



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 32 OF 2016

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS UNDER ARTICLE 40(1), 48,

50(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 90, 96(2), 97 OF THE LAND ACT

AND

IN THE MATTER OF RULE 11 (B)(x) OF THE AUCTIONEERS RULES

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

M'ANYIRI HANNINGTON GITARI.....1ST PETITIONER

JAMES M'ITONGA MIRIANGA.....2ND PETITIONER

VERSUS

YETU SACCO LTD.....1ST RESPONDENT

I.G. RINGERA T/A VIEWLINE AUCTIONEERS.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 11th November, 2016 seeks the following orders:-

- a) That the matter be certified urgent.
- b) That this application be heard exparte in the 1st instance.
- c) That a temporary injunction be issued against the 1st and 2nd Respondent pending hearing and determination of this application, restraining them from selling land parcel No. Nkuene/Nkumari/2986, **OR**
- d) In the event that there was a sale conservatory orders do issue pending the hearing and determination of this application.
- e) That an inhibition do issue in land No. Nkuene/Nkumari/2986 for sale based on the change to the 1st respondent the pending hearing and determination of this application.
- f) That costs be in the cause.

2. The application is based on the following grounds:

- a) An auctioneers notice expired on 25th October, 2016.
- b) The 1st respondent has moved to sell land No. Nkuene/Nkumaru/ 2986.
- c) That the notice issued was defective.
- d) There was no forced valuation done on LR. No. Nkuene/Nkumaru/2986 to ascertain the forced sale valuation before the intended sale.
- e) That the charge was taken on the security of customary land and the beneficiaries never consulted.
- f) That the plaintiff and the surety are likely to suffer irreparable damage.

3. There is a Supporting Affidavit of the M'Anyiri Hannington Gitari and James M'Itonga M'rianga. The gist of the matter is that 1st Petitioner took a loan from 1st Respondent on 06.04.14 where by the security was land Parcel No. Nkuene/Nkumari/2986 owned by 2nd Petitioner. The 1st Petitioner has been unable to service the loan.

The second petitioner avers that he has children who are entitled to that land and they never gave their comment.

On 13.12.16, directions were given for the application to be dealt with by way of Written Submissions.

I have weighed all the issues raised herein and I have considered the Submissions along with the authorities.

The orders sought for are equitable in nature. He who come, to equity must come with clear hands. It has emerged that a similar suit was instituted, the same being Meru ELC No. 205/2016 and was struck out. On 13.12.16, Judge Njoroge commented on this issue as follows:-

"I do find that if it is true that this matter via another application had been heard by Hon. Olao Judge at Kerugoya, I would find myself unable to sit as an appellate Court in active matter

already heard by a Judge of horizontal and concordant Jurisdiction”.

Against this background, it was incumbent upon the Applicant to come clear on the circumstances against which the suit was dismissed. As the matter stands, even the order dismissing the suit has not been annexed.

I therefore in agreement with Respondents Submissions that this Court has not been approached properly.

I am therefore unable to consider the merits of the application which I proceed to dismiss with costs to Respondents.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MERU THIS 4TH DAY OF OCTOBER, 2017 IN THE PRESENCE OF:

CA: Janet

Hon. L.N. MBUGUA

ELC JUDGE