



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

**AT KITALE**

**LAND CASE NO. 86 OF 2017**

**MARY NYAMBURA MAINA.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**VIEWLINE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff filed an application dated 8/5/2017 seeking an order of temporary injunction to restrain the defendants or their agents from selling by way of public auction or private treaty or in any other manner interfering with the plaintiff's ownership, possession and/or interest in all that land known as **Kitale Municipality Block 15/Koitogos/879**.
2. The sworn affidavit of the plaintiff was filed in support of the application. It is dated 8/5/2017. The plaintiff's case is that the 1<sup>st</sup> defendant's statutory power of sale has been crystallized, yet it has authorized the 2<sup>nd</sup> defendant to advertise the plaintiff's land mentioned hereinabove for sale.
3. The plaintiff denies having ever been notified by the defendants of any default in servicing the loan with the 1<sup>st</sup> defendant as required by law; also the 2<sup>nd</sup> defendant has never served the plaintiff with the proclamation and/or notification for sale and/or redemption notice as required by law.
4. The plaintiff avers that she has not been given an opportunity to regularize her account and she has already made plans to regularize the said account as she is already disposing of some of her assets for the purpose.
5. According to the plaintiff, she purchased the land by way of a mortgage facility of **Kshs.6,300,000/=** which she was advanced by the 1<sup>st</sup> defendant on **7/7/2014** and which she had been servicing until **March, 2016** when she was unable to raise the monthly installment due to a theft of **Kshs.7,000,000/=** that crippled her business. She avers that she explained her predicament to the 1<sup>st</sup> defendant and requested for more time to make arrangements to repay the loan arrears by selling some of her properties.
6. The application is opposed by both respondents. The replying affidavit of **Doris Shianda Rono** sworn on **12/7/2017** has been filed. Affidavit alleges that from the onset of the disbursement of the mortgage facility, the applicant has never complied with the terms and conditions therein; that the applicant's facility fell into huge arrears, for failure to deposit the monthly installments as agreed; that letters have been written to the applicant reminding her of the arrears and she has acknowledged being in arrears; that

the applicant was informed vide a letter dated 16/5/2016 that her account had been forwarded to the Debt Recovery Unit which Unit also notified her vide a letter dated 18/5/2016 of her outstanding balance of **Kshs.460,212.52** giving her **14 days** from 18/5/2015 to clear the arrears, failure to which the entire outstanding mortgage debt then standing at **Kshs.6,509,941.92** would be demanded back; that upon failure to do so the 1<sup>st</sup> defendant issued a statutory notice dated 22/6/2016 to the applicant; that a second statutory notice dated 15/11/2016 was issued, when the total outstanding debt was **Kshs.7,046,621.02/=** that it was only after these failed to elicit any positive response that would have regularized the account that the 1<sup>st</sup> respondent gave authority to the 2<sup>nd</sup> respondent to realize the security by way of public auction.

7. According to the 1<sup>st</sup> defendant the 2<sup>nd</sup> defendant served the applicant with the **45 days** redemption notice and a notification of sale both dated **2/3/2017**, with the latter document setting the auction dated as **11/5/2017**. These two documents are alleged to have been served upon the applicant by one **Isaac Gitonga Ringera** on 2/3/2017, who has sworn an affidavit of service dated 6/3/2017.

8. By virtue of the foregoing, the 1<sup>st</sup> defendant avers that the statutory power of sale had already crystallized before the suit property was advertised for sale by public auction.

9. The principles governing whether an applicant may be granted an order of a temporary injunction was set in the celebrated case of **Giella –vs- Cassman Brown 1973 EA 358**. The applicant seeking a temporary injunction has to establish that she has a *prima facie* case with probability of success and that she would suffer irreparable damage. If the court is in doubt, it will rule on a balance of convenience.

10. The main issue that the suit seeks to raise is whether the 1<sup>st</sup> defendant's statutory power of sale had crystallized before the advertisement for sale. Evidence on that issue would need to be led at the hearing of the main suit. For now what we have are allegations from both sides.

11. The issue of service is a central issue in the determination of the instant application. The plaintiff alleges she was not served, while the 1<sup>st</sup> defendant asserts that she was served. In order to resolve an issue of service in some cases when it is disputed, cross examination of a process server who alleged to have served may occasionally be ordered by court. At this interlocutory stage of these proceedings, this court can only examine what each party says about the issue of service in their affidavits and annexures in order to determine whether the applicant's application passes the test laid down in the **Giella –vs- Cassman Brown** case.

12. It is noted that it is not shown by what means the letters dated 26/1/2015 [**Exhibit DSR3**] 16/2/2015 [**Exhibit DSR4 (a)**] 20/1/2015 [**Exhibit DSR 4(b)**] 19/5/2015 [**Exhibit 4(a)**] 15/1/2016 (**Exhibit DSR 4(d)**) and 23/2/2016 [**Exhibit 4(e)**] were delivered to the plaintiff. Besides, she is not alleged to have personally acknowledged receipt thereof.

13. However, the most crucial documents in this matter are the statutory notice under **Section 90(1) (2) (3) of the Land Act**. The copy of list of posted items is annexed as **Exhibit 8(b)**. It shows that some document was sent to one **Mary N. Maina**. The address used is 1740-30200, Kitale. Also annexed and similarly labeled **Exhibit DSR 8(b)** is a certificate of posting. It merely states that the 1<sup>st</sup> defendant posted 64 articles on the material date.

14. The copy of statutory notice to sell under **Section 92 (2) of the Land Act** dated 15/11/2016 is annexed as **DSR 9(a)**. There is a list of posted items marked as **DSR 9(b)**. The certificate of posting attached as **DSR 9(b)** only shows that some 13 articles were sent. The 45 days redemption notice shows on its face that it was not received by the plaintiff but by another person not party to this suit. So is the notification of sale marked **DSR 11(b)**. The affidavit of service sworn by Isaac Gitonga Ringera does not assert that it is the plaintiff who was served with these 2 documents. Exhibit No. **DSR 12 (b)** merely shows that Mary Nyambura Maina was the addressee of some parcel. In my view it is not possible to state with certainty at this interlocutory stage that service of the three documents was effected upon the plaintiff.

15. All the above should be viewed against this background: that the plaintiff has acknowledged indebtedness and arrears owed to the 1<sup>st</sup> defendant and undertaken to pay. She has even proposed more lenient arrangements citing a misfortune that befell her.

16. The conditions set in the case of *Giellavs Cassman Brown & Co. Ltd [1973] EA 358 at page 360* are that where the court is in doubt it will determine the application on a balance of convenience. If the sale goes through and it later turns out to be true at the hearing that service was not effected as required by law the plaintiff may suffer great loss.

17. I therefore find that on a balance of convenience, it is safer to preserve the subject matter of the suit through issuance of a temporary order of injunction. I therefore issue an order of temporary injunction restraining the defendants or their agents from selling or in any way dealing or interfering with the suit property pending the hearing and determination of the suit.

18. I therefore grant the plaintiff's application dated 8<sup>th</sup> May 2017 in terms of **prayer 3** thereof. The costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this **28<sup>th</sup>** day of **September, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**28/09/2017**

Before – Mwangi Njoroge Judge

Court Assistant – Picoty

Mr. Teti for Applicant

Mr. Bisonga for the Respondent

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**28/09/2017**