



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 160 OF 2013

FRANCIS WISITSA GYIDEYAPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD..... DEFENDANT

RULING

1. The Applicant in his notice of motion dated 5th June 2013 seeks orders from this court for;
 - a. That this application be certified as urgent and service there of be dispensed with in the first instance.
 - b. That this honourable court be pleased to temporarily restrain the Defendant, its servant, agents and or **M/S Sadique Enterprise Auctioneers** from auctioning and or otherwise attempting to sell by public auction the Applicant's property land parcel **No. W. Bukusu/N. Myanga 274** scheduled on 7.6.2013 pending the hearing and determination of this application inter-parties.
 - c. That this honourable court be pleased to issue a permanent injunction restraining the Defendant, its servant, agents and or **M/S Sadique Enterprise Auctioneers** from auctioning and or otherwise attempting to sell by public auction the Applicant's property land parcel **No. West Bukusu/North Myanga/274** pending the hearing and determination of the main suit or further orders of this court.
 - d. That costs of this application be provided.
2. The motion is supported by the grounds on the face of it and the affidavit sworn by the Applicant. The key ground raised is that before the suit property was advertised for sale, the Respondent did not serve the statutory notices as provided in law. In the further affidavit sworn on 17th September 2013, the Applicant says his physical address is c/o Box 163 Tiriki and not 763 Bungoma.
3. The Application is opposed and the Respondent has filed a replying affidavit. In the replying affidavit, the Respondent has deponed that the Applicant was duly served with the requisite statutory notices and the notification of sale (par 13, 14,15 and 17 of the replying affidavit).
4. The parties filed written submissions as a mode of arguing this motion. In the Applicant's submission in summary said, he was not served with any notice and only learnt of the sale through an advert in the daily Nation newspaper of May 18, 2013 (annexed). He submits that under Registered Land Act (Counsel referring to it without minding it is repealed) requires a chargee to give the chargor 90 days statutory notice of sale and a further 45 days notification of sale. He submitted that the purported

statutory notices were sent to the wrong address i.e Box 763 Bungoma instead of 163 Tiriki. He relied on case law of,

1. **Cesar Kunguru vs. KCB Civ. Application Nai. 101 of 2001**
2. **Gitau Muiruri vs. Standard Chartered Bank (K) Ltd. Civ. case No. 424/04**

5. The Defendant's submissions in summary stated that the necessary statutory notices of sale were duly served. They referred to annexures no. 6, no. 7, no. 8 and no. 10 in their replying affidavit. That the Plaintiff failed to comply with notices hence the property was advertised for sale. In support of their submissions, they cited the following statutes & case law;

- i. **Registered Land Act cap 300 (repealed)**
- ii. **Land Act No. 6 of 2012.**
- iii. **NBK Limited vs. Shimmers Plaza Limited [2009] e KLR**
- v. **St. Elizabeth Academy – Karen vs. HFCK CC 747 of 2012 (Milimani Commercial Court).**
- vi. **Nyanza Fish Processors Ltd. Vs. Barclay Bank (K) Ltd. Nbi Civ. Appeal No. 114 of 2009.**

6. I have considered the pleadings, submissions and case law relied on by both parties. To determine whether the Applicant has shown a prima facie case with a probability of success, I will answer the question whether the requisite statutory notice was duly served. The notices annexed were served on the Applicant through postal address of Box. 763 Bungoma.

7. The Plaintiff has deponed that his address is 163 Tiriki. From the loan documents (annex No-1, No.2, No. 3) none of the addresses appear. The Respondent has not explained how they arrived at Box. 763 as the address of the Applicant. It cannot be conclusively decided that the Applicant was properly served. To this extent, the Applicant has a basis to challenge the sale that was put up in the daily Nation of 18th May 2013. The next issue is whether to grant the injunction pending determination of suit or shorter as pleaded by the Defendant.

8. The Respondent urged the court in their submission that should this court be inclined to grant the orders sought, then the orders be granted on terms limited to the extent when the proper notices will be served and not pending determination of suit. On this limb, they have cited **NBK Vs. Shimmers Plaza Ltd. At page 4** of that ruling, the court of Appeal had this to say;

“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”.

9. The Defendant also in citing St. Elizabeth Academy- Karen *supra*, referred this court to paragraph 34 where quoting the court of appeal in *Re: Daniel Kamau Mugambi vs. HFCK said;*

“A Plaintiff should not be granted an injunction if he does not have clean hands and no court of equity will aid a man to derive advantage from his own wrong, for the Plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity.”

The Applicant herein admits he is in default, paying the loan advanced

10. I am persuaded by the above decisions and I see no reason to depart from them. The Applicant herein is entitled to injunction orders for failure by the Respondent to send the notices to a correct address. However the Injunctive orders issued will be to the extent restraining the Defendant/Respondent from exercising its power of sale of land parcel No. W. Bukusu/N. Myanga/274 until proper statutory notices are served on the Applicant as provided under the Law.

11. The application is thus allowed to the extent stated above with costs of the application awarded to the Plaintiff/Applicant.

DATED, SIGNED and DELIVERED this 13th day of May 2014

A. OMOLLO

JUDGE.