



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN BUSIA**  
**LAND & ENVIRONMENTAL DIVISION**

**ELC. NO. 105 OF 2016**

AMISI ONYANGO MUKOYA ..... APPLICANT

**VERSUS**

NATIONAL BANK OF KENYA LTD..... RESPONDENT

**RULING**

1. The application before me is a Notice of Motion dated 30/8/2016 and filed in Court on the same date. It is brought under Section 3A of Civil Procedure Act (Cap 21) and Order 40 Rules 1, 2, 6 and 7 of the Civil Procedure Rules. The Applicant - **AMISI ONYANGO MUKOYA** - filed it against the Respondent - **NATIONAL BANK OF KENYA** - asking, in the main, for temporary injunctive relief to stop sale of land parcel No. SOUTH TESO/ANGOROMO/2299 which he had offered as security for a loan advanced to him by the Respondent.

2. The application was filed contemporaneously with a suit of even date where the applicant, who is the Plaintiff, complains that the Respondent, who is Defendant, has not served statutory notice; has unilaterally increased interests; and is also barred by the Statute of Limitation of Actions Act from carrying out the intended sale.

3. The application originally had five (5) prayers but prayers 1, 2, and 4 were for consideration at an earlier stage and are therefore moot now. For consideration at this stage are prayers 3 and 5, which are as follows:

Prayer 3: A temporary injunction do issue restraining the Respondents (sic) by themselves (sic) or through their agents, workers, employees, servants, assignees, (sic) and any other person acting on the directions and instructions from auctioning selling, alienating all that parcels (sic) of Land L.R. SOUTH TESO/ANGOROMO/2299 pending hearing and determination of the suit.

Payer 5: Costs of this application be provided.

4. According to the Applicant, he will suffer irreparable loss if the property is sold before the suit is heard. The Respondent is accused of not following the laid down procedure as it failed to recover the loaned money before 12 years. It is also accused of not serving a statutory notice of sale.

5. The Applicant said he borrowed Kshs.30,000 from the Respondent which was to be repaid with an interest of 15% per annum. The Respondent then altered the rate of interest increasing it several times. Even then, the Applicant paid the loan. He finds it unfair now that the bank is demanding Kshs.8,656,900 after 27 years.

6. The Respondent opposed the application vide a replying affidavit dated 22/11/2016 filed here on the same date. According to the Respondent the Applicant borrowed various loans of much greater amounts and charged several of his properties. More specifically, the loans were of 200,000/= and 300,000/= and the properties charged were SOUTH/TESO/ANGOROMO/2538, 2900, and 2299. The Respondent then defaulted in payment. He was served with the requisite statutory notices through the address he had provided. No payment however was made and the default persisted.

7. The Respondent, given the circumstances, was said to be right and within the law to initiate the process of sale.

8. The Applicant filed a further affidavit in which he reiterated that the loan he borrowed was kshs.30,000 and that is the loan for which parcel No.2299 was security. He reiterated that he paid the loan.

9. The application was canvassed by way of written submissions. The submissions of the Applicant were filed on 6/4/2017. The submissions largely dwelt on the issue of failure by the Respondent to demonstrate that it had served the required statutory notice for sale of parcel No. 2299. He pointed out that the statutory notices annexed to the replying affidavit are misleading as they relate to different properties.

10. The Respondent's submissions were filed on 20/2/2017. According to the Respondent, the statutory notice was served. The Applicant was also said to be without clean hands as he had failed to honour various promises of payment to the Respondent and he also ignored notices.

11. The Applicant was said not to have established a *prima facie* case as spelt out in **GIELA vs CASSMAN BROWN & CO. LTD [1973] EA 358** and defined in **MRAO vs FIRST AMERICAN BANK & 2 OTHERS [2003] KLR 125**. And dirty hands would disentitle the Applicant from relief in line with courts pronouncements in **SAMSON ALITON OKELLO vs BARCLAYS BANK [2009] eKLR** and **FRANCIS J. K. ICHATHA vs HFCK CA No. 108 of 2005**.

12. I have considered the application, the responses made, and the rival submissions. Many issues were raised by both sides which in my view, are better left for consideration at the trial of the suit. The fundamental issue for consideration at this stage is whether the Applicant was served with the requisite statutory notice. That is the most crucial issue raised in the application and largely submitted on by the Applicant. In a bid to show that the Applicant was served the Respondent annexed three statutory notices to the replying affidavit. The three notices were marked "BM2-a" and "BM2-b" and "BM2-c" respectively. I have read the notices. None refer to parcel No. 2299. To be specific, annexure "BM2-a" refers to parcel No. 2538, annexure No. BM2-b refers also to parcel No.2538 while BM2-c refers to parcel No.2900.

13. It was crucial for the Respondent that the statutory notice for parcel No.2299 be availed. The notice of sale served on the Applicant by the auctioneer referred to this particular parcel. That notice comes after statutory notice of sale and the details of property on it should match the details on the statutory notice earlier served.

14. Failure by the Respondent to show the statutory notice served for parcel No. 2299 gave a much needed shot in the arm to the Applicant's application. No court will readily endorse sale where the requisite notices are not shown to be served.

15. There is another issue that needs to be considered at this stage. The issue is this: The Applicant was said to be without clean hands. From the Respondents submissions, this was alleged because the Applicant had made many promises of payment without honouring them and had also been served many notices which he ignored.

16. But these allegations remained just that, allegations. Nothing was availed to show the alleged promises. And when it comes to notices, the most crucial notice is the statutory notice for parcel No. 2299. This is the notice that the respondent has failed to avail to court. This is the notice that the

Applicant says he was not served with. It is not shown that he was served. The other notice was the one served by the auctioneer. That notice serves as notification of sale. Was that notice ignored? The answer is NO. That is the notice that impelled the Applicant to file this suit. That one was served.

17. But even assuming the Applicant did these things, would that amount to soiling his hands? The answer is NO. The Respondent needed to demonstrate that the Applicant deceitfully or willfully intended to gain some undeserved mileage in the application or the suit. This was not shown and the allegations therefore made against the Applicant sound hollow.

18. I perhaps need to explain why some of the issues raised are best left for consideration at the trial. In **MBUTHIA vs JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLRI**, there was an application for injunction which the High Court had dismissed. On appeal, it was held, *inter alia*, that the correct approach in dealing with an application for injunction is not to decide issues of fact, but rather weigh up the relevant strengths of each sides proposition. The Lower Court Judge was faulted for making final findings of facts on disputed affidavit.

19. In this application itself, the issue of Limitation of Actions was raised. This issue has the potential to end the suit. Yet, I am not being asked to dismiss the suit. I am being asked to dismiss the application. If I make a conclusive finding of this issue at this stage, where does that leave the suit? The other issue is that of illegal or disputed interests. It was raised by the applicant in support of the application. But the same issue is raised at paragraph 6 of the plaint and denied at paragraph 4 of the defence filed. If I address my mind to this issue now, what aspect of the issue will be left for determination at the trial?

20. It is enough then that the issues of statutory notice and lack of clean hands are chosen for the determination of this application. And as can be seen, these issues are in the Applicant's favour. The upshot is that the application here has merits. The application is therefore hereby allowed in terms of prayer 3. Costs, which is prayer 5, to be in the cause.

**Dated, signed and delivered at Busia this 19<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Appellant: .....

Respondent: .....

Balongo & Co. Advocates for Appellant: .....

Bogonko & Co. Advocates for Respondent: .....