



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 203 OF 2016

THE REGISTERED TRUSTEES

ARCHDIOCESE OF KISUMU.....PLAINTIFF

VERSUS

BANK OF AFRICA (KENYA) LIMITEDDEFENDANT

RULING

1. **The Registered Trustees, Archdiocese of Kisumu**, the Plaintiff vide notice of motion dated 25th May 2016 and amended on the 22nd June 2016 seeks for the following prayers;

- Temporary injunction restraining Bank of Africa Kenya Limited, the Defendant, from disposing or in any way interfering with the Plaintiff's use of land parcel "**Kisumu/Municipality/Block/560**" pending the hearing and determination of this suit.
- Inhibition order restraining the Defendant or its agents from transferring or registering any dealing on land parcel Kisumu/Municipality Block 6/560 pending the hearing and determination of this suit.
- An order nullifying the purported sale that may have been conducted either by public auction, private treaty or any other way on the 27th May 2016 or any other date prior or after in respect of land parcel **Kisumu Municipality/Bock 6/560** pending the hearing and determination of this suit.

The application is based in the eleven grounds on the notice of motion marked (a) to (K) and is supported by the affidavit sworn by Reverend Father Moses Nicholas Omollo and Reverend Father Caroli Odiwour Achok on the 22nd June 2016.

2. The application is opposed by the Defendant, through the replying affidavit sworn by Felix Muhati, a recoveries officer with the Defendant, sworn on the 5th July 2016.

3. The notice of motion came up for hearing on the 13th July 2016 when the court gave directions on filing of written submissions. When the matter was mentioned on the 29th November 2016, the Plaintiff counsel was absent and had not filed written submissions. The court granted the counsel for the Defendant leave to file and serve their submissions which they did dated 23rd February 2017. The matter was then mentioned on 28th February 2017 and today's ruling date fixed.

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

a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction, inhibition and order nullifying the sale of the suit land to issue at this stage.

b) What order to issue.

c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both parties, submission by the Defendant's counsel and come to the following finding;

a) That though the initial loan facility given to the Plaintiff by the Defendant was Ksh. 20,000,000/= as evidenced by the letter of offer dated 22nd February 2012 and marked MNO3 attached to the replying affidavit, the facility was subsequently increased to kshs50,000,000/ under the letter of offer dated 10th March 2014 and charge documents registered on 28th October 2014 marked FM 2 and FM 3 (a) respectively also attached to the replying affidavit.

b) That the Defendant has availed demand notices dated 31st march 2015, 26th June 2015 and 23rd July 2015 marked FM 4 (a) to (c) respectively, and attached to the replying affidavit.

That also attached to the said affidavit is the statutory notice dated 7th September 2015 and the 40 days notice dated 11th January 2016 and the auctioneer's 45 days redemption notice marked 5 (a) to (c) respectively whose service and receipt have not been disputed or rebutted by the Plaintiff.

c) That from the documents referred to in (b) above, the repayment of the financial facility extended by the Defendant to the Plaintiff had fallen into arrears and the Defendant's power of sale had arisen by the time they advertised for the sale of the suit property by public auction on 27th may 2016. That this suit was commenced through the plaint dated and filed on 25th May 2016 that was filed contemporaneously with the notice of motion of even date. That by the time the notice of motion came up for hearing, the counsel for the Defendant had disclosed during the court appearance of the 31st May 2016 that the suit property had been sold on the 27th May 2016 as scheduled. That disclosure prompted the Plaintiff to file the amended plaint and notice of motion dated 22nd June 2016 to among others seek for the nullification of the auction of 27th May 2016. That having considered the affidavit evidence presented, the court do not find any basis for interfering with the result of the auction of 27th May 2016 at this stage. The Plaintiff may still have recourse as provided for under **Section 97** of the Land Act No.6 of 2012. That in case the Plaintiff was to be successfully after the main hearing, they will not be without recourse as the court takes note that the Defendant is a financial institution and there is nothing presented before this court to suggest that it would be unable to meet any order that may issue to compensate the Plaintiff.

d) That in view of the findings above, the court finds and holds that the Plaintiff has on the evidence so far availed failed to establish a prima facie case for issuance of temporary order of injunction and or inhibition at this interlocutory state. That the court further finds and hold that the suit land having been charged to secure the loan facility became a commercial commodity whose value is capable of being ascertained through valuation reports and as the Plaintiff was obviously in arrears of repayment, and the amount kept on increasing, the Plaintiff do not stand to suffer any irreparable loss. The balance of convenience tilts against issuing the orders sought.

6. That flowing from above, the notice of motion dated 25th May 2016, and amended on the 22nd June 2016 is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Owiti for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr Owiti for Defendant/Respondent

Court: Ruling dated and delivered in open court in presence of

Mr. Owiti for Defendant/Respondent only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017