



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO.238 OF 2015

**LORDVICK PHILIP OTIENO.....PLAINTIFF/
APPLICANT**

VERSUS

**KENYA COMMERCIAL BANK (K) LTD.....DEFENDANT/
DEFENDANT**

RULING

1. **Lordvick Philip Otieno**, the Applicant, through the notice of motion dated 17th September 2015 seeks for temporary injunction orders barring **Kenya Commercial Bank (K) Limited**, the Respondent, from selling or disposing land parcel **Kisumu/Karando/4824** pending the hearing and determination of this suit. The application is based on the ten grounds on the notice of motion and supporting affidavit sworn by **Lordvick Philip Otieno** on the 17th September 2015.
2. The application is opposed by the Respondent through the replying affidavit sworn by **Fredrick Mungathia**, a manager with the Respondent, sworn on 7th March 2016 in opposition to the application.
3. The application was heard on 21st April 2016 when Mr Obuso and Mr Ragot, advocates for the Applicant and Respondents respectively, made their rival submissions;
4. The issues for determination are as follows:

a) Whether the Applicant has established a prima facie case with a probability of success for issuance of interlocutory injunction orders.

b) Who will pay the costs of the application.

5. The court has considered the ten grounds on the notice of motion, the affidavit evidence by both parties, submission by counsel and come to the following conclusions:

a) That the Applicant's main complaint are that the Respondent power of sale had not arisen as they had not served him with the statutory notice and secondly, the dispute on interest had not been resolved. That the Applicant had deponed that he was a resident of Tanzania and posting any notice to his Kenyan address would not amount to effective service. That the court has perused the letter of offer and the charge documents dated 17th April 2013 and noted that the address of the Applicant is given as **Post Office Box 19280 -00501 Nairobi**. The charge document at paragraph 38 headed " **notices**" provided as follows:

" Any notices or demand for payments by the Bank shall be deemed to have been properly served on the charger if delivered by hand, or sent by registered post to the Chargor at the registered office or at any of the principal places of business in Kenya or the last known place of

abode of the Chargor. In the absence of evidence of earlier receipt, any notice or demand shall be deemed to have been received, if delivered by hand, at the time of delivery or, if sent by post, seven days after posting (not withstanding that it be undelivered or returned undelivered) or, Where a notice or demand is sent by registered post, it shall be sufficient to prove that the notice or demand was properly addressed and posted."

b) That the Applicant has not provided any evidence to show that he had notified the Respondent of any change in his address. The court has noted that the Applicant had done a letter to the Respondent dated 9th June 2015 in which he made references to the notices received from the Respondent and made some proposals on how to clear the arrears and regularize the repayments. The address the Applicant used in the said letter is the same one in the charge document and to which all copies of the letters and notices from the Respondent had been address. The court is not persuaded that the Applicant had any other address in respect of the charge transaction.

c) That the finding in (b) above leads the court to the only conclusion under the circumstances that the address to which the Respondent addressed all their correspondence and statutory notice over the loan facility with the Applicant was the address the Applicant had preferred as his address for service. That the Applicant had received the notices for him to make reference to them in his letter.

d) That the Applicant has not availed evidence to confirm that he had paid wholly the amount the Respondent demanded under the notices and the fact that he has issues on the interests charged on the loan facility would not in law be the basis of stopping the Respondent's exercise of their power of sale.

6. That for reasons set out above the court finds that the Applicant has failed to establish a prima facie case with a probability of success. He has also not shown that he would suffer irreparable loss if, the charge property is sold in exercise of the power of sale. The fact that the Applicant matrimonial home is on the property is not enough to stop the sale. The Applicant not only obtained the consent of his spouse, **Linnet Aoko Onyina**, as shown in the affidavit of consent of spouse, but ought to have known the property he was charging would be sold in the event he fell into arrears in his repayments. The balance of convenience also tilts in favour of not issuing the interlocutory injunction as the Respondent has a responsibility to protect the funds that it lends out to their customers as it comes from the public.

7. That the application dated 17th September 2015 is without merit and is dismissed with costs. The earlier orders of injunction issued on 18th September 2015 are hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 31ST DAY OF MAY 2016

In presence of;

APPLICANT Absent

RESPONDENT Absent

Counsel M/s Onsongo for Obuso for Plaintiff/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2016