



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.188 of 2017

PAUL BARNABA CHELIMO.....PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA.....DEFENDANT

RULING

1. By a notice of motion 31<sup>st</sup> May 2017, Paul Barnaba Chelimo, the Plaintiff, seeks for an order of temporary injunction restraining Commercial Bank of Africa Limited, the Defendant, by “themselves, their agents, servants, employees, successors in title, assigns, personal representatives or any other person in authority from selling or disposing of all that parcel of land known as **Kisumu/Municipality Block 12/434 and Uasin Gishu/Kimumu Scheme 3416, Manyatta A/4633** by way of public auction or any other way interfering, with the Plaintiff’s proprietary interests in the said parcel of land,” pending the hearing and determination of this suit. The application is based on the ten (10) grounds marked (1) to (10) on the notice of motion and is supported by the affidavit sworn by the Plaintiff on the 31<sup>st</sup> May 2017.

2. The application is opposed by the Defendant through their replying affidavits sworn by Dr. Jacob Ogola on the 12<sup>th</sup> June 2017 and the 2<sup>nd</sup> November 2017.

3. That the notice of motion came up for mention on the 14<sup>th</sup> June 2017 when various directions, including on filing and serving written submissions within set timelines, were given. That the counsel for the Defendant filed written submissions dated 21<sup>st</sup> November 2017 but none has been filed by counsel for the Plaintiff.

4. The following are the issues for the determination of the court;

a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction orders to issue at this stage.

b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides, and written submission by the Defendant’s counsel and come to the following determinations;

a) That the Plaintiff commenced these proceedings through the plaint dated and filed on 31<sup>st</sup> May 2017, through M/S Ouma Anyumba & Company Advocates. That filed contemporaneously with the plaint if the notice of motion under certificate of urgency of even date which is subject matter of this ruling.

b) That the letter from the Law Society of Kenya dated 27<sup>th</sup> September 2017, attached to the Defendant’s further affidavit sworn on 2<sup>nd</sup> November 2012, has disclosed that there is “**No advocate who has declared to be practicing in the firm of Ouma Anyumba & Co. Advocates. However, we do have an Advocate by the name Anyumba George Ochieng who has declared to be an associate in the firm of Odhiambo Ouma & Company Advocates.**”..... of Natasha Hotel Building 1<sup>st</sup> Floor, P.O. Box 2583-40100 Kisumu. That postal address of Odhiambo Ouma & Company Advocates is the same postal address in the pleadings filed on behalf of the Plaintiff by Ouma Anyumba & Company Advocates. That therefore, the pleadings filed by Ouma Anyumba & Company Advocates for the Plaintiff are filed by counsel unknown by Law Society of Kenya. The pleadings have been signed by an advocate whose number is P105/3888/98 L.S.K 2017/3812 which is different from the number cited in the Defendant’s counsel letter to Law Society of Kenya dated the 29<sup>th</sup> August 2017, and attached to their further affidavit. That the court is therefore unable to confirm whether that number belongs to the said Ondego Eric Garo, who is reportedly “**not certified to practice law**” vide the Law Society of Kenya letter dated 27<sup>th</sup> September 2017, which was referred to earlier.

c) That by the time the Plaintiff filed this suit, and the notice of motion, the only notice served on him by the Defendant was the one

dated 10<sup>th</sup> May 2017 giving him 10 (ten) days. That the parties have both annexed a copy of the said letter to their affidavits, and it starts by setting out the ten loans and accounts references and the figure owing in each as of that date. That the letter at paragraph four gives the Plaintiff notice in the following words;

***“ WE HEREBY PUT YOU ON NOTICE that unless we receive full payment of the outstanding sums as described hereinbefore including interest thereon within ten (10) days from the date hereof, the Bank shall, at your cost and expense proceed to repossess the financed assets and/or exercise its statutory powers under the held charges to achieve full recovery of the aforementioned amounts and the accruing interest plus all incidental costs.”***

That the Defendant has given details of the financial facilities they have given the Plaintiff in their replying affidavit and at paragraph 14 gives the total arrears as of 1<sup>st</sup> June 2017 at Ksh.89,618,482/81. That the Plaintiff has been irregular in his payment prompting the demand notice dated 10<sup>th</sup> May 2017. That the Defendant further at paragraph 16 of their replying affidavit deponed as follows:

***“ 16..... there is no actual statutory notices as provided for by Section 90 of the Land Act No.6 of 2012 Laws of Kenya) served upon the Applicant and therefore the Applicant’s assertion that he has only ten (10) days .....”***

That the Defendant’s deposition set out above have not been challenged, rebutted or controverted. That whereas the demand notice may have caused apprehension on the part of the Plaintiff, it is obvious it did not amount to a statutory notice which would have manifested the Defendant’s preparedness to exercise their power of sale ones it crystalizes, after the all statutory notices are served and there is no redemption by the Plaintiff.

d) That instead of the Plaintiff coming to court to seek injunctive orders on receipt of the demand notice dated 10<sup>th</sup> May 2017, which was itself a premature move in view of the findings in (c) above, he would have done better to contact the Defendant with a view of coming to an amicable and workable arrangement or compromise as he was undoubtedly in arrears, before the Defendant could start the process of activating their statutory power of sale.

e) That for the Plaintiff to be found to deserve the injunction order sought, he has to come within the principles set out in the celebrated classicus case of **Grella –V- Casman Brown & Co. Ltd** (1973) E.A. 358 at page 360, by establishing a prima facie with a probability of success; prove that unless the order is issued he will suffer irreparable loss, and that the balance of convenience tilts in his favour. That the Plaintiff herein has not offered evidence of the payments he has made in respect of the various financial facilities he had received from the Defendant over time. That such evidence would have helped the court make a finding that probably, he is or may not be in arrears. That accordingly the Plaintiff has failed to establish a reasonable or arguable case, as it were, with a probability of success from the availed affidavit evidence. That the Plaintiff has also not shown that he stands to suffer irreparable loss if injunction order is not granted and the balance of convenience tilts against issuing of restraining order at this stage.

6. That flowing from above, the Plaintiff’s notice of motion dated 31<sup>st</sup> May 2017 is without merit and is dismissed with costs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY.2018**

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mrs. Onyango for Amollo for Plaintiff

Mr. Oganda for Ragei for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/2/2018**

**28//2018**

**S.M. Kibunja Judge**

Parties absent

Mrs. Onyango for Amollo for the Plaintiff

Mr. Ogonda for Maina Rogei for the Defendant.

Court: the ruling dated and delivered in open court in the presence of Mrs. Onyango for Amollo for the Plaintiff and Mr. Ogonda for Rogei the Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/2/2018**