



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.83 OF 2017

SUSAN CARLEAN OGUTTU.....PLAINTIFF

VERSUS

CREDIT BANK LIMITED.....DEFENDANT

RULING

1. The plaintiff, **Susan Carolean Oguttu**, vide notice of motion dated 23rd February 2017, seeks for an order of temporary injunction restraining the Defendant, **Credit Bank Limited**, its agents, employees, servants or assigns and or any person whatsoever acting on its behalf “from alienating, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with land parcel No. **Kisumu/Manyatta ‘A’/1678**, pending the hearing and determination of the present suit”. The notice of motion is based on the nine (9) grounds on its face and supported by the affidavits of the Plaintiff sworn on the 23rd February 2017 and 13th March 2017.
2. The application is opposed by the Defendant through the replying affidavit sworn by Wainaina F. Ngaruiya, the legal officer, on the 2nd November 2017.
3. The application came up for hearing on the 7th November 2017 when Mr. Abande and Mr. Odeny, the learned counsel for the Plaintiff and Defendant respectively, made their oral submissions.
4. The following are the issues for the court’s determination;
 - a. Whether the Plaintiff has made a prima facie case for the order of temporary injunction sought to issue at this stage.
 - b. Who pays the costs.
5. The court has considered the grounds on the notice of motion, affidavit evidence presented by both parties, oral submissions by counsel for the parties and come to the following findings;
 - a. That both parties are in agreement that the Plaintiff obtained some financial facility from the Defendant that was secured on a charge over land parcel Kisumu/Manyatta ‘A’/678. That the Plaintiff has run into arrears in the repayments. That the Defendant had advertised to auction the security allegedly in accordance with their statutory power of sale which they claim had arisen. That the Plaintiff opposed the Defendant’s action by coming to this court on the ground that the statutory notices had not been served upon her and therefore the Defendant power of sale had not arisen.

b. That as the Plaintiff has not disputed that she has defaulted in the loan repayments, it was incumbent upon the Defendant to ensure that they had served the statutory notices on her before commencing the process to realize the security. That the charge document attached to the Defendant's replying affidavit at paragraph 9 (K) provides as follows on service;

“That any notice required or authorized by law by this charge to be served by the lender on the chargor shall be sufficiently served if it is sent by post in a stamped envelope addressed to the chargor (as the case may be) at the last known postal address of the chargor in Kenya or if it be delivered to the place of abode or business of the clangor (as the case may be) or to the charged property, AND FURTHER THAT in the case of joint chargor proof of service on any one of them shall for the purposes of this charge be deemed to be good and sufficient service.”

c. That in their attempt to respond to the Plaintiff's deposition that the statutory notices were not served on her, the Defendant attached copies of notices dated 23rd February 2015 and 7th December 2016 under paragraphs 10 and 11 of their replying affidavits. That the statutory notices dated 23rd February 2015 is addressed to the Plaintiff whose postal address is given as **“P.O. Box 840-40100” Kisumu** while the redemption notice dated 7th December 2016 is address to the Plaintiff through **“P.O. BOX 84-40100’ Kisumu**. That the charge document indicates the Plaintiff's postal address as **“P.O. BOX 840 KISUMU”**. **That even assuming both notices were posted, it is obvious the notice dated 7th December 2016 was addressed to an address different from that of the Plaintiff.**

d. That there is nothing on the notices dated 23rd February 2015 and 7th December 2016 or in the entire Defendant's replying affidavit to confirm that the notices, or any one of them, was actually served on the Plaintiff, either in person, place of abode or business or on the charged land or posted to her postal address as required under **clause 9 (k)** of the charge document. That the Defendant had an obligation to avail evidence of postage or affidavit of service to confirm that other than issuing the said notices, they were actually posted and or served on the Plaintiff. That the Defendant has not discharged that obligation.

e. That in view of the finding in (d) above it is obvious that though the Plaintiff has defaulted in her loan repayment obligations, the Defendant's statutory power of sale had not arisen by the time they advertised the auction of the security as they are yet to serve the Plaintiff with the statutory **notices as required under Section 90 (2) and 96 (2) of the Lands Act No.6 of 2012.**

6. That flowing from the foregoing the Plaintiff's notice of motion dated 23rd February 2017 has merit and is allowed in terms of prayer 3 with costs. That further, the Defendant is at liberty to issue and serve the Plaintiff with the requisite statutory notices in accordance with the law and thereafter proceed to realize their security notwithstanding this suit being pending in court so long as the Plaintiff continues to be in default of her loan obligations.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2018

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Abande for the Plaintiff

M/S Olango for Odeny for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018

14/2/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mr. Abande for Plaintiff

M/S Olangor for Odeny for the Defendant

Court: Ruling dated and delivered in open court in presence of Mr. Abande and M/s Olango for Odeny for the Plaintiff and Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018