



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT**  
**LAND CASE NO.45 OF 2015**

**ERICK BOOKER OTIENO OGUTU.....APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK.....RESPONDENT**

**RULING**

**1. Erick Booker Ogutu**, the Applicant, filed the Notice of Motion under certificate of urgency dated 19th February 2014 and filed in court on 19th February 2015, seeking for seven prayers marked 1 to 7. The court issued prayers 1 and 2 following the ex parte hearing on 23rd February 2015. The ruling will therefore deal with prayers 3 to 7 which are for inter alia temporary injunction against **Kenya Commercial Bank limited**, Respondent, over **Kisumu/Kasule/4669** pending the hearing and determination of the suit, taking of account and restricting the loan overdraft. The application is based on the six grounds marked (a) to (f) on the notice of motion and supported by the Applicant's affidavits sworn on 19th February 2015.

2. The application is opposed by the Respondent through the replying affidavit sworn by Abraham Kapello on 5th May 2015.

3. The application is also supported by the Applicant's further affidavit which is undated and filed on 16th September 2015.

The parties counsel appeared before the Deputy Registrar on 17th September 2015 and agreed to have the application dealt with through written submissions.

4. The applicant's counsel filed their written submissions dated 29th September 2015 while Respondent's counsel filed theirs dated 14th October 2015.

5. The main issues for the court's determination are first whether the Applicant has established a prima facie case with a probability of success for temporary injunction to issue at this interlocutory stage. Secondly who pays the costs. There are no issues for determination in respect to prayers 4 and 5 that deals with the taking of account in view of the Applicant's submission at the last page that reads;

**" The act of respondents offends the in duplum rule in Section 44A of the Banking Act. She also claimed that no statements were ever issued on the sum claimed. The plaintiff/Applicant claims the figure is unconscionable ..... This also is a very important legal issue at the core of the suit and is incapable of resolution by way of affidavit evidence. Much more is needed through a hearing....."**

6. The court takes it that the Applicant abandoned the prayer on taking of accounts and restricting of the loan overdraft on the realization that the two can only be addressed after evidence is adduced through the hearing of the main suit.

7. The court has after considering the grounds on the notice of Motion, affidavit evidence and rival submissions by counsel come to the following findings;

(a) That indeed the Applicant received from the Respondent a loan facility of Ksh.900,000/=which was secured through the Charge on **Kisumu/Kasule/4669** as confirmed by the charge document dated 23rd March 2012 that was signed by the Applicant, as the borrower, the Respondent, as the Chargee and Elly Ogutu Z. Akach the registered proprietor as the Chargor. That though the court is not expected at this stage to make conclusive determination on the law and facts as that will await the full hearing, it is necessary to point out that the Charge document makes provision for the interest chargeable at clause 2 as 26% p. a and 3% p. a on any sum that falls due and remains unpaid. The 20% p. a cited by the applicant at paragraph 4 of his further affidavit is therefore not based on the charge document.

b) That depositions in the Applicant's supporting and further affidavit and the annexed letters dated 2nd April 2013, 30th September 2013 and 6th August 2014 shows that the Applicant is aware that he has been in arrears of the loan repayments. In the further affidavit filed in court on 16th September 2015, he deponed at paragraph 4 that he has paid Ksh.400,000/= to the Respondent for the loan of Ksh.900,000/=. He however disputes the Respondent's figure of indebtedness at Ksh..1361560/=.

The superior courts have in several cases taken the position that a Chargee will not be restrained from exercising its power of sale merely because the amount outstanding is in dispute, or where the Chargor has commenced the redemption action or where the chargor is uncomfortable with the way the Chargee is arranging the sale. The courts will however restrain the Chargee if the Chargor shows that he has completed the redemption or has paid the whole amount claimed by the chargee to the court. An offer of redemption which is rejected by the Chargee, like the Sh.15000.= per month offered by Applicant herein which was reportedly rejected by the Respondent, is not enough to be the basis of a restraining order. [see **Morris & Co Ltd -V- Kenya Commercial Bank Ltd & Another** [2003] E.A 605, **Maltex commercial Supplies Ltd & Another -V- Euro Banmk Ltd** (in liquidation) [2007] eKLR, **Mrao Ltd -V- First American Bank of Kenya & 2 Others** [2004] eKLR **Elijah Kipngeno Arap Bii -V- Kenya Commercial Bank Ltd** [2001] KLR 458 and **Hyundai Motor Kenya Ltd – V- East African Development Bank Ltd** [2007] eKLR.]

c) That though it appears the applicant and the Respondent had engaged into some correspondence over the loan arrears repayments in 2013 or thereabouts, the Applicant has denied being served with the requisite statutory notice. The Respondent deponed that the statutory notice was served and annexed a copy of certificate of postage with date stamp for the year 2014. The Respondent has however not annexed a copy of the statutory notice and the court is unable to confirm its contents or whether it was the one sent through the said certificate of postage and not some other ordinary correspondence. That even though the

Applicant has admitted in his deposition to be indebted to the Respondent, the Respondent is obligated to comply with the law by issuing and serving the requisite statutory notices before excising their power of sale.

d) The courts role in disputes of this nature is to ensure the provisions of law are complied with in enforcing the express agreements of the parties and not to rewrite the agreements for the parties as the Applicant herein appear to suggest.

e) That the moment a party offers his land, whether matrimonial or family land to secure a loan, such land becomes a commodity whose value is ascertainable through valuation and may be sold in realization of the loan arrears in accordance with the law. The fact that ones loved ones resides on the land subject matter of a power of sale is not enough for the court to stop the sale.

8. That from the foregoing the court finds no merit in the Notice of Motion dated 19th February 2014. The application is dismissed with costs and the interim orders issued on 23rd February 2015 are hereby vacated. The Respondent is at liberty to proceed with the power of sale upon issuance of the requisite statutory notices.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered this **24th day of February 2016**

In presence of;

APPLICANT Absent

RESPONDENT Absent

COUNSEL Mr Kowino for Mwamu for Plaintiff and

Mr Ndome for Defendant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/2/2016**

24/2/2016

S.M. Kibunja J

Parties absent

Mr Ndome for Defendant

Mr Kowino for Mr Mwamu for Plaintiff.

Court: Ruling delivered in open court in presence of Mr Kowino for Mwamu for Plaintiff/Applicant and Mr Ndome for Defendant/Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/2/2016**