



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**CASE NO. 8 OF 2017**

**(FORMERLY HIGH COURT CIVIL CASE NO. 2 OF 2017)**

**ISAIAH JUMA**

**PHOEBE ACHIENG JUMA..... PLAINTIFF/RESPONDENTS**

**VERSUS**

**CO-OPERATIVE BANK LTD..... DEFENDANT/APPLICANT**

**RULING**

1. This ruling is in relation to Notice of Motion by the Plaintiff against the Defendant is dated 20<sup>th</sup> January 2017 brought under Certificate of Urgency. The motion is brought pursuant to order 51 Rule 1, order 40 Rules 1 and 2, Section 1 A and B, 3, 3A and 63 E of the Civil Procedure Act Cap 21 laws of Kenya and Article 159 of the Constitution of Kenya, 2010 and all other enabling Provisions of the law.

2. The Plaintiff /Applicants are represented by Mr. Mudeyi Advocate. They are seeking the following orders

**a) .....(spent).**

**b) That an interim order.**

**c) To (e)**

3. The application is supported by an affidavit of the 1<sup>st</sup> Plaintiff/Applicant sworn on 20/1/14 annexed documents marked 1 J to 4, and grounds namely:

**a. The Plaintiff would be given time to continue repaying the outstanding loan which he diligently and faithfully honoured as per the terms of the contract.**

**b. The Plaintiff offered security in terms of various titles of the suit parcel of land.**

4. The Defendant represented by Nyachae and Ashitiva Advocates opposed by the Notice of motion by way of a replying affidavit sworn on 10/2/17 Elkana Lwane Esikuri, a business banker with the Defendant's branch, Migori. The Defendants stated that on 16/8/14 and 19<sup>th</sup> February 2015, the Plaintiffs were granted credit facilities by way of a term loan in the sum of **Ksh 5,760,000/=** and **Kshs. 48,300,000/=** respectively. It was guaranteed and secured by existing legal charge over **Suna East Wasweta 1/1583, 13561 to xi** herein. They defaulted repayment epriress of recovery by issuing notices.

He supported the replying affidavit by document marked “ ELC 1 to 8”

5. On 20/1/2017, Mr. Judge issued an interim order of injunction for 14 days and fixed inter parties hearing for 31/1/2017. The suit was originally Migori, High Court No.HCC 4/2017. On 31/1/17, the suit was transferred to this court for mention for directions on 20/2/2017.

6. The parties represented by their respective counsel requested the court to allow them to argue the Notice of Motion by way of filing and service of written submissions. The court allowed them at Order 51 Rule 6 Civil Procedure Rules, 2010 and the practice directions.

7. The Plaintiff/Applicants counsel filed submissions dated 26/4/2017. He submitted on history and brief fact of the case, cited the law Section, Order, rules and replying Affidavit. He relied on the case of **Giella Vs. Cassman Brown (1973 E.A. 358) and Benjamin Kamuruga Vs. Stanbic Bank Ltd (2014) eKLR** on the .....should required for grant of an injunction. He urged the court to allow Notice of motion.

8. The Defendant/Respondents counsel filed his submissions dated 4/4/2017.He summarized the applicant's and the respects cases, issue for determination including 3 conditions for granting of a temporary injunction. He did cite **Giella Vs. Cassman Brown case (supra) Mirau Ltd Vs. First American Bank of Kenya Ltd and 2 others (2003)eKLR Jopa Villas LLC Vs. Overseas Private Investment and 2 others (2009) eKLR Samuel Kiprop Vs. Ubadia Kipleting Kogei and others (2016) eKLR and David Ngunji Ngaari Vs. KCB Ltd (2015) eKLR.** He urged this court to dismiss the Notice and the entire suit with costs.

9. I have studied the Notice of Motion, replying affidavit and Submissions by consent. The issue to resolve is whether the Plaintiff/Applicants are entitled to the orders sought going by the holding in Giella case. I have noted the Sections cited and the case law relied upon.

10. There is no dispute that the Plaintiff/Applicant obtained credit facility from the Defendant/Respondent. They charged the suit land parcels of land as security for the credit facility. The same is liable for ...in case of default thro lawful procedure.

11. The Plaintiff/Applicants has been served with the requisite statutory notice of sale as required under Section 96 (2) of the land Act 2016 (2012)- 3 months' notice. A further notice of not less than 140 days has to be given to the charger see Fast security case (Supra). Section 90 (2) governs details of particular of the notice issued under Section 90 (1) of the Land Act and Section 90 (3) remedies thereof.

12. Considered the Notice of Motion order merited is to be serve and or preseve the suit parcels of land until the same is heard and determined on merit ,See **Section 13 ELC Act 2015(2012)** and Musa **Angira Angira Vs.Industrial and Commercial Development Corporation (2015) eKLR.** In lien of injunction sought in the notice of motion status quo would be appropriate.

13. I accordingly direct that the parties maintained the obtained status quo the suit land preserved no step to enforce the charge pending the hearing and determination of the suit.

14. The parties to comply with order 11 Civil Procedure Rules 2010 within the next 30 days on 25/7/2017 for hearing of main suit.

15. Costs of the Notice of Motion dated 20/1/2017 be in the cause.

**G. M. A. ONGONDO**

**JUDGE**

**DELIVERED, SIGNED and DATED** in open court at MIGORI this **13<sup>th</sup>** day of **June 2017.**

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of;**

Ms. Godia for the Defendant/Respondent

Mr. Ochwagi for Mudeyi for the Plaintiff/Applicant

**G. M. A. ONGONDO**

**JUDGE**