



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 88 OF 2014**

**JAMES ODHIAMBO OYUGI ..... PLAINTIFF**

**V E R S U S**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CARMEY ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. **JAMES ODHIAMBO OYUGI** the Plaintiff herein has sued **KENYA COMMERCIAL BANK LIMITED**, the 1<sup>st</sup> Defendant (hereinafter called “**the Bank**”) alleging that they are not entitled to exercise their Statutory right of Sale of property **No. KISUMU/CHIGA/2237** (the property) which is charged to the Bank as security for a financial facility afforded to **CARMEY ENTERPRISES LTD**, the 2<sup>nd</sup> Defendant.
2. By his Plaintiff the Plaintiff alleges that the charge instrument is defective because his wife’s consent was not obtained; that he had not received the Banks Statutory Demand for payment; and that as a consequence the intended sale of the property is null and void. In his final prayer in the Plaintiff seeks permanent injunction stopping sale of the property; and a declaration that the charge instrument is null and void.
3. Plaintiff filed a Notice of Motion dated 9<sup>th</sup> July 2014 seeking interlocutory injunction to restrain the 1<sup>st</sup> Defendant from selling by auction the property pending the determination of this suit.
4. The application was opposed by the 1<sup>st</sup> Defendant by means of the Replying Affidavit dated 28<sup>th</sup> August 2014. 1<sup>st</sup> Defendant also raised a Preliminary Objection which is being considered together with the Notice of Motion application. The 2<sup>nd</sup> Defendant has not defended Plaintiff’s application.
5. The Plaintiff and 1<sup>st</sup> Defendant filed written submissions and also made oral submissions before Court. I have considered all the documents filed and the parties Learned Counsel’s submissions before Court. I will proceed to consider the issue raised which in my view are pertinent in the determination of the interlocutory application.
6. The Learned Counsel Mr. Kongere made spirited submissions that this Court has no jurisdiction to determine this case. In his submission he stated the jurisdiction of this matter lay before the Environment and Land Division of the High Court. Article 165(5) and 162(2) of the Constitution

of Kenya was referred to as follows-

**“From that Article, the jurisdiction of the High Court is constitutionally subjected to Clause 5 of Article 165, Clause 5 on its part provides-**

**(5) The High Court shall not have jurisdiction in respect of matters-**

**(a) ...**

**(b) falling within the jurisdiction of the Courts contemplated in Article 162(2).**

For completeness Article 162(2) provides that,

**(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title to, land.”**

According to 1<sup>st</sup> Defendant those provisions prohibit the High Court from hearing any matter relating to use and occupation of title to land.

7. I have considered the submissions of the parties on this issue and I hold the view that in a matter such as this the High Court has jurisdiction because what is at issue is the charge instrument. Accordingly, even though 1<sup>st</sup> Defendant made an almost convincing argument on that issue I rule otherwise. This Court has jurisdiction.
8. First Defendant sought Plaintiff suit be struck out on the ground that the verifying affidavit supporting the Plaintiff did not indicate where the Oath was taken. 1<sup>st</sup> Defendant relied on the case **SUPERSONIC TRAVEL & TOURS LTD & 3 OTHERS –Vs- NATIONAL BANK OF KENYA LTD [2005]eKLR** where the Court held –

**“The Plaintiff’s affidavits are dated but fail to state where the Oath was taken. From the provisions of Section 5, Cap 15; it is clear that the said affidavits are in breach thereof. I am afraid I cannot accept the Plaintiff’s contention that, that failure is a mere irregularity. I do accept the Defendant’s submission as being correct that a breach of an Act of Parliament cannot be regarded as irregularity that can be cured by a subsidiary legislation. Indeed there can be no waiver of a condition prescribed by law.”**

9. I have looked at the Verifying Affidavit in this case and although the place where the affidavit was sworn is not shown in typed form next to the deponent’s name, as is normally done, there is a stamp by the Commissioner of Oaths and that stamp clearly shows that the Commissioner of Oath is based in Mombasa. It therefore cannot be said that the place where Plaintiff took his Oath is not shown. It was taken as seen in the Commissioners stamp, in Mombasa.
10. 1<sup>st</sup> Defendant submitted that the Plaintiff was guilty of material non disclosure when he appeared before Court, *ex parte*, and obtained interim injunction. There were issues it was submitted that the Plaintiff failed to make disclosure.
11. The Plaintiff as stated before deposed that his wife’s consent had not been obtained when the property was charged even though he supplied her details to the 1<sup>st</sup> Defendant’s Advocates when he executed the charge. In response to this 1<sup>st</sup> Defendant by its Replying Affidavit annexed all the pages of the charge, including page 20 which had been excluded by Plaintiff. That page 20 is an affidavit sworn by the Plaintiff at the time of execution of the charge whereby he stated therein

that he was unmarried. This is how Plaintiff responded to that disclosure in his Supplementary Affidavit-

**“THAT in response to paragraph 6 of the 1<sup>st</sup> Defendant’s Replying Affidavit I wish to state that what I said in my Supporting Affidavit is the bare truth and the deponent cannot talk of perjury and yet I never appeared before him when I was signing the Charge Document in question.”**

12. That does not explain why Plaintiff stated in his affidavit in support of the Notice of Motion that he was married but that his wife’s consent had not been obtained. At this interlocutory stage I do make a declaration on a prima facie basis that the Plaintiff is guilty of material non-disclosure. This is what the Courts have held when there has been material non disclosure. In the case STANLEY KUBANIA M’EKABU & ANOTHER –Vs- JOSHUA MWITI M. KABORO (2011)eKLR the Court stated-

**“At an ex parte stage, it is essential that a party should present all the facts before the Court. When a party approaches Court ex parte, he assumes a responsibility to act in utmost good faith and to make full disclosure of all material evidence. This was so stated in the case The Owners of the Motor Vessel (Lillians) vs. Caltex Oil (Kenya) Ltd Civil Appeal No. 50 of 1989. The Court of Appeal in that case stated-**

**‘It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified: See Reg. vs Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac [1971]1 KB 486. Examples of this principle are to be found in the case of ex parte injunctions, ex parte orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the Court.’”**

In the above case the Court also referred to the case UHURU HIGHWAY DEVELOPMENT LTD – Vs- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APP. NO. NAI 140 OF 1995 as follows-

**“.... I would add my voice to that of my learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place.”**

13. Having found Plaintiff is guilty of non disclosure the Court then ought to discharge the exparte interim injunction and dismiss the interlocutory application. However, although the non disclosure by Plaintiff is grave and calls for such severe consequences I have noted that the 1<sup>st</sup> Defendant sent their Statutory Demand letter to Nairobi whereas the Plaintiff’s address in the charge instrument is Mombasa. It follows that if the Court dismisses Plaintiff’s injunction application the 1<sup>st</sup> Defendant will be free to exercise its Statutory Power of Sale when it has failed to serve the Plaintiff with demand as required under the Land Act 2012. The lesser evil therefore is to refuse to dismiss the injunction application for non disclosure. What orders then should the Court give. In my view interest of justice would best be served by granting limited injunction.

## **CONCLUSION**

14. The issues raised by the parties in their submissions and which I have not referred to here are not pertinent in regard to the application.

15. In granting the final orders I am guided by the Court of Appeal decision in **NATIONAL BANK OF KENYA LIMITED –Vs- SHIMMERS PLAZA LIMITED (2009)eKLR** viz-

**“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”**

16. I grant the following orders-

- a. **There shall be a limited injunction restraining the 1<sup>st</sup> Defendant from selling or alienating property KISUMU/GHIGA/2237 until the 1<sup>st</sup> Defendant issues fresh Statutory Demand Notices to the Plaintiff and until such notice take effect.**
- b. **The costs of the Notice of Motion dated 9<sup>th</sup> July 2014 shall be in the cause.**

**DATED and DELIVERED at MOMBASA this 26<sup>TH</sup> day of FEBRUARY, 2015.**

**MARY KASANGO**

**JUDGE**