



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CIVIL CASE NO.224 OF 2015

THE REGISTERED TRUSTEES/ARCHDIOCESE OF KISUMU...APPLICANT

VERSUS

ECO BANK KENYA LIMITED.....RESPONDENT

RULING

1. **The Registered Trustees/Archdiocese of Kisumu**, the Applicant, vide notice of motion under certificate of urgency dated 31st August 2015 seeks for injunction orders restraining **Eco bank Kenya Limited**, the Respondent, from realizing, selling, auctioning and or disposing of the Applicant's land parcel No.Kisumu/Konya/2677 or in any way interfering with the Plaintiff's rights to quiet and peaceful enjoyment of the immovable property pending the hearing and determination of this suit.

The Applicant also prays for costs. The application is based on the seven grounds on its face marked (a) to (g) and supported by the joint affidavit of Rev. Fr. Moses Nicholas Omollo and Rev. Fr. Richard Odhiambo Oloo sworn on the 31st August 2015. The Applicants case through the affidavit evidence is as summarized herein below:

a) That the Applicant obtained loan facilities from the Respondent between November 2007 and April 2012 on three accounts numbers;

§ 008 NTLD 130850002

§ 008 NTLD 1308870001 AND

§ 008 NTLD 1308850001.

b) That the Applicant secured the loans on its land parcel **Kisumu/Konya/2677**.

c) That the Applicant has serviced the loans through monthly installments to completion.

d) That the Respondent issued and served Applicant with the statutory notice dated 17th April 2014 demanding payment of Ksh.275,241,281.52 and has threatened to realize the security on 2nd September 2015 despite the Applicant reaffirmation that they would clear the amount.

e) That the Applicants advocate have advised them that the demand for Ksh.275,241,281.52 by the Respondent was unlawful and irregular.

2. The application is opposed by the Respondent through their replying affidavit sworn by Elizabeth

Hinga, head of Early Warning Remedial and Recovery Department of the Respondent's Bank sworn on 16th November 2015 whose highlights are as follows:

a) That the Applicant requested the Respondent for various financial loan facilities and the Respondent accepted and made the offers for the amounts which the applicant accepted as detailed herein below;

<u>AMOUNT</u>	<u>DATE</u>
· Khs.40,000,000/	12.11.2007
· Ksh.63,000,000/=	01.07.2010
· EURO 115,290(Kshs.14,000,000/=)	30.06.2011
· Ksh.20,000,000/=	30.06.2011
· Ksh. <u>33,000,000/=</u>	22.10.2012

TOTAL Kshs. 170,000,000/-

b) That the loan amount were secured on a charge, further charge, second charge and third charge on land parcel Kisumu /Konya/2677 registered on 17.04.2007, 15.10.2010,27.03.2012 and 22.10.2012 respectively.

c) That the Applicant wrote to the Respondent a letter dated 18.04.2012 asking for the loan facilities that then stood at kshs169,954,074/= to be restructured and the Respondent accepted vide their letter dated 4.07.202 which was acknowledged by the Applicant through their letter dated 12.07.2012.

d) That upon another request by the Applicant, the Respondent restructured the loan facility creating new facilities for an aggregate of Kshs262,101,113.10 also secured by a further legal charge on the same security. That the loan restructuring was discussed by the Board of the Applicant in their meeting of 13.2.2013 and approved and a copy of the minutes forwarded to the Respondent.

e) That despite the Respondent agreeing to restructure the loan facilities at the request of the Applicant, and inspite of several demands for repayment being made the Applicant has failed to regularize the repayment of the loan facilities.

f) That the Applicant has failed to disclose to the court the details of the various loan facilities they obtained from the Respondent and the various negotiations the parties had engaged in and has therefore made misrepresentations to the court.

g) That despite the Applicant paying the Respondent Ksh.50,000,000 on 10th February 2015, the loan facilities are still in arrears.

h) That by letter dated 27th October 2014, Valley Auctioneers, on instructions of the Respondent, gave the Applicant notice to auction the charged property unless Ksh.307,810,560.30 was paid in full.

i) That the suit property was valued by Acumen Valuers Limited and market value ascertained at Ksh.255,000,000/= and forced value at Kshs.1919,250,000/= before the auction was advertised in the Daily Nation Newspaper.

j) That the Respondents power of sale had arisen after exhausting all their contractual and statutory obligations to the Applicant and no injunction should issue.

3. That the application was placed before the Deputy Registrar of this court on 1st September 2015 who directed it to be placed before the ELC duty Judge in Eldoret on the same date. The next coram indicates that the matter was placed before Hon. Moseti, possibly a Deputy Registrar at Eldoret, who granted interim orders in terms of prayer 2 after certifying the application urgent in terms of prayer 1. There is no disclosure as to why the matter was not placed before the Judge as directed by the Deputy registrar Kisumu.

4. That the matter was then placed before this court on 5th October 2015 when further directions on the timelines for Respondents to file their papers were given. That both counsel then appeared before the court on 22nd February 2016 when directions on filing of written submissions were given. The Applicant's counsel was to file their's within 30 days but failed to file any submissions within the time given and the Respondent's counsel filed their's dated 27th April 2016 on the 28th April 2016. That during the mention of 4th May 2016, another mention was fixed for 9th June 2016 to see whether the Applicant would file submissions but come that date, the Applicant had not done so and the ruling date of 27th July 2016 was fixed. However the judge got bereaved in the month of July 2016 and the ruling was rescheduled to 11th October 2016.

5. That issues for court's determination are as follows:

a) Whether the Applicant has established a prima facie case for injunctive orders to be issued at this interlocutory stage.

b) Who pays the costs of the application

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, written submissions by Respondent's counsel and come to the following determinations;

a) That though the Applicant had deponed that they had cleared all the loan facilities obtained from the Respondent on various dates between November 2007 and April 2012, the documentary evidence availed by the Respondent rebuts that position. That it is admitted by the Applicant that the Respondent had by their notices dated 17th April 2014 demanded payment of Kshs.275,241,281.52 as at 1^{5th} April 2014. That the Applicant has not shown evidence that they paid that amount by the time they moved to court.

b) That in view of (a) above, the deposition by the Applicant that the whole loan facilities obtained by the Applicant from the Respondent had been cleared was not only untrue, but clearly at variance with the documentary evidence availed.

c) That the Applicant obviously failed to make full disclosure when they moved this court as they did not disclose that they had held various negotiation sessions with the Respondent that had resulted to two restructuring of the laon facilities and that they still failed to service within the timelines agreed.

d) That where an Applicant fails to make full disclosure to the court, then such an Applicant cannot obtain any advantage from the proceedings thereof, and stand to be deprived of any advantage they may have obtained in the interim as was held in Nairobi **HCC No.382 of 2014 Abraham Mutai & 5 others -V- Paul M. Mutwii** at Page 4, in the following words;

“ is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.”

e) That from the foregoing the court find that the Applicant has failed to establish a prima facie case with a probability of success as defined in the case of **Mrao Limited –V- first American Bank of Kenya Limited & 2 others** KLR [2003] at Page 126 and the temporary injunction orders sought cannot issue. That interim orders issued by the Deputy Registrar issued without jurisdiction, as the file had been referred to the ELC duty Judge Eldoret, are null and void ab initio and are hereby set aside.

7. That the sum total of the foregoing is that the Applicant's notices of motion dated 31.08.2015 is without merit and is dismissed with costs. That the interim orders of 01st September 2015 are hereby set aside. That the Respondent is at liberty to proceed with the realization of the charged security ones the relevant statutory provisions on notices are complied with.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2016

In presence of;

Applicant Absent

Respondent Absent

Counsel Mr Makori for M/S Akonga for Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2016

11/10/2016

S.M. Kibunja J.

Oyugi court assistant

Parties absent

Mr Makori for M/S Akonga for Defendant/Respondent

Court: Ruling Judgment dated and delivered in open court in presence of Mr Makori for Akonga for Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2016