



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.229 OF 2016**

**WILLIAM ROMAN MC TOUGH.....PLAINTIFF**

**VERSUS**

**GIRO COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

1. **William Roman MC Tough**, the Plaintiff, vide notice of motion dated 29<sup>th</sup> August 2016, seeks for temporary injunction restraining Giro **Commercial Bank Ltd**, the Defendant, from “advertising for sale, auctioning, selling, disposing, alienating, transferring, dealing and/or interfering whatsoever with the Plaintiff’s premises herein known as **Kisumu Municipality/block 7/152** pending the hearing and determination of this suit.” He also prays for costs.

The application is based on the seventeen grounds marked (a) to (g) on the face of the notice of motion and is supported by the affidavit sworn on the 29<sup>th</sup> August 2016 and further affidavit sworn on the 12<sup>th</sup> December 2016.

2. The application is opposed by the Defendant through the replying and supplementary affidavits worn by Tilas Nthia Muringi, the risk manager with the Defendant, on the 9<sup>th</sup> November 2016 and 6<sup>th</sup> February 2017 respectively.

3. The application came up for hearing on the 8<sup>th</sup> February 2017 when directions on filing of written submissions were given. The counsel for the plaintiff and Defendant then filed the written submissions dated 11<sup>th</sup> April 2017 and 27<sup>th</sup> April 2017 respectively.

4. The following are the issues for the court’s determination;

a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction orders to issue at this stage.

b) Who pays the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the written submission by the parties counsel, the cited decided cases and come to the following determinations;

a) That the Plaintiff and the Defendant have had a long history during which the Defendant has at the request of the Plaintiff extended to him several financial facilities. That the facilities have been secured through promissory notes, charges over land parcels **Kisumu Municipality/block 7/152**

and **Flat No. A 7 on L.R No.209/12811 Nairobi.**

b) That from the Plaintiff's deposition at paragraphs 4 and 5 of supporting affidavit, he obtained four loan facilities totaling Ksh.60,000,000/= from the Defendant which he secured with charges over land parcel **Kisumu Municipality/Block 7/152.**

That fact is supported by the Defendant through their deposition at paragraph 9 of the replying affidavit which refers to the letter of offer dated 6<sup>th</sup> March 2013.

c) That whereas the Plaintiff depones at paragraph 6 of the replying affidavit that he paid the whole Ksh.60,000,000/= through the Ksh.73,000,000/= he subsequently raised on disposing of some other properties, the supporting document marked "**WRM 3**" shows payment of Ksh.23,000,000/= by Magharibi Services Station to the Plaintiff's account with the Defendant. That deposit cannot amount to a loan repayment of Ksh.60,000,000/= to the Defendant.

d) That the Defendant has at paragraph 19 of their replying affidavit deponed that the said Ksh.23,000,000/= was paid to the Plaintiff's personal account and not the loan account which deposition has not been disputed by the Plaintiff.

e) That though the Plaintiff case is that he had cleared the loan, he at the same time concedes to having learnt that as of July 2015, he was indebted to the Defendant at Kshs.12,795, 943/= which by March 2016 had risen to Ksh.31,938,202/= [see the copies of the statements attached to the supporting affidavit marked WRM 4]. That the defendant has availed copies of correspondence attached to their replying affidavit marked "**TNM 15**" between themselves and the Plaintiff. The letter dated 18<sup>th</sup> December 2013 indicated that the overdue balance as Ksh.12,809,356.20 and asked the Plaintiff to pay it in 14 days or be reported to the credit reference bureau. The Plaintiff responded to that letter through his dated 24<sup>th</sup> December 2013 seeking for more time. The letter does not dispute the indebtedness. The Defendant has also provided copies of letters dated 27<sup>th</sup> December 2013, 30<sup>th</sup> January 2014 and 21<sup>st</sup> March 2016 addressed to the Plaintiff. That from the foregoing correspondence between the parties and copies of the statements marked "**TNM 16,**" it is apparent that the Plaintiff is in arrears of the loan facilities accorded to him by the Defendant.

f) That the Plaintiff may have a dispute with the Defendant over the interest charged in view of the varying rates contained in the charge documents and correspondence marked "**TNM 15**" but that alone does not automatically mean that the Defendant right to realize the charged security is defeated as long as the power of sale has arisen.

g) That the Plaintiff claim that the Defendant's power of sale had not arisen when the process to auction the charged property was commenced. The Defendant has defended their action and availed a copy of the statutory notice dated 24<sup>th</sup> June 2014 and the certificate of postage. The statutory notice sets out the details on Loan account numbers 400175/TL/10 and 400175/TL/11 giving the outstanding loan figures for both loan as Ksh.70,316,297.44 and arrears as Ksh.19,648,910.04 as of 16<sup>th</sup> June 2014. The notice further states as follows: "**WE HEREBY GIVE YOU NOTICE** pursuant to the provisions of **Section 90 (1) (2)** of the Land Act No.6 of 2012 that unless you pay the entire outstanding loan arrears of Ksh.19,648,910.04 as at 16<sup>th</sup> June 2014 within **THREE (3) MONTHS** from the date of service of this notice upon yourself, our instructions are to sell by public auction or private treaty the charged property mentioned herein above with a view to recovering the total outstanding loan together with the accrued arrears thereon, interest, legal costs and other charges occasioned by the sale." The court notes that the statutory notice dated 24<sup>th</sup> June 2014 carries the following reference; Statutory notice under **Section 90 (1) (2) of the Land Act No.6 of 2012** in respect of flat No. 7 erected on L.R. 209/12811" The said statutory notice does not make any reference to land parcel **Kisumu Municipality/Block 7/152** and cannot suffice as the basis upon which M/S Garam Investment auctioneers subsequently issued the redemption notice dated 28<sup>th</sup> June 2016 and notification of sale

for a public auction on 9<sup>th</sup> September 2016 of the suit property.

h) That in view of the finding in (g) above, the court find that though the Plaintiff is obviously in arrears in the loan repayments, the Defendant has failed to prove that they had issued and served a statutory notice in respect to the loan facilities secured with Kisumu Municipality/Block 7/152 and therefore the advertisement for public auction of the said land was premature as the Defendant's power of sale in respect of that security had not arisen. The notices would have been sufficient in respect of the security described therein, that is, flat No.7 erected on L.R. 209/12811.

i) That notwithstanding the finding in (h) above and the fact that this suit is pending in court, the Defendant is at liberty to issue the requisite notices to the Plaintiff if he is still in arrears of the loan facilities.

6. That the Plaintiff's notice of motion dated 29<sup>th</sup> August 2016 has merit and is allowed in the following terms:

(a) That the Defendant's power of sale had not arisen by the time they had the Plaintiff's land parcel Kisumu Municipality/Block 7/152 advertised for public auction on the 9<sup>th</sup> September 2016. That accordingly, the Defendant is hereby restrained from advertising for sale or otherwise alienating land parcel Kisumu Municipality/Block7/152 for one year from today pending the herring and determination of this suit.

(b) That the Plaintiff will get the costs of this application.

(c) That in case the Plaintiff is in arrears of the loan facilities accorded to him by the Defendant and secured on land parcel Kisumu Municipality/Block 7/152, the order in (a) above does not in any way stop the Defendant from issuing the appropriate statutory notices to the Plaintiff and proceeding to realize the charged security in accordance with the law, in case of default to redeem.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OCTOBER 2017

In presence of;

Plaintiff        Absent

Defendant      Absent

Counsel        Mr. Nyauma for Odeny for the Plaintiff/Applicant

Mr Odongo for Kagethe & Co Advocate for Defendant/Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**4/10/2017**

4/10/2017

S.M. Kibunja Judge

Oyugi Court assistant

Mr Nyauma for Odeny for the Plaintiff/Applicant

Mr. Odongo for Kangethe & Co. Advocate for Defendant/Respondent

Order: Ruling dated and delivered in open court in the presence of Mr. Nyauma for Odeny for Plaintiff/Applicant and M/S Odongo for Kangethe & co Advocate for Defendant/Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**4/10/2017**