



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 457 OF 2017**

**MICHAEL WAMBUA MATHEKA t/a ZACH ELECTRONIC**

**PLUS MOTORS LTD.....PLAINTIFF**

**VERSUS**

**FAULU MICROFINANCE BANK LIMITED...DEFENDANT**

**RULING**

1. In the Notice of Motion dated 30<sup>th</sup> January, 2019, the Defendant is seeking for the following orders:

**a. That this Honourable Court does discharge and/or set aside the ex-parte orders of injunction made by this court on 26<sup>th</sup> February, 2018.**

**b. That costs be in the cause.**

2. The Application is supported by the Affidavit of the Defendant's Legal Officer who has deponed that the Plaintiff took several loans through his company from the Defendant to the tune of Kshs. 22,000,000; that the Plaintiff executed charge instruments over parcels of land known as Machakos/Matuu/6183, 6579 and 6462 (*the suit properties*) and that even upon demand, the Plaintiff has refused to repay an outstanding amount of Kshs. 16,459,318 as at 12<sup>th</sup> September, 2018.

3. According to the Defendant's Legal Manager, the Defendant issued to the Plaintiff the requisite statutory notices, including the auctioneer's forty five (45) days redemption notice; that the action of realization of the security had commenced when the Plaintiff rushed to this court and that the Plaintiff withheld material facts and obtained an ex-parte injunction.

4. The Defendant's Legal Manager deponed that the present case is only meant to frustrate the Defendant from realizing what is lawfully owed to it; that the Plaintiff has neglected and or failed to settle his debt and that the ex-parte orders are causing great hardships to the Defendant.

5. In reply, the Plaintiff deponed that when he sought for injunctive orders, he was truthful that he was indebted to the Defendant; that he disputed the pre-mature recovery proceedings that the Defendant had commenced and that the Defendant did not oppose his Application.

6. The Plaintiff deponed that he has never been served by the Defendant with notices prescribed under Section 96(2) of the Land Act; that under Section 97(2) of the Land Act, the Defendant ought to have availed a current Valuation Report before purporting to exercise an illegal power of sale and that the Defendant has declined to supply him with the statement of account against the orders of the court. Both the Plaintiff and the Defendant's advocate filed written submissions and authorities, which I have considered.

7. The record shows that on 20<sup>th</sup> November, 2017, the Plaintiff filed an Application of the same date seeking for injunctive orders against the Defendant. In the said Application, the Plaintiff sought for the orders in the following terms:

**a. That the Honourable Court do issue a temporary injunction against the Defendant restraining the Defendant by itself, its agents, employees, servants, attorneys or any other person acting on the Defendant's behalf from selling, alienating, wasting or interfering in any way with Machakos/Matuu/6183, Machakos/Matuu/6579 and Machakos/Matuu/6462 pending the determination of the suit.**

**b. That the Honourable Court be pleased to declare the statutory notice issued to the Plaintiff as premature hence not**

**exercisable and the recovery proceeding thereof are null, void, in effectual and of no legal effect at all.**

**c. That the Honourable Court be pleased to order for accounts to be taken and the Plaintiff to be supplied with all statements of accounts.**

**d. That cost of the Application be provided for.**

8. The Defendant in this matter was served with the Application dated 20<sup>th</sup> November, 2017. On 22<sup>nd</sup> January, 2018, the Defendant's advocate informed the court that he had not received documents from the Defendant for the purpose of filing a Replying Affidavit. The advocate requested for fourteen (14) days to be able to get the documents from his client and file a Replying Affidavit. The court granted him his request and fixed the Application for hearing on 26<sup>th</sup> February, 2018.

9. On 26<sup>th</sup> February, 2018, the Defendant's advocate did not appear in court. The Application proceeded for hearing unopposed, and the same was allowed as prayed.

10. Having not opposed the Application dated 20<sup>th</sup> November, 2017, the Defendant cannot now allege that it served the Plaintiff with the requisite notices. Indeed, the issue of whether the Defendant complied with the law before commencing the process of selling the suit properties can only be dealt with at trial, and not by way of an Application to set aside the injunctive orders.

11. In any case, the Defendant was ordered by this court to supply to the Plaintiff with all Statements of Account. The Plaintiff has deponed that this has not been done. Having not complied with the orders of this court, the Defendant cannot be granted the orders setting aside the earlier orders. Indeed, the failure to supply to the Plaintiff with the Statements of Account has contributed to the delay in fixing this matter for hearing.

12. For the reasons I have given above, I dismiss the Application dated 30<sup>th</sup> January, 2019 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**