM INVESTMENTS AUCTIONEERS.....1<sup>ST</sup>DEFENDANT/RESPONDENT**

**ECO BANK KENYA LIMITED.....2<sup>ND</sup> DEFENDANT /RESPONDENT**

**RULING**

The Plaintiff/Applicant by way of a Notice of Motion dated 8th March, 2017 and filed on 14th March 2017 brought under Order 40 Rule 1 of the CPR, Section 3, 3A, 63(c) of the Civil Procedure Act, Sections 90 and 96 of the Land Act is seeking for the following orders:

1) Spent

2) **THAT:** This Honorable Court do grant a stay of the intended sale purported to emanate from the unlawful and or unprocedural Auction conducted on 28th February 2017, payment of purchase price, transfer and any or any other dealings on LR. No. NGONG/NGONG/54730 by the Respondents, their agents and or servants pending the hearing and determination of this Application.

3) **THAT:** This Honorable Court do grant a stay of the intended sale purported to emanate from the unlawful and or unprocedural Auction conducted on 28th February 2017, payment of purchase price, transfer and any or any other dealings on LR. No. NGONG/NGONG/54730 by the Respondents, their agents and or servants pending the hearing and determination of this suit herein.

4) **THAT:** This Honorable Court be pleased to issue temporary injunction restraining the Defendants herein, their servants, employees and or agents from taking any action whatsoever, and exercising and or invoking their rights whether accrued or otherwise under the charge dated 27th June 2013 pending the hearing and determination of this suit.

The application is based on the following grounds:

- a) The applicant herein charged her land parcel No. NGONG/NGONG/54730 to the 2nd Defendant herein for the sum of Kshs. 3,900,000
- b) The 2nd Defendant failed to grant the Applicant's request to look for a purchaser who would buy the subject parcel of land for a reasonable amount of money and went ahead to instruct auctioneer
- c) The 1st and 2nd Defendant have failed to give statutorily required notice to the Applicant herein thus rendering the actions by the 1st Defendant null and void
- d) The Applicant is likely to be dispossessed of her property without the proper legal channels having been followed by the Defendants.
- e) The Applicant is a single mother with young children and she is likely to suffer irreparably if she is thrown out of her property with her young children.

The Notice of Motion is further supported by the affidavit of CAROLINE KERUBO ONGAGA sworn on 8th March, 2017. The deponent admitted being the registered owner of land parcel number NGONG/NGONG/54730 and that she charged the said property to the 2nd Defendant to secure a loan of Kshs. 3,900,000. She states that she continued servicing the loan even after losing her job and was looking for a buyer for the suit land. She avers that she learnt of the auction through an acquaintance and denies having been issued with a statutorily required period before advertising the sale of her property.

The application was served upon the defendants who did not enter any appearance. There is an affidavit of service as proof of service. The Plaintiff/Applicant proceeded unopposed and was canvassed by way of oral submission.

The Plaintiff/Applicant filed the application on 8th March, 2017 while the purported auction of the charged property had been conducted on 28th February, 2017. The Plaintiff/Applicant is not disputing having charged her property or owing the 2nd Defendant monies. The Plaintiff/ Applicant even admits in paragraph 5 of her affidavit that she had been looking for a buyer for the suit property. She further admits in paragraph 18 of her affidavit that she knew of a bidder who had attended the auction.

The conditions for the grant of an interlocutory injunctive relief was settled in the case of Giella Vs. Casman Brown & Co. Ltd Court of Appeal at Kampala Civil Appeal No. 51 of 1972 where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience.

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial. The Plaintiff/Applicant has filed the case 10 days after the purported auction. The Plaintiff/Applicant does not deny owing monies to the second defendant and neither does she deny charging the suit property. She also admits she had been looking for a buyer to enable her sell her property. The Plaintiff/Applicant is only challenging the fact that the auction was not procedurally done and also denies receipt of statutory notices from the 2nd Defendant before the intended auction took place. The Plaintiff/Applicant well aware that the auction was scheduled never sought for an injunction to stop the sale before the date of auction. From the supporting affidavit, it appears that the Plaintiff/ Applicant had been in discussion with the 2nd defendant on how to sell the suit property. Further from the other pleadings filed, the Plaintiff/Applicant especially in her written statement, admits defaulting on repayment from February 2016 and getting a notification of sale where she offered to look for a purchaser for the suit land. Her only contention is that the purported auction was not procedural and that the 2nd Defendant never gave her time to get a buyer on her own.

The upshot of the matter is that the Plaintiff/Applicant filed this application as an afterthought. She sought an injunction from the court 10 days later after the auction claiming the auction was unprocedural. She was further well aware that the suit property had already been auctioned at Kshs. 4.875 million as per

information in her annexure 'CKO3b'. The issues the Plaintiff/Applicant is raising cannot be fully effectuated upon at this interlocutory stage and the court must refrain from purporting to do so. Inconsistent untested affidavit evidence is simply not suitable for a full and proper adjudication of all the issues in dispute in the suit and should be taken through a full trial.

The Plaintiff/Applicant has admitted owing monies to the 2nd Defendant and defaulting in the loan repayment since February 2016. In **Nairobi ELC 184 of 2013 (Stanley Kirui -vs- Westlands Pride Limited)** Gacheru J held as follows;

*"... it is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable"*

The Plaintiff has failed to establish a prima facie case that would warrant granting of the orders of injunction.

The notice of motion dated 8th March, 2017 is dismissed. The interim orders sought by the Plaintiff are declined. Those are the orders of the court.

**DATED AND DELIVERED AT KAJIADO THIS 16<sup>th</sup> DAY OF MARCH 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION:**

Court Clerk- Mr. Mpoye

Mr.Ogutu holding brief for Anyoka for Plaintiff.

No attendance for Defendant/Respondent.

Caroline Kerubo Onganga – Plaintiff