



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 81 OF 2017

JAMES NDIRANGU NG'ANG'A.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 27/6/2017 and filed on 3/7/2017. It is brought under Sections 1A, 2B and 3A of Civil Procedure Act, Order 40 Rule 7 of Civil Procedure Rules, and other enabling provisions of Law. The application was brought by the Defendant/Applicant – **SIDIAN BANK LIMITED** – and its focus are orders dated 16/6/2017 issued by Environment and Land Court, Bungoma (Mukunya. J). The orders were issued pursuant to an earlier application for restraining orders filed by the Plaintiff/Respondent – **JAMES NDIRANGU NG'ANG'A**.

2. At this stage, the relevant orders for consideration in this application are as follows:

Prayer 2: The orders of this honourable court dated 16/6/2017 stopping the Defendant from exercising its statutory power of sale be set aside, discharged and/or varied in their entirety.

Prayer 3: The costs of this application be provided.

3. Various grounds were advanced in support of the application but the main one is that the Defendant/Applicant was not given a chance to be heard. According to the Defendant/Applicant, service was effected upon it on 14/6/2017, with hearing meant to take place on 16/6/2017. The Defendant/Applicant cited provisions of Order 51 rule 13(3), which requires at least 7 (seven) clear days from the date of service to hearing. The Plaintiff/Respondent is said to be heavily indebted to the Defendant/Applicant and is in default of his loan repayment obligations. This, the Defendant/Applicant continued, is causing immense loss and damages to itself.

4. It is clear from the application that the Defendant/Applicant was served on 14/6/2017 at 2.49pm but everything was received under protest because the notice given was too short. The Defendant/Applicant averred that the head office in Nairobi had to be informed. That office was duly contacted and informed and it instructed a counsel on 15/6/2017. The counsel was to appear in court on 16/7/2017 to seek for more time to file a comprehensive reply.

5. According to Defendant/Applicant, counsel was denied audience by the court because of not filing a notice of appointment. The court then proceeded to issue orders Exparte. These are the orders being challenged now.

6. It appears clear that the dispute herein is premised on default in repayment of a loan advanced to the Plaintiff/Respondent by the Defendant/Applicant. The loan, stated to be 25,000,000/= by the Defendant/Applicant, was secured by a legal charge over land parcels Nos BUSIA/TOWNSHIP/519 and BUSIA/TOWNSHIP/520. The Defendant/Applicant wants to sell these properties because of the Plaintiff's/Respondent's alleged default in repayment. The Plaintiff/Respondent is opposed to the intended sale for various legal and factual reasons.

7. The Plaintiff/Respondent responded vide a replying affidavit filed on 5/7/2017. According to the Plaintiff/Respondent, the Defendant/Applicant should have had recourse to appeal. The Defendant/Applicant, the Plaintiff/Respondent deponed, was given a chance to be heard but squandered it. The application is said to be unmerited and the court was asked to dismiss it.

8. On 26/7/2017, it was agreed that the application be canvassed by way of written submissions. In that regard, the Defendant's/Applicant's submissions were filed on 5/10/2017 while the Plaintiff's/Respondent's submissions followed on 11/10/2017. In the Defendant's/Applicant's submissions, what is emphasized is the alleged denial of the right of hearing to the Defendant/Applicant. It was however also submitted that the Plaintiff/Respondent actually owes a colossal sum of money; that he himself admits owing; that the Defendant/Applicant followed the law in the intended sale process; and that the application herein is merited.

9. The Defendant/Applicant submitted, *inter alia*, that the Defendant/Applicant seems to have largely focused on the earlier application instead of the present one; that the same party seems not to appreciate that the orders given are interim, not final, and are meant to await the determination of the suit; and that justice would be served better if the orders remain.

10. I have considered the application, the response made, rival submissions, and the suit as filed. It would be easy to set aside or discharge the orders being challenged if the Plaintiff's/Respondent's conduct in relation to the subject matter of the suit is demonstrated to fall short of the requirements of a court of equity. But when all is considered, there is nothing convincing showing blameworthy conduct on the part of the Plaintiff/Respondent. If anything, it is doubtful if the Defendant/Applicant was denied the right of hearing as it alleges. Records show that the application first went before Mukunya J at Bungoma on 14/6/2017. The judge did not grant a restraining order *ex parte*. He ordered that the application be served so that parties could appear before him for hearing on 16/6/2017. The Plaintiff/Respondent served and the Defendant/Applicant itself confirms this service.

11. Service is actually confirmation that the right of hearing was accorded to the Defendant/Applicant. The Defendant/Applicant received service under protest because, said it, the time given was too short. Even then however, the Defendant/Applicant stated that it instructed counsel to appear in court on 16/6/2017 to plead for more time in order to comprehensively respond to the application. This counsel, said Defendant/Applicant, was denied audience because of not filing a notice of appointment.

12. I think the Defendant/Applicant is being less than honest here. In the normal course of things, the court *coram* would show the presence of such counsel. His address to court would also be seen as is the court's refusal to deny right of evidence. I have looked at the court record of 16/6/2017. No such counsel appeared. The record only shows the counsel for Plaintiff/Respondent addressing the court. The Defendant/Applicant is not therefore telling the truth. And given the facts the court had when it issued the orders, there was justification for granting them.

13. The Defendant/Applicant would like the orders issued to be discharged. Such a discharge would open the doors for sale of the property. But the Plaintiff has raised issues that call for consideration before sale can proceed. I think it is only fair that the Status Quo be maintained before any sale is conducted. The orders granted precisely serve to maintain the Status Quo.

14. The upshot, in light of the foregoing, is that it would be improper to discharge or set aside the orders. The application herein is therefore dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Busia this 14th day of December, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: