



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.241 OF 2016

GEORGE ABONYO OBETO T/A RAKWEL BODYBUILDERS....PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....DEFENDANT

RULING

1. **George Abonyo Obeto T/A Rakwell Body Builders**, the Plaintiff, seeks vide the notice of motion dated 9th September 2016, for injunction order restraining **ECO Bank Kenya limited**, the Defendant, from “administering, handling, dealing in, distributing, depositing of, taking over, alienating, selling land parcel **Kisumu Pandpieri/1594,**” pending the hearing and determination of this suit. The application is based on the five grounds on the notice of motion and is supported by the affidavit sworn by the Plaintiff on the 9th September 2016.
2. The notice of motion is opposed by the Defendant through the replying affidavit sworn by Thaddaus Okwaro Mboga, the Defendant’s Kisumu Branch Manager, on the 10th October 2016.
3. The counsel for the Plaintiff filed written submissions dated 7th November 2016 while that of the Defendant filed theirs dated 17th March 2017.
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 to issue.
 - b) Who pays the costs.
5. The court has after carefully considering the grounds on the notice of motion, affidavit evidence by both parties, and written submission by the parties’ counsel come to the following findings;
 - a) That from the evidence adduced by both parties the Plaintiff applied from the Defendant a financial facility of Kshs.1,500,000/= in the year 2014. That each of the parties annexed to their affidavit a copy of the Defendant’s letter of offer to the Plaintiff dated 29th December 2014 as the documentary evidence of the financial facility disbursed to the Plaintiff by the Defendant.
 - b) That the letter of offer is duly signed on all the pages by the Plaintiff, including the acceptance certificate at the last page.
 - c) That at clause 3 headed “**REPAYMENT**”, the parties agreed that “**The facility is to be repaid**

either upon receipt of LPOs specified under clause 2 above proceeds, or on expiry of 6 months from the date of disbursement whichever comes first. However interest shall be serviced monthly” That the purpose of the loan facility is set out at clause 2 of the letter of offer as follows; “the facility shall be used to enable the borrower finance the below LPOs awarded to him;

i) General Motors East Africa

KCB Asset Finance Kes - 683.000

ii) Direct Line Assurance Kes- 590,000

iii) Link Auto Tyres – Chase

Bank Asset Finance Kes- 2,000,000

iv) Joseph Agok –Housing

Finance Asset Finances Kes- 1,660,000

v) Joseph Obuya Ondego – NBK

Asset Finance Kes- 990,000

vi) Mpapaleson Empire Agencies

Asset Finance Kes 1,400,000”

d) That the Plaintiff has at ground (c) on the notice of motion and paragraph 5 of the affidavit conceded to have defaulted in his obligations to service the loan facility allegedly for reasons of having been ailing for the last for years. That the letter of offer is of year 2014 while the notice of motion and the suit were filed in year 2016. That it therefore follows that the four years the Plaintiff say he has been ailing started in year 2012 which is two years before the loan facility was disbursed. That the issue of illness was not a factor when the loan facility was entered into in 2014, and could not have excused the Plaintiff from his loan obligations; that is to pay the loan in or before the expiry of six month as per clause 3 of the letter of offer.

e) That the Plaintiff has not disputed or controverted the Defendant’s deposition that the LPOs listed at the clause 2 of the letter of offer were not paid through the Plaintiff’s account with the Defendant contrary to their agreement. The court further notes that the plaintiff did not deny having been paid for the five LPOs refered to above, and he had therefore no explanation as to why he failed to service the loan facility as agreed.

f) That though counsel for the Plaintiff submitted that the Defendant did not avail a copy of the charge document and went on to suggest that there was no legal charge, the court notes that the Plaintiff has not questioned the legality of the charge in his pleadings and affidavit. That can be seen in paragraph 4 of the plaint dated 9th September 2016 and paragraph 3 of his affidavit sworn on the 9th September 2016 which are reproduced hereinbelow;

“4. I applied for a loan of Kenya shillings: One million five hundred thousand only (Kshs.1,5000,000) from the 1st Defendant where I charged my property known as Kisumu/Pandpieri/1594.”

“3. That I applied for a loan of Kenya shillings; One million five hundred thousand only (Kshs.1,500,000) from the 1st Defendant where I charged my property known as

Kisumu/Pandpieri/1594. A copy of the charge is hereby attached and marked G0A2”.

That the existence or legality of the charge over the suit land not having been raised as an issue in contention by the Plaintiff, the Defendant had no obligation to tender evidence to prove it

g) That though the Plaintiff appears to take issue with the accounts, he does not blame the Defendant but himself for it. That he seems to seek in the supporting affidavit and pleadings for an opportunity to discuss with the Defendant on the accounts as he has lost some documents. The Defendant has responded by stating that they have been issuing the Plaintiff with the account's statements whenever requested. The court notes that there is no specific prayer for taking of accounts in respect of the loan facility either in the plaint or the notice of motion.

6. That flowing from the foregoing the court finds no merit on the

Plaintiff's notice of motion dated 9th September 2016 and the same is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Odeny for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

20/12/2017

20/12/2017

S.M. Kiunja Judge

Oyugi/Joane court assistant

Parties absent

Mr. Odeny for the Plaintiff/Applicant

Order: The Ruling dated and delivered in open court in presence of Mr. Odeny for the Plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

20/12/2017