



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA CASE NO. 23 OF 2018

OLWAL GABRIEL OTIENO.....APPELLANT

-VERSUS-

KENYA WOMEN FINANCE TRUST LTD.....RESPONDENT

RULING

The application before court is dated 12/11/2018 wherein the appellant/applicant prays that pending the hearing and final determination of this appeal there be a temporary order of injunction restraining the defendant either by itself, its servants, agents and/or employees or anyone claiming to derive authority from and/or acting on its behalf from trespassing onto, selling, disposing off, or in any other manner dealing with the appellant/applicant's properties designated as **LAND PARCEL NUMBERS KISUMU/OJOLA/1623/AND KISUMU/OJOLA/2013**. That costs of this application be awarded to the appellant/applicant.

The application is based on grounds that the appellant is the registered owner and proprietor of **LAND PARCEL NUMBERS KISUMU/OJOLA/1623/AND KISUMU/OJOLA/2013** the subject matters of this appeal. That the appellant had filed a suit in the Chief Magistrate's court at Kisumu for an order of a permanent injunction restraining the respondent herein from disposing off or in any other manner dealing with the applicant's properties designated as **LAND PARCEL NUMBERS KISUMU/OJOLA/1623/AND KISUMU/OJOLA/2013**.

Alongside the aforementioned suit the appellant find an application dated 22nd January 2018 for an order of temporary injunction restraining the respondent herein from disposing off or in any other manner dealing with applicants' properties designated as **LAND PARCEL NUMBERS KISUMU/OJOLA/1623/AND KISUMU/OJOLA/2013** pending the hearing and final determination of the suit.

The said application was dismissed on 10th September 2018 and that the appellant was aggrieved by the ruling of the trial magistrates and has filed an appeal against the said ruling. It is therefore prudent, fair and in the interest of justice that the orders sought herein are granted. The appellant stands to suffer great prejudice in the orders sought herein are not granted. The respondent stands to suffer no prejudice if the orders sought herein are granted.

The appellant submits that he has established a prima facie case against the respondent herein. For the respondent to legally exercise its right of redemption, several legal steps must be followed, for instance it is the appellant's legal entitlement to receive a statutory notice before any sale of his property can be legitimate. The appellant/applicant stated categorically that he did not receive any such notice from the respondent. At paragraphs 6 and 7 of the replying affidavit the respondent has stated that two stationary notices were sent to the applicant and annexed the same as annexures 5 and 6. Unfortunately the respondent has failed to inform the court whether the said notices were ever received by the applicant if at all they were ever sent and/or the mode in which they were sent.

The respondent's failure to serve the appellant with a ninety day statutory notice is a clog on the appellant's equity of redemption and denies the appellant the legal duration provided for under Section 90 (1) and 96 (2) of the Land Act No. 6 of 2012.

He further submitted that no notification of sale was served upon the appellant as required by law and therefore the intended sale is premature, illegal and irregular. This is a fact that has not been denied by the respondent in its replying affidavit.

The respondent also failed to serve the appellant with a notice to sell as stipulated in Section 96 (2) of the Land Act which notice ought to be served at least 40 days before the property subjected of the charge can be sold.

The respondent has not also denied that it failed to obtain spousal consent as provided for under section 79 (3) of the Land Act No. 6 of 2012 and thus the facility in question is defective.

He further submitted that if the orders sought herein are not granted the applicant stands to suffer irreparable damage as no valuation has been carried out on the said properties to ascertain their current market value. These are prime properties and if the respondent is allowed to carry out the intended sale the parcels of land may be sold at throw away prices below their value.

The respondent submits that the appellant has not proved that the loan advanced has paid in full. There is no evidence that the appellant has been making payment towards the loan advanced.

The respondent submits that an order of injunction should not be granted since this will prejudice the rights of the bank as it waits the suit to be concluded.

The loan owed to the bank keeps earning interest. The respondent argues that the appellant is not likely to suffer irreparable loss. The balance of convenience according to the respondent tilts towards dismissing the application for injunction.

I have considered the application, the replying affidavit and rival submission and do find that the evidence on record is to the import that the appellant borrowed the money as alleged thus Kshs. 3,000,000. There is no evidence of repayment of the same. There is evidence of the 1st statutory notice dated 27/4/2017.

The second statutory notice giving the appellant 40 days to pay Kshs. 821,609.91 as at 23/7/2017 failure of which the respondent was to exercise a remedy under Section 90 (3) (e) of the Land Act no 6 of 2012 and sell the charged land was given. The outstanding liability with the bank was at Kshs. 2,239,884.43.

I do find that with the evidence that the appellant is owing the respondent money, the appellant has not demonstrated a prima facie case with a probability of success. Moreover, I do find that the appellant offered the two suit properties as securities for a loan of Kshs. 3,000,000. The two securities are now commodities of trade and subject for sale. The upshot of this is that the application is not allowed. Costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE