



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

**ELC SUIT NO. 701 OF 2017**

**JOSEPH MUIRU KABIRU ..... PLAINTIFF**

**VERSUS**

**JAMII BORA BANK LIMITED ..... 1ST DEFENDANT**

**JOSEPH NYUTU KAMAU T/A PHUMTA AUCTIONEERS.....2ND DEFENDANT**

**CHIEF REGISTRAR OF TITLES ..... 3RD DEFENDANT**

**RULING**

1. The suit herein stems from a legal charge created against Land Reference Number 209/13815 on 19/7/2013 in favour of the 1st defendant to secure monies advanced to the plaintiff by the 1st defendant. The suit property belongs to the plaintiff.

2. On 10/11/2017 the plaintiff brought a Notice of Motion dated 8/11/2017 praying for an order restraining the defendants against auctioning, selling, alienating, charging, mortgaging, or transferring the suit property. The application is supported by the plaintiff's affidavit sworn on 8/11/2017. This ruling relates to that application.

3. The gravamen of the plaintiff's grievance against the defendants is two-fold; first, that the 1st defendant seeks to exercise the chargee's statutory power of sale without complying with the mandatory provisions of **Section 90 (2) (b) and (c) of the Land Act** which require a chargee to serve a three months notice before invoking the remedy of sale. The second limb of the plaintiff's grievance is that the 2nd defendant, as an agent of the 1st defendant, intends to auction the suit property without complying with the mandatory provisions of **Rule 15 (d) of the Auctioneers Rules** which require that before an auctioneer sells charged property in exercise of the chargee's statutory power of sale, he must serve a 45 days' redemption notice upon the chargor.

4. The 1st defendant opposes the application through an affidavit sworn on 17/11/2017 by its Legal Manager, James Murage. In summary, Mr Murage contends that all the mandatory statutory notices were served and that the debt secured by the charge remains unpaid to the tune of KShs.2,682,806.06 as at 23/10/2017. The application was argued before me on Friday 17/11/2017.

**Determination**

5. I have carefully considered the plaintiff's application in the context of the principles governing grant of interlocutory injunctive orders as spelt out in **GIELLA V CASSMAN BROWN & CO. LTD, (1973) EA 358**. First, the applicant is required to establish a *prima facie* case with a probability of success. Second, he is expected to demonstrate that if the injunctive order is not granted, he will stand to suffer irreparable

damage that cannot be sufficiently indemnified through an award of damages. Lastly, if the court is in doubt, the application should be decided on a balance of convenience.

6. A *prima facie* case was defined in the case of **MRAO LIMITED V FIRST AMERICAN BANK LIMITED & 2 OTHERS, (2003) KLR 125** as:

***“... a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.”***

7. The first limb of the plaintiff’s grievance is that the three months statutory notice required under **Section 90 (2) of the Land Act** has not been served. To support this contention, the plaintiff relied on a letter dated 24/8/2017 from M/s Phutma Auctioneers and said that this letter failed to satisfy the timelines set out in **Section 90 (2) of the Land Act**.

8. The second limb of the plaintiff’s grievance is that the auctioneer has not issued the mandatory notice under **Rule 15 of the Auctioneers Rules**. In this regard, the plaintiff referred the court to the notice dated 24/8/2017 addressed to the Nairobi County Commissioner. He submitted that the notice was directed to the wrong destination.

9. In response, the 1st defendant has presented to the court copy of statutory notice dated 5/4/2017 issued by the 1st defendant’s advocates, M/s S. I. Mwaura & Company Advocates, addressed to the plaintiff and to Esther Gathoni Muiru. Second, the 1st defendant has also presented copies of certificates of posting in respect of the two mails, both issued on 5/4/2017. Third, the 1st defendant has presented copy of a second statutory notice dated 8/7/2017 addressed to the plaintiff and to Esther Gathoni Muiru by M/s S. I. Mwaura & Company Advocates. Fourth, the 1<sup>st</sup> defendant has presented a notice dated 24/8/2017 from M/s Phtuma Auctioneers to the plaintiff, with a copy to the Nairobi County Commissioner. Also presented are copies of two certificates of posting in respect of the notices sent by the auctioneer on 24/8/2017 to the plaintiff and to the Nairobi County Commissioner. Further, the 1st defendant has presented a copy of the bank statement in respect of the loan account showing that as at 23/10/2017, the unpaid balance on the loan account was KShs.2,682,806.06. Lastly, the 1st defendant has displayed copies of newspaper notice of the intended auction.

10. In our prevailing jurisprudence, an interlocutory injunction is a discretionary relief granted on the basis of evidence and well settled legal principles spelt out in **GIELLA V CASSMAN BROWN & CO. LTD, (1973) EA 358**. In the present application, the plaintiff has faulted the 1st defendant on the basis of the auctioneer’s notice dated 24/8/2017. On its part, the 1st defendant has explained that this particular notice was the auctioneer’s notice issued under **Rule 15 of the Auctioneers Rules**. Secondly, the 1st defendant has exhibited copies of certificates indicating that all the mandatory statutory notices were issued by the 1st defendant. The 1<sup>st</sup> defendant has also presented copies of certificates of posting showing that the auctioneer’s notice was sent to the plaintiff and copied to the Nairobi County Commissioner.

11. Taking the foregoing into account, and having carefully examined the materials presented by both the plaintiff and the 1st defendant at this point, the court is not convinced that the plaintiff has made out a *prima facie* case with a probability of success to warrant the grant of an injunctive order against the defendants. From the materials, it does appear there was compliance with the requirements of **Section 90 of the Land Act** and **Rule 15 of the Auctioneers Rules**. Because what is before me is an interlocutory application, I would refrain from commenting further on the merits of the plaintiff’s case against the defendants. Suffice to say, at this point, the plaintiff has failed to establish a *prima facie* case with a probability of success.

12. The upshot of this Ruling is that the plaintiff’s Notice of Motion Application dated 8/11/2017 fails for lack of merit and the same is dismissed. The 1st defendant shall have costs of the application.

**Dated, signed and delivered at Nairobi on this 20th day of November, 2017.**

**B M EBOSO**

**JUDGE**

**In the presence of:**

Otieno Advocate for the Plaintiff

.....Advocates for the Defendants

.....Court Assistant