



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 263 OF 2017

ENOCK PTINEK MANYU.....PLAINTIFF

VERSUS

JAMII BORA BANK LIMITED.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from dealing with the suit property; another suit being Nakuru CMCC No. 929 of 2015 wherein the parties are the same as those in this suit found to exist; this suit filed in breach of section 6 of the Civil Procedure Act prima facie case established; this suit transferred to Chief Magistrate's Court Nakuru for hearing and determination and consolidated with Nakuru CMCC No. 929 of 2015)

1. This ruling is in respect of plaintiff's Notice of Motion dated 23rd June 2017, an application brought under Order 40 rule 1 of the Civil Procedure Rules and in which the following orders are sought:

a) Spent.

b) Spent.

c) That this honourable court be pleased to restrain the defendants by way of an injunction from selling, transferring, alienating, charging or in any way interfering with the plaintiff's quiet possession and use of land parcel number L.R No. 10/235 Kabachia Estate (Nakuru County) pending hearing and determination of this suit.

d) That costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that together with his wife Queenvane Kukubo Manyu, being joint proprietors of L.R. No. Nakuru Municipality Block 10/235 (hereafter "the suit property"), they charged the suit property in favour of the defendant to secure a loan advanced to Agency for Development Research Limited (hereinafter "ADRL"). Sometime around 6th August 2015, the plaintiff was served with Notification of Sale and Notice of Intention to Sell Charged Land in respect of the suit property, indicating that the property would be sold on 9th October 2015. Being of the view that the defendant had not complied with sections 90 and 96 of the Land Act, the plaintiff filed Nakuru CMCC No. 929 of 2015 Enock Ptinek Manyu –vs- Jamii Bora Bank Ltd and was granted an injunction restraining the defendant from selling the property pending inter parte hearing in the said court. The inter parte hearing proceeded but before the ruling could be delivered, the matter was stayed owing to a decision of the High Court that deprived the subordinate court of jurisdiction. That on 17th June 2017 the plaintiff saw a notice circulating in his neighborhood showing that the suit property

would be sold on 4th July 2017. He annexed among others, copies of his pleadings in CMCC 929 of 2015, the defendant's replying affidavit therein as well as the order issued on 3rd September 2015. The plaintiff therefore filed the suit and the application for injunction.

3. The application is opposed by the defendant through a replying affidavit sworn by Christine Wahome, a Legal Officer in the defendant company. She deposed, inter alia, that the plaintiff was duly served with statutory Notice and Notice to sell by registered post through Post Office Box Number 104 Nakuru as provided in the charge document. She added that the plaintiff has not denied being in default and that in view of the existence of CMCC No. 929 of 2015 which is still pending this suit is subjudice and is thus an abuse of the court's process.

4. The application was argued by way of written submissions. In that regard, the applicant filed submissions on 3rd August 2017 while the respondent filed submissions on 5th October 2017. I have considered the application, the affidavits filed as well as the submissions. The two issues that emerge for determination are firstly whether the suit herein offends the provisions of Section of the Civil Procedure Act and secondly whether an injunction should issue as prayed.

5. I will start with the first issue since its outcome has a direct bearing on the fate not only of the application but the suit as well. Section 6 of the Civil Procedure Act states:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

6. The plaintiff has owned up that there exists another suit being Nakuru CMCC No. 929 of 2015 wherein the parties are the same as those in this suit. He has annexed copies of pleadings in the said suit which was filed on 3rd September 2015. I have perused the pleadings and I note that the prayers sought in the said suit are the same as those sought in this suit. I also note that the plaintiff had obtained an ex parte injunction in the said suit on 3rd September 2015 and that the wording of the extracted Order is virtually a replica of prayer (c) of the present application. I therefore find and hold that the matters in issue in this suit are also directly and substantially in issue in Nakuru CMCC No. 929 2015 which was previously instituted and wherein the parties are the same as those in the present suit. In short this suit offends section 6 of the Civil Procedure Act.

7. The defendant has argued that this suit is an abuse of the court's process. The plaintiff has on the other hand explained that the subordinate court stayed proceedings pending hearing and determination of an appeal concerning jurisdiction of Magistrate's Courts to hear and determine land matters. I take judicial notice of the fact that there has been a general state of paralysis in the subordinate courts as concerns matters whose subject matter is title to, use and occupation of land following the decision of the High Court in the **Malindi Law Society –vs- Attorney General & 4 others [2016] eKLR**. That issue was recently resolved by the Court of Appeal on 19th October 2017 in **Law Society of Kenya Nairobi Branch –vs- Malindi Law Society & 6 others [2017] eKLR** wherein the court set aside the decision of the High Court. As a result, the subordinate courts are now in a position to hear and determine matters concerning title to, use and occupation of land so long as those matters fall within their pecuniary jurisdiction.

8. To the extent that progress of his case in the subordinate court was stalled by matters beyond his control, I do not fault the plaintiff for filing this case even though he did so in breach of the provisions of section 6 of the Civil Procedure Act. In the unique circumstances of this case, I do not declare this suit an abuse of court process as doing so would be an affront to the provisions of Article 159(2) of the Constitution and would mean that the plaintiff would have been left without a remedy in the face of the new notice of sale that he says he came across on 17th June 2017.

9. In the end, I make the following orders:

- a) This suit is hereby transferred to Chief Magistrate's Court Nakuru for hearing and determination and is hereby consolidated with Nakuru CMCC No. 929 of 2015. The lead file shall be CMCC No. 929 of 2015.
- b) The Chief Magistrates Court Nakuru to proceed to expeditiously hear and determine the consolidated suit and pending applications.
- c) Pending further orders of the subordinate court, parties to abide by the orders issued on 3rd September 2015 in CMCC No. 929 of 2015.
- d) Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 13th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Gikonyo holding brief for Mr. Ngure for the plaintiff/applicant

Mrs. Gathecha holding brief for Mr. Ndichu for the defendant/respondent

Court Assistant: Gichaba