



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.45 OF 2017

GEORGE OSURA WANGOMA.....PLAINTIFF

VERSUS

EQUITY BANK.....1ST DEFENDANT

JOSIAH JAMES ONYANGO T/A NYALUOYO AUCTIONEERS...2ND DEFENDANT

RULING

1. **George Osura Wangoma**, the Plaintiff, vide notice of motion dated 25th January 2017 seeks for the court “to issue an order of interim injunction against the respondents” **that is Equity Bank Limited and James Onyango Josiah T/A Nyaluonyo Auctioneer**, herein after referred to as 1st and 2nd Respondents respectively, “whether by themselves or servants, agents, auctioneer or any of them or otherwise howsoever, restraining them from selling by public auction, or by private treaty or otherwise howsoever at any time or by completion by conveyance or transfer of any sale considered by auction or otherwise howsoever of the suit property, land parcel No. **South Baukowino/5885**” pending the hearing and determination of the suit. The application is based on the six (6) grounds marked (a) to (f) on its face and is supported by the Plaintiff’s affidavits sworn on the 25th January 2017 and 4th October 2017. The Plaintiff among others depones that he is up to date with his loan repayment and that the alleged arrears are from excessive interest rates, payments made and not reflected, and debits erroneously made on his account. He further depones that the mandatory statutory notices have not been issued and served as claimed by the Defendant.

2. The application is opposed by Steve Biko, the Credit Manager with the 1st Defendant Bondo branch, on the 4th April 2017. The Credit Manager among others depones that after the Plaintiff failed to regularize his loan account, they sent him a demand notice under **Section 90 of the Land Act** in January 2016 demanding Ksh.760,819.66 that was in arrears. They also reminded him of his liability of Ksh,7,158,654.66 that was attracting normal and penalty interests. That a reminder was sent in May 2016 and a redemption notice under **Section 96 of the Land Act** was sent to him in September 2016. That in October 2016, they instructed the 2nd Defendant, to sell the charged security and that on the 18th November 2016, the Plaintiff was given 45 days notice to redeem the property. That a valuation was carried on 9th November 2016 and the auction advertised on the 16th January 2016 (sic). The deponent denies charging excessive interests or failing to reflect any payment made by the Plaintiff to his account.

3. That the application came up for hearing on the 9th October 2017 when directions on filing of written submissions were issued. The counsel for the Plaintiff and Defendant then filed their written submissions dated 31st October 2017 and 6th March 2018 respectively.

4. The following are the issues for the court’s determination;

- a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunctive orders to issue.
- b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides, written submissions and decided authorities cited and come to the following conclusions;

- a) That under the letters of offer dated 9th October 2013 and 14th May 2014, the 1st Defendant offered the Plaintiff, who accepted by signing the said documents, Ksh.5,000,000/= and Ksh.3,000,000/= respectively. That at clause 4 headed “**INTEREST AND COMMISSIONS**”, the interest charged and agreed is stated as “20% on the reducing balance basis.” That the first and second loans where to be repaid in 60 and 36 months respectively. That further at clause 5 of the first letter of offer and clause 4 of the second letter, a default/penalty interest of 6% per annum is provided for.

b) That though the Plaintiff alleges that he is not in arrears, it is clear there are some amount not cleared and which he blames on excessive interests and other charges. That the 1st Defendant has taken the position that the Plaintiff has been in default and they have been demanding that the Plaintiff regularize the account from 2016. That the superior Courts have taken the position that disputes over accounts are not basis from granting injunctions to restrain the chargee from realizing the charged property.

c) That the Defendants have in the replying affidavit attached copies of the statutory notice dated 20th May 2016 and the evidence of its posting to **P.O. BOX 4-40601 Bondo**, which is the address of the Plaintiff. That the Defendants have also annexed the redemption notice dated 7th September 2016 and evidence of its posting. The notification of sale by auctioneer dated 18th November 2015 is also annexed but is however of a date before the statutory notice and therefore invalid.

d) That having found as above the 1st Defendant is under obligation to ensure a proper notification by the auctioneer is issued and served upon the Plaintiff before proceeding with their efforts to exercise their statutory power of sale, should the Plaintiff still be in arrears and default of the loan obligations.

6. That for reasons set out above, the court finds the Plaintiff's notice of motion dated 25th January 2017 to be without merit and is dismissed with costs. Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2ND DAY OF MAY 2018

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Amule for Kouko for Plaintiff

Mr. Onsongo for Olel for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE