



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.28 OF 2015**

**MALKIT SINGH PANDHAI.....PLAINTIFF**

**VERSUS**

**N.IC BANK LIMITED.....1ST DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENT....2ND DEFENDANT**

**KAMLESH KUMAR**

**VITTALBHAI PATEL.....INTENDED INTERESTED PARTY**

**RULING**

1. **Kamlesh Kumar Vittalbhai Patel**, the Intended Interested Party, vide notice of motion dated 20<sup>th</sup> October 2016, seeks for the following prayers;

1. That application be certified urgent.
2. Leave be granted for the applicant to be enjoined as an interested Party.
3. That pending the hearing and determination of the matter, NIC Bank, the 1<sup>st</sup> Defendant, be restrained from advertising for sale, selling by private treaty or otherwise disposing of Kisumu Municipality/Block 8/204 in exercise of chargee's power of sale.
4. That the Defendant be restrained from selling the property unless and until they comply with the requirements of **Sections 96 to 98** of the Land Act No.6 of 2012.
5. The costs be paid by the Defendant.

The notice of motion is based on the six grounds on its face and supported by the affidavit sworn by **Kamlesh Kumar Vittalbhai Patel** on the 20<sup>th</sup> October 2016. The main basis of the intended Interested Party's application is that he has been a tenant on the suit premises since September 2008 and that he only learnt from **Malkiat Shigh Pandhai**, one of the co-owners of the property, that the 1<sup>st</sup> Defendant Was in the process of exercising its chargee's power of sale over the suit property charged to it. That the 1<sup>st</sup> Defendant had not served him with any notices as a tenant.

2. The application is opposed by Defendants through the replying affidavit sworn by **Kelvin Mbaabu**, the 1<sup>st</sup> Defendant Manager Legal Services, on the 28<sup>th</sup> October 2016. The main basis of opposing the application is that the intended Interested Party is not a tenant on the suit premises. That the

tenancy/Lease agreement is not registered and has not been availed to the court. That the notices were served to the relevant persons and auction advertised in the local dailies and the Intended Interested Party was aware of the process. That the Intended Interested Party has not shown that he would likely suffer irreparable loss or damage that cannot be compensated with an award of damages.

3. The counsel for the intended Interested Party appeared before Hon. Obutu, Magistrate on the 21<sup>st</sup> October 2016 and obtained prayers 1, 2 and 3 in the interim pending interparties hearing. The Hon. Magistrate further directed that the matter be placed before the Judge on the 26<sup>th</sup> October 2016 for further orders. On the 26<sup>th</sup> October 2016, counsel for the parties appeared before the Deputy Registrar instead and the interim orders were extended to the 23<sup>rd</sup> November 2016 when the interpartes hearing was to take place. On the 23<sup>rd</sup> November 2016 the counsel appeared before the Deputy Registrar again and direction on filing of written submissions were given and interim orders extended to the 18<sup>th</sup> February 2017. The matter was mentioned again before the Deputy Registrar on the 18<sup>th</sup> February 2017 when filing of written submissions was confirmed after which the Deputy Registrar directed the matter to be mentioned on the 21<sup>st</sup> February 2017 before the Judge for purposes of taking a date for ruling.

The counsel for Intended Interested Party and the one holding brief for counsel for the Defendant appeared before the Judge on the 21<sup>st</sup> February 2017 and today's ruling date was fixed. The counsel for the Intended Interested Party then sought for extension of interim orders but the request was rejected on the basis that there was no interim orders capable of being extended as none had been issued by the Judge.

4. The counsel for the Intended Interested Party filed the written submissions dated 6<sup>th</sup> February 2017 on the 9<sup>th</sup> February 2017, while counsel for the Defendants filed theirs dated 12<sup>th</sup> January 2017 on the 16<sup>th</sup> January 2017. Their submissions are as summarized herein below;

#### **A. INTENDED INTERESTED PARTY'S COUNSEL SUBMISSIONS;**

- That the Intended Interested Party has established that he is a tenant on the suit property by availing a copy of the lease agreement marked "KKVP-1", and therefore has the locus to file the application by dint of **Section 96** of the Land Act 2012.
- That the Intended Interested Party is one of the persons the 1<sup>st</sup> Defendant, as the chargee, was obligated to serve notice of intention to sell the suit property on as his lease commenced before the charge.
- That the 1<sup>st</sup> Defendant as the chargee was deemed by law to have had notice of the obligations the Plaintiffs, as the chargors, were bound by prior to the time of execution of the charge.
- That as equity follows the law and as the 1<sup>st</sup> Defendant did not serve the Intended Interested Party with the notice their purported exercise of chargee's power of sale was illegal ab initio and the balance of convenience tilts to allowing the application.
- That the provisions of **Section 96** of Land At 2012 is in mandatory terms and the requirement for notice to be served on the tenants of a property subject to the chargee's power of sale is aimed to ensure protection to persons with legitimate justifiable interest over charged properties.

#### **A. DEFENDANTS COUNSEL'S SUBMISSIONS:**

- That the Plaintiff's applications dated 30<sup>th</sup> January 2015, 12<sup>th</sup> November 2015 and 3<sup>rd</sup> March 2016 were dismissed on the 4<sup>th</sup> November 2015, 3<sup>rd</sup> February 2016 and 19<sup>th</sup> October 2016 respectively.
- That the Intended Interested Party has not availed evidence to confirm that he is a tenant of the Plaintiff on the suit land. That the lease agreement annexed as "KKVUP – 1" was to run for five (5) years from 1<sup>st</sup> September 2008 and there is no evidence to show that it had been renewed. That the said lease was never registered and contravenes **Section 32** of the Land Registration Act and hence is null and void ab initio.
- That the two valuation reports dated 30<sup>th</sup> April 2013 and 26<sup>th</sup> March 2013 that are annexed to the

Plaintiff's earlier application for injunctive orders had indicated that the premises were used by the owners and members of their family.

- That the Plaintiff has not in all the proceedings that has so far taken place mentioned that there was any tenant on the suit property.
- That there was no tenant on the suit property when the chargee commenced the process of realizing the charged property.
- That the Intended Interested party was not a necessary party in this proceeding in view of the decisions in **Joseph Njau Kingori –V- Robert Maina Chege & 3 Others** {2002} eKLR and **Kimaru –V- Makomboki Tea Factory Ltd** (2008) IEA 154.
- That the Intended Interested Party, not being a tenant at the suit premises, was not a necessary party in this suit and is without any rights that need to be protected by enjoining him in the matter.
- That the Intended Interested Party is not privy to the charge agreement between the Plaintiff and 1<sup>st</sup> Defendant and ought not be enjoined as a party.
- That the application is res judicata as previous applications filed by the Plaintiff seeking for similar injunctive orders have been dealt with and rejected. The learned counsel referred to the case of **Mwabeja Ranching Company Limited & Another –V- Kenya National Capital Limited** (Kenyac) & 6 others [2015] eKLR.
- That the Intended Interested Party is not entitled to the injunctive relief sought as he is not likely to suffer any loss that cannot be compensated in damages.
- That due to the level of the arrears the 1<sup>st</sup> Defendant is owed by Plaintiff, the balance of convenience do not tilt in favour of issuing the injunctive order as prayed by the Intended Interested Party.

5. The following are the issues for determination by the court;

a) Whether the Intended Interested Party has established the existence of a right or interest over the suit property or that he is a necessary person to be enjoined in this suit for the issues in the matter to be effectively and completely adjudicated.

b) Whether the Intended Interested Party was one of the persons entitled to be served with a notice before the 1<sup>st</sup> Defendant advertised the process of realizing the suit property.

c) Whether the intended Interested Party has established a prima facie case for temporary injunctive order to issue at interlocutory stage.

d) Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the submissions by counsel and come to the following conclusions;

a) That the provision of **Section 96 (3)** of the Land Act No.6 of 2012 requires that not less than 40 days' notice under **Section 90 (2)** to be served to the following persons;

National land commission in case of charged land being public land.

The holder of the land out of which the lease has been granted in case where the charged land is a lease.

- A spouse of the chargor who had given the consent.
- Any lessee and sublessee of the charged land or of any buildings on the charged land.
- Any person who is a co-owner with the chargor.
- Any other chargee of money secured by a charge on the charged land of which the chargee proposing to exercise the power of sale has actual notice.
- Any guarantors of the money advanced under the charge.
- Any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property.
- Any other person as may be prescribed by regulations which should be posted in a prominent place

at or as near as may be to the charged land.

b) That the Intended Interested Party's basis of entitlement to service of the notice is by virtue of being a tenant since September 2008 of residential premises on the charged property described as **Kisumu/Municipality/Block 8/204**, under the lease agreement said to be dated 25<sup>th</sup> August 2008.

c) That both parties are in agreement that the lease agreement that the Intended Interested Party basis his claim on was not registered against title of the suit property. That notwithstanding, the Intended Interested Party contends that the Defendant was obligated to serve him with a not less than 40 days notice pursuant to **Section 96 (3) of the Land Act 2012**. The Defendant's response is that the Intended Interested party was not a tenant in the suit property and referred to the contents of the two valuation reports dated 30<sup>th</sup> April 2013 and 26<sup>th</sup> March 2013 by **N.W. Realite valuers and Chrisca Real Estate**. The court has perused the two valuation reports attached to the Plaintiff's Notice of motion dated 30<sup>th</sup> January 2015 and noted that the former was obtained on instruction of the 1<sup>st</sup> Defendant while the latter was made on instructions of **Surjit Singh**, a co-owner of the suit property. That both reports were on **Kisumu Municipality/Block 8/204** which is the suit property herein. That none of the reports captured the existence of any tenant on the said premises. That the court finds that had the Intended Interested Party been a tenant on the premises as alleged, then his Landlords would have ensured that the valuers report had captured that fact.

d) That a careful consideration of the provision of **Section 96 (3)** shows that the chargee has to effect service on the persons Described therein. That the chargee must have knowledge of those persons so as to know where to get them for service. The spouse who give consent provides their address on the document of consent. The court notes that the requirement of service is not on all spouses of a chargor, but on the one who gave consent. The court is of the considered view that the lessee, sublessee, other chargee or other persons entitled to be served with the notice must be those in the knowledge of the chargee exercising the power of sale. That one way of identifying such persons is by checking the register of the charged land to confirm those whose lease agreements or other interests have been registered or noted on the register. That without the Intended Interested party lease agreement, if any, having been registered or brought to the attention of the 1<sup>st</sup> Defendant at the time of executing the charge document or soon thereafter, it would be a impossible to expect the chargee to know that he was one of the persons to be served with the notice, or where to get him for service.

e) That the Intended Interested Party was not a party to the charge under which the 1<sup>st</sup> Defendant had commenced the process to realize the charged property. Those that were privy to the charge or contract have previously presented applications seeking injunctive orders of a similar nature to prayer 3 and 4 of the current application. That even though the Intended Interested Party was not involved in the previous applications, the inclusion of prayer 3 and 4 in his application leads the court to find and hold that he was acting in cohort with, or for the benefit of the Plaintiff to buy them more time. The filing of multiple applications in a matter without taking concrete steps to prosecute the main suit is contrary to the duty and objectives of the court as set out in **Sections 1A, and 1B** of Civil Procedure Act Chapter 21 of the Laws of Kenya. That is because it does not amount to efficient use of judicial time and leads to delay in the determination of the suit.

f) That in view of the foregoing, the Intended Interested Party has not shown the existence of any recognizable right or interest that would qualify him as a necessary party to be enjoined in the proceedings for effective and conclusive determination of the issues before the court.

g) That further to the court's pronouncement of 21<sup>st</sup> February 2017, when the request to extend the interim order was disallowed, it is important to note that the main prayer in the application dated 20<sup>th</sup> October 2016 was for a temporary injunctive order against the 1<sup>st</sup> Defendant and not the enjoinder of the Intended Interested Party. That had the enjoinder been the main interest, the application would have been brought much earlier but not wait until after the ruling of 19<sup>th</sup> October 2016 to be delivered. That applications for temporary injunctions under **Order 40** of the Civil

Procedure Rules are not among those covered under the special powers of Registrars under **Order 49** of the Civil Procedure Rules. That the application was not placed before the judge until after the filing of the submissions while all along the interim order issued by the Hon. Magistrate had been extended on every court appearance contrary to **Rule 21** of the Chief Justice Practice Directions on Proceedings in the Environment and Land Court of 28<sup>th</sup> July 2014 under G.N. 5178 which provides as follows:

**“ 21. In the absence of a Judge in the station, all interlocutory applications of an urgent nature shall be placed before a Deputy Registrar in the station who will have the discretion to grant interim orders pending the listing of the application before the Judge for further direction/orders or hearing.”**

That the interim order issued **under Rule 21** of the said Practice directions is to be in force for a brief period as the matter is placed before the Judge. The provision does not allow the Deputy Registrar to extend such an order as happened in this case. That the court therefore find and hold that the interim order issued by Hon. Obutu on 21<sup>st</sup> October 2016 lapsed automatically on the 26<sup>th</sup> October 2016 as it was not placed before the Judge. That there was therefore no order capable of being extended by the Deputy Registrar on all the subsequent court appearances.

7. That flowing from the findings above, the notice of motion dated 20<sup>th</sup> October 2016 is without merit and is dismissed with costs to the Defendants.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY 2017**

In presence of;

Plaintiff Absent

Defendants Absent

Intended Interested Party Absent

Counsel Mr. Anyumba for Intended Interested party

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**31/5/2017**

31/8/2017

Before S.M. Kibunja Judge

Court Assistant Oyugi

Parties absent

Mr. Anyumba for the Interested party.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**31/5/2017**

Court: Ruling dated and delivered in open court in presence of Mr. Anyumba for the Intended Interested Party.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**31/5/2017**