



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.44 OF 2014

MAURICE OKELO ALATA..... APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD(KCB)..... RESPONDENT

RULING

1. **Maurice Okelo Alata**, the Applicant, filed the Notice of Motion under certificate of urgency dated 27th February 2014 seeking for Kenya Commercial Bank Limited, the Respondent, to be restrained from selling off or interfering with the Applicant's land parcel **Kisumu/Pandpieri/2008** pending the hearing and determination of the suit. The Notice of Motion is based on the nine grounds on the application marked (a) to (i) and the supporting affidavit sworn by **Maurice Okelo Alata** on 27th February 2014.
2. The application is opposed by the Respondent through their replying affidavit sworn by **Debra Ajwang** on 7th May 2014.
3. The parties counsel appeared before the court on 25th March 2015 and agreed to file written submissions in respect of the application. The counsel for the Applicant filed their submissions dated 8th June 2015 while the Respondent's submissions dated 9th November 2015 were filed on the same date.
4. The main issues for determination are as follows:
 - a) Whether the Applicant has established a prima facie case with probability of success in accordance with the principles set out in **Giella – V- Cassman Brown Company Ltd** (1973) E.A 358 for issuance of injunction order at this interlocutory stage.
 - b) Who pays the costs of the Notice of Motion.
5. The court has carefully considered the grounds on the Notice of Motion, the affidavit evidence presented by both parties and the rival written submissions by counsel of the parties and come to the following conclusions;
 - a) That the Applicant obtained an overdraft facility of Kshs.100,000/= and loan of Kshs250,000/= making a total of Kshs.350,000/= from the Respondent in 1997 and secured it with a charge over his land parcel **Kisumu/Pandpieri/2008**. The Respondent has annexed to the replying affidavit a copy of the letter of offer dated 21st February 1997 and charge document registered on 12th July 1999.

b) That from the numerous correspondence attached to the supporting and replying affidavits, it is a crystal clear that the Applicant has been in arrears of the loan repayment over a long period necessitating several negotiations on the repayment. Though the Applicant main ground for the application is that he has fully paid the loan facilities offered, the Respondent's position is that he is in arrears to the tune of Ksh.883834/= as at 4th July 2013. {See the copy of statutory notice dated 17th July 2013}. The Applicant responded in writing to the said Notice vide the letter dated 27th July 2013 in which he among others reaffirmed his "Commitment to repay and settle the loan balance as agreed in our previous correspondence". He goes on to request to be allowed to pay Kshs171,000/= which had remained outstanding from the respondent's offer of Kshs 265,000/= in May 2002. The Applicant has not availed any evidence to show that he subsequently paid the amount the Respondent demanded through their statutory notice or any other negotiated amount. The Applicant deposition that he has fully paid the whole loan amount cannot therefore be true in view of the said correspondence and absence of evidence of payment.

c) That Superior courts have time and again held that a Chargee will not be restrained from excising 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 sale is being arranged. The courts have held that the Chargee will nevertheless be restrained if the Chargor completes the redemption or pays the whole amount claimed by the Chargee unto the Court. [See Moris & Co Ltd – V- Kenya Commercial Bank Ltd & Another [2003] E.A 605, Maltex Commercial Supplies Ltd & Another -V- Euro Bank Ltd (in liquidation) [2007] eKLR, Mrao Ltd - V- First American Bank of Kenya & 2 Others [2003] eKLR Elijah Kipngeno Arap Bii -V- Kenya Commercial Bank Ltd [2001] KLR 458 and HYUNDAI Motors Kenya Limited -V- East African Development Bank Ltd [2007] eKLR.]

The applicant has not disputed being served with the statutory notice. He has actually annexed to his supporting affidavit a letter he wrote to the Respondent in reply to the statutory notice. In the letter, the Applicant acknowledges being in arrears and makes proposals of payment but instead of tendering the payment, moves the court to restrain the Respondent from realising the security. The court cannot go to the Applicant's aid without him showing that he has fully paid the arrears that the Respondent demanded from him.

(d) That the applicant, having failed to show that he has paid the amount the Respondent demanded from him under the statutory notice fails to establish a prima facie case with a probability of success and like in the case of Andrew Ouko -V- Kenya Commercial Bank of Kenya ltd & 3 others Milimani HCC NO.558 of 2004, the court finds that the notice of Motion dated 27th February 2014 has no merit.

5. That having found as above the application dated 27th February 2014 is dismissed with costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

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

In presence of;

APPLICANT Absent

RESPONDENT Absent

COUNSEL Mr Omolo for Madialo for Plaintiff and Mr Ragot for Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

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24/2/2016

S.M. Kibunja J.

Oyugi Court Assistant

Parties absent

Mr Ragot for the Defendant

Mr Omolo for Madialo for Plaintiff.

Court: Ruling delivered in open court in presence of Mr. Ragot for the Defendant and Mr Omolo for Madialo for plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016