



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**ELC. CASE NO. 57 OF 2017.**

**JONATHAN SITUMA WABOMBA.....PLAINTIFF**

**VERSUS.**

**NATIONAL BANK OF KENYA LIMITED. ....DEFENDANT**

**RULING.**

[1] The applicant brings this application under order 40 rule 1 and 2 of the Civil Procedure Rules. He prays for a temporary injunction to be issued against the defendants, by themselves their agents from selling the plaintiffs land parcel East Bukusu/North Sang'alo/5438 by Public Auction or otherwise alienating, disposing the said property pending the hearing of this application. The application is grounded on the fact that the Plaintiff was not served with any statutory requirements (meaning statutory notices) and further that the amount demanded by the respondent is unconscionable and excessive. The application is supported by an affidavit of Jonathan Situma Wabwoba sworn on 20<sup>th</sup> April, 2017.

[2] The application is opposed by the respondents who filed a replying affidavit by Agnes Mutisya a relationship manager asset quality, with the respondent Bank. The respondents argue that the application is devoid of any merits, is scandalous frivolous vexatious and otherwise an abuse of the court process.

It argues that the respondents have not satisfied the conditions in *Giella Vs. Casman Brown*. The respondent argues that the applicant was extended by the bank a term loan facility of Kshs.600,000/= with an interest of 18% p.a. and repayable in 36 months. That later on 11<sup>th</sup> November, 2011 at the applicants request, the applicant was granted an overdraft facility of Kshs.1,200,000/= and that the said facilities were secured by a Legal Charge of Kshs.2,000,000/= over the applicants parcel of land No. East Bukusu/North Sang'alo/5438. It was argued that he defaulted and was served with a statutory Notice dated 18/8/2016 pursuant to Sec. 90(1) and (2) of the Land Act. The said notices were annexed to the said affidavit. Further that the applicant was served with a redemption notice but he failed and neglected to redeem the suit property.

[3] The law relating to injunctions is well settled. The *Locus Classicus case of Geilla Vs. Casman Brown (1973) E A 358* set out the principles. The honourable court set them out as follows;

*“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.*

The court of Appeal in the case of *Ngurumon Limited Vs. Jan Bonde Nelson & 2 Others [2014] eKLR*.

The Court stated

*“These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount”*

[4] The applicant in this case relies, as a foundation of his argument that the statutory notice was not served to him. I presume notices required by Sec 96 (1) and (2) of the land Act 2012. The respondent has sworn and stated that the notice under Sec. 96(1) and (2) was sent to the respondent on 18/8/2016 through the last known address. In a further replying affidavit the respondent said that the respondent used various addresses in P. O. Box 1142 - 50200 Bungoma in opening his savings account No.01245055368900 and P. O. Box 1167 - 50200 Bungoma while applying for a term loan and temporary overdraft. The respondent contends that 1142 - 50200 is the applicants last known address. A copy of the certificate of posting of a registered Postal article was annexed proving postage of the notices. A copy of the bank opening form was annexed to the affidavit. However, the applicant in a supplementary Affidavit denied that the handwriting on the account opening document was his. He however, did not dispute opening the said account and did not equally dispute the particulars filled in that form. He also did not dispute that the signature on the said forms was his own.

[5] I am therefore satisfied that the applicant opened an account 0124555368900 with the National Bank of Kenya on 28<sup>th</sup> February 2009 and signed the account opening forms. In that form he gave his address as 1142 - 50200 Bungoma and his telephone Number as 0734887439 and 0726569836 among other details. The statutory Notice was sent to him through that address on 18/8/2016 by registered Post. This was his address. The requirement in Sec. 96(1) and (2) of the Land Act was satisfied. The redemptions Notice was issued to the respondent. I find that the contention that the notice was sent to the wrong address as having no basis. I reject the same. I equally find that there is no prima facie case established as per the dictum No. 1 of Giella Vs. Casam Brown aforesaid.

[6] The property herein was used as security. It therefore became a commodity for sale. It has a value. Both parties herein have given the same a value. In Andrew Muriuki Wanjohi Vs. Equity Building Society and Another [2006] eKLR the Court held that;

*“whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off by the charge, the charger could not be heard to complain that his loss was incapable of being compensated by damages. He had, had the said property evaluated in monetary terms”.*

The second limb of Geilla Vs. Casman Brown also fails.

If the contention of the applicant is that his property is now more valuable than when it was charged to the Bank, the applicant has a remedy in Sec 97 (1) of the land Act See Kisumu Al hyder Trading Co. Ltd. Vs. Diamond Trust Bank Kenya Ltd & Another. ELC 280 of 250 Kisumu. Where the court held that the act held remedies for the Chargor and imposed a duty on the chargees to obtain the best sale possible.

[7] This application fails. I am unable to grant the orders sought. The same is dismissed with costs to the respondents.

Ruling read in open Court.

**Dated at Bungoma this 22<sup>nd</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Joy: Court Assistant

Mr. Imende: For the Applicant

Okeyo: For the Respondent not present

Miss Nafuye holding his brief