



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NUMBER 8 OF 2016

LAMECK MBAKA MOTEGI.....PLAINTIFF

VERUS

BANK OF BARODA(KENYA) LTD.....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

RULING

1. This suit was filed on the 26th February 2016 and simultaneously filed was the Notice of Motion of even date, brought under **Order 40 Rule 2, Order 50 Rule 1 and Sections 3A, 63 of the Civil Procedure Act**. It is sought that:

(a) -----

(b) This Honourable court be pleased to restrain the Defendants by way of temporary injunction by itself, its agents and/or servants from selling transferring, alienating, charging or in any other way interfering with the plaintiff's quiet possession and use land Parcel known as NJORO/NGATA BLOCK 1/702 (Original No.4) Pending the hearing of this application interparties

2. On the 26th February 2016, an interim order of injunction interms of prayer (b)above was granted by the court.

I have considered the grounds in support of the application and the supporting affidavit by the plaintiff/applicant. The main ground is that the banks intended auction of the charged property was irregular and illegal by virtue of none service of the statutory notices, and in particular the proclamation notice and notification of sale.

3. The applicant admits having offered as Security the property **Njoro/Ngata 1/702 (original No. 4)** but denies knowledge of the outstanding loan if any and further denies having been served with the demand notice and statutory notice as envisaged under **Section 90 of the Land act (Act No. 6 of 2012)**, and Redemption notice of 40 days as required under **Section 90(3)e of the Land Act and Section 96(1)(2) of the Land Act**. He also denies having been served with the notification of sale notice.

It is his averment that should the court deny to grant the orders sought, he and his family would suffer mental anxiety and anguish.

4. Arguments by the Applicants Advocate Mr. Kamau is that no service of the statutory notices were served personally upon the applicant.

Citing the case **Kisima Holdings Ltd -vs- Fidelity Bank Ltd (2013) e KLR**, it was his submission that it was upon the respondent to prove that service was effected upon the applicant or any of his adult member of his family.

He however confirmed that service of the Redemption notice was served but upon an employee, one John Mugo, and as the service was doubtful, the chargors interest sought to be protected.

5. In opposing the application Mr. Kisila Advocate for the Respondents relied on a replying affidavit by the Banks Nakuru Branch head and another by the proprietor of the 2nd Defendant. It was his submission that the amount owed as at the initiation of process of recovery was well stated in a demand letter that the applicant by his letter dated 4th July 2014 made offers of payment of the then sum of Kshs.24,722,000/= but that no such payment was made.

6. On the disputed service of statutory notices under **Section 90-96 of the Land Act**, the respondents exhibited the charge document showing the chargors address as P.O. Box 17338-20100 Nakuru and an affidavit sworn by the applicant on the 20th December 2012 with the said address.

Exhibited too was a letter dated 16th July 2015 written to the applicant under the above address giving him statutory notice of three months under **Section 90(1) of the Land Act (No. 6 of 2012)** and showing his indebtedness as Kshs.30,811,962.00/=. A certificate of posting a registered postal Article was issued and is also annexed. I have also seen a Valuation Report of the subject property dated 3rd December 2015. A notification of Sale issued by the 2nd Respondent on the 19th November 2015 shows the amount claimed as Kshs.30,811,962/=. I have also seen a 45 Days Redemption Notice addressed to the Applicant under the same Postal address. This one was served upon one John Mugo a worker residing on the suit property and duly signed for on the 22nd December 2015.

7. For service of the Notification of Sale, I have seen a certificate of posting sent by the 2nd Defendant on the 22nd December 2015 to the same address. Further there is attached **a certificate under Section 15(c) of the Auctioneers. Rules 2017** certifying that the Auctioneer prepared the 45 Days Redemption Notice and the Notification of sale and that on the 22nd December 2015, the served the said documents to the worker named John Mugo who accepted and appended his signature on the notices, and further he thereafter served the debtor by registered post to his postal address as stated above.

8. The Respondent further submitted that the application is made in bad faith as at all material times the applicant was aware of the indebtedness and urged the court that where there is an affidavit of certificate of service and no supplementary affidavit by the applicant denying such service, there is a presumption that service was effected.

9. It is further submitted that the requirements stated in **Giella -vs- Cassman Brown** case were not met and urged for the dismissal of the application.

10. From the above narration, it is evident that the applicant has not been truthful, that he knew his indebtedness to the Bank, a fact confirmed by the letter he wrote to the Bank making proposals of settlement. Further, under **Section 96 (3) of the Land Act 2012**, personal service of the Statutory notices is not the only mode of service.

11. The applicant did not deny that the postal address to which the notices were sent and a certificate of posting issued was not his address. He admitted that he received the 45 days Redemption notice serviced through his worker, on the 22nd December 2015. Since that day, if indeed he did not know anything about the recovery process, he would have made inquiries or moved to court sooner. He waited for a full year and only approached the court on the 26th February 2016.

12. I do not find the applicants submission that although he is in default, that does not give the chargee right to sell the charged property. It has no basis in law unless it has been shown that no service of the statutory notices or any other necessary and procedural requirement were not taken.

I have considered the **Kisima Holdings Case** (supra). In allowing injunctive orders against the defendant bank, the court considered that the applicant had made out a *prima facie* case with a probability of success and had found that the statutory notices under the Land Act had not been served.

13. I have also considered the case **Albert Mario Cordeiro & Another -vs- Vishram Shamji(2015) e KLR**. Once again, the court found that the applicants had established a *prima facie* case with chances of success and that the said **Giella -vs- Cassman Brown** principles should be considered in line with principles of Justice as stated in **Article 159 of the Constitution**, and **Section 1A and 1B of the Civil Procedure Rules** which commands courts to administer substantive justice to all parties expeditiously.

14. I have considered and weighed the applicants interests in the charged property against the Respondents interests in the same.

In **Tubro Highway Eldoret Ltd and 2 Others -vs- Bank of Africa Ltd (2016) e KLR**, in very similar circumstances as in the present application concerning service of statutory notices the court (Munyao Sila J, on 18th February 2016) rendered himself that the only way the applicant could get relief from the sale of his property was to demonstrate that the notices were not served. Having seen the said statutory notices and satisfied that they were indeed served by registered post and certificates of postage exhibited, the court rejected the application for an injunction against sale of the charged property.

15. For a party to succeed in an application such as this, the applicant ought to demonstrate a *prima facie* case with probability of success and also demonstrate what irreparable loss he would suffer should orders sought be denied, and if in doubt, the court would consider the balance of convenience. (**Giella -vs- Cassman Brown (1973) EA 358**).

16. Interestingly, the applicant failed to inform the court what the outstanding sum was nor what he believed he had paid. Through his Advocate, it was stated that he had fully paid the loan but failed to tender any evidence of such payment. This is contrary to his payment proposals made to the bank and which he failed to comply with. As at date of his proposals, the outstanding and indebtedness to the bank was over Kshs.30 Million. He did not dispute the sum. He gave proposals of payment that he did not meet. He therefore knew the amount outstanding at all times, and he is obligated to settle the said amount.

17. On the matter of irreparable loss, nothing was placed before the court to demonstrate the alleged loss should the orders sought be denied.

For a party to seek an injunctive order, he must come to court with clean hands. The applicant came to court and withheld material facts that are evidently within his knowledge like how much he claims to have paid towards discharging the loan and the balance outstanding. Equity aids the vigilant. The applicant confirms receipt of the 45 days Redemption notice on 22nd December 2015. If he had any dispute he would have taken speedy action to raise the dispute then, and not one year down the line without any explanation for the delay.

18. In **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others**, the court, in dismissing the appellants application held that the applicant had come to a court of equity but having failed to show utmost good faith, held that it was not entitled to the injunction order.

19. The interest of the bank is the recovery of its money, well over Kshs.30 Million as at 3rd December 2015 and continues to increase by way of interest. The valuation of the charged property as shown in the valuation report was Kshs. 15,800,000/= (forced sale value) and Kshs.17 Million mortgage value. This is already below the outstanding indebtedness to the Bank of over Kshs.30 Million.

Other than statement that the applicant would suffer loss, no such loss was demonstrated. Against the above, the Banks interest would supersede the applicants undisclosed loss, that would in any event, if proved be compensated by an award of damages. See **HCC No. 84 of 2013 Sammy Japhet Karuku -vs- Equity Bank Ltd & Others (2014) e KLR** when in very similar circumstances, the court declined to issue an injunction against a sale of the charged property.

20. For the above reasons, I am persuaded that the applicant is NOT deserving of the injunctive orders he seeks.

Weighing the rival parties interests against each other, I find the balance of convenience tilts in favour of the Respondents.

21. I have also considered the case **John Mwenja Ngumba -vs- KCB & Another (2006) e KLR** and find that the applicant/plaintiff has not made out a *prima facie* case with a probability of success at the trial. See **St. Elizabeth Academy – Karen Ltd -vs- Housing Finance Co. Ltd 20130 e KLR**.

22. In conclusion I find no merit at all in the application dated 26th February 2016 and I must dismiss it with costs to the defendants.

The interim order of injunction issued by the court on the 26th February 2016 against the defendants is hereby discharged.

Dated, Signed and Delivered this 16th Day of February 2017.

J.N. MULWA

JUDGE