



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**COMMERCIAL CASE NO. 08 OF 2018**

**PAUL BARNABAS CHELIMO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**COMMERCIAL BANK OF AFRICA (K) LTD.....DEFENDANT/APPLICANT**

**RULING**

1. By a notice of motion dated 20<sup>th</sup> June, 2017 brought under Section 1A, 1B, 3, 3A and 80 of the Civil Procedure Act, Order 45 Rules 1, 2, 1 and 5; Order 51 Rule 1 of the Civil Procedure Rules all enabling provisions of the law; the defendant/applicant prays for orders that: -

*i. ....spent*

*ii. This Honourable Court's Orders issued on 17<sup>th</sup> May, 2018 and all consequential orders emanating therefrom be hereby set aside, reviewed and/or varied*

*iii. Costs be provided for*

2. The application is based on the grounds that:

- 1) This Honourable Court erred in evaluating the value of the certificate of postage
- 2) There was and still is a certificate of postage in the court proceedings evidencing service of the 90 days Statutory Notice
- 3) The said 90 days Statutory Notice was sent to the respondent's last known address
- 4) The applicant has not received any information from the plaintiff of any change of address
- 5) There is an apparent error on the face of the record with regard to Order 2

3. The application is supported by an affidavit sworn on 20<sup>th</sup> June, 2018 by Eva Muchui, advocate who the applicant who reiterates the grounds on the face of the application. She further avers that the respondent was served with 90 days Statutory Notice. Attached to the affidavit and marked EWM 2 which were outlined in defendant's replying affidavit dated 21.12.17 and filed on 27.12.17 in respect of the plaintiff's application dated 14.12.17. a and b are copies of a 90 days Statutory Notice dated 1.8.17 and a certificate of Postage dated 16<sup>th</sup> August 2017.

4. In response to that application, the respondent on 12.7.18 filed a replying affidavit denying that he was ever served with the 90 days Statutory Notice either personally or by way of registered post.

**Analysis and Determination**

5. I have considered the notice of motion 20<sup>th</sup> June, 2017 in the light of the affidavits on record and annexures thereto and submissions by the defendant/applicant. The issues in question are: -

**i. Whether the court overlooked service of the 90 days Statutory notice Whether the court erred in evaluating the value of the certificate of postage and whether there was, and still is a certificate of postage in the court proceedings evidencing service of**

**the 90 days Statutory Notice Whether there is an error on Order 2 issued on 17<sup>th</sup> May, 2018**

**ii. Whether there is an error on Order 2 issued on 17<sup>th</sup> May, 2018**

6. In my impugned ruling dated 17<sup>th</sup> May, 2017; I set out the background of this case which I will once again partly repeat for avoidance of doubt.

7. The plaintiff/respondent's first application for injunction was dated 31.5.17. In response to that notice of motion, the applicant/defendant through an affidavit sworn on 12.6.17 by Dr. Jacob Ogola, the Head of Remedial Management Unit conceded at paragraph 16 that the plaintiff/respondent had not been served with a 90 days Statutory notice as provided for by section 90 of the Land Act No. 6 of 2012.

8. Subsequently, Hon. Kibunja J. on 28.2.18, dismissed the plaintiff/respondent's application dated 31.5.17.

9. On 17.4.18, plaintiff/respondent filed the notice of motion dated 16.4.18 seeking similar orders to the notices of motion dated 31.5.17 and two other applications dated 6.11.17 and 14.12.17. In response to that application, defendant on 10.5.18 filed a replying affidavit sworn on 9.3.18 by Dr. Jacob Ogola, the Head of Remedial Management Unit. At paragraph 18 of that affidavit, the deponent did not allude to the service of the 90 days Statutory Notice or attach it. The deponent however attached a 40 days' Notice dated 27.11.17 marked J2 which referred a statutory power of sale with no mention of when and on whom it was served.

10. The court record shows that in arguing the application dated 16.4.18 which is the subject of the impugned ruling, applicant's counsel submitted a 90 days Statutory Notice dated 1.8.17 had been served by post on the plaintiff/respondent and personally on the plaintiff/respondent, his spouse and another member of his family and that each of them had acknowledged receipt.

11. In my ruling dated 17<sup>th</sup> May, 2018, I found that that the defendant/applicant had not tendered any evidence of service to show when, how, and on whom the 90 days Statutory Notice was served and, on that ground, allowed the application dated 16<sup>th</sup> April, 2018.

12. I have had a chance to peruse the court file and I have not found the defendant's replying affidavit allegedly filed on 27<sup>th</sup> December, 2017 and to which a 90 days Statutory Notice dated 1.8.17 and a certificate of postage were allegedly attached.

13. Even assuming that the 90 days Statutory Notice dated 1.8.17 had been served, the certificate of postage marked EWM 2b is faint so much so that it does not show when it was filed in court or to whom it was sent. Such a certificate cannot *prima facie* be evidence of service of the 90 days Statutory Notice.

14. From what is stated hereinabove, the applicant's submission that this Honourable Court erred in evaluating the value of the certificate of postage and that there was, and still is a certificate of postage in the court proceedings evidencing service of the 90 days Statutory Notice is rejected.

15. I have considered the provisions Order 45 of the Civil Procedure Rules which provide as follows:

1. (1) Any person considering himself aggrieved-

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

16. I have also considered Order (2) dated 17<sup>th</sup> May, 2017 and I notice that an omission of the word NOT before the word however inadvertently denied the applicant/defendant its right of exercising its statutory power of sale.

**DISPOSITION**

17. Consequently, the Notice of Motion dated 20<sup>th</sup> June, 2018 is allowed in the following terms.

*i.* Order (2) dated 17<sup>th</sup> May, 2017 is reviewed to read as follows:

***It should be noted that this order does however NOT bar the defendant/respondent from proceeding to exercise its power of sale upon due compliance with all procedural and legal requirements relating to service of the notices under the provisions of the Land Act.***

*ii.* ***Costs of this application shall be in the cause***

**DATED, DELIVERED AND SIGNED THIS 31<sup>st</sup> DAY OF July 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Applicant/defendant - Ms. Muchui

Respondent/plaintiff - N/A