



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 102 OF 2016

MARTIN JUMA NAIBEL.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT/RESPONDENT

KOLATO AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The applicant filed a notice of motion dated 17/6/2016 in which he sought an injunction restraining the respondent or their servants from selling by way of public or private treaty **LR. No. Kiminini/Kinyoro Block 4/Rafiki/110**. The application was placed before the court on 20/6/2016. Temporary orders of injunction were granted pending hearing of the application inter-partes.

2. The interim orders were subsequently extended by consent and the parties agreed to dispose of the application by way of written submissions. The applicant contends that he was not served with a statutory notice required *under Section 96 of the Land Act 2012*. That he only came to know about the intended sale through an advertisement in the Daily Nation Newspapers in which **LR. No. Kiminini/Kinyoro Block 4/Rafiki/110** (charged property) had been advertised for sale by way of public auction.

3. The applicant further contends that he had not been notified of any default in payment by the borrower. The respondent had guaranteed a loan of **Kshs.600,000/=** which was advanced to **Joseph Merilima Lomokel** which loan was secured by a charge over the charged property. The applicant therefore contends that the advertisement for sale of the charged property is malicious and that he is ready and willing to repay the loan advanced if the same is re-scheduled.

4. The respondent has countered the applicants claim by stating in a replying affidavit sworn on 1/7/2016 in which the first respondent contends that statutory notice required under Section 96 of the Land Act was sent to the address given by the applicant through registered mail. That the applicant had never given notification of change of address and that service was deemed complete when it sent a notice under Section 96 to the last known address of the applicant.

5. I have carefully gone through the applicant's application and the response thereto by the first defendant. I have also gone through the submissions filed by the respective parties. The only issue for determination in this application is whether the applicant has demonstrated that he has a prima facie case to warrant confirmation of the injunctive orders which were granted on 20/6/2016. The applicant's contention is that he was not served with the statutory notices. The applicant was a guarantor and under

Section 90 of the Land Act the first respondent was required to notify him of any default in payment by the borrower. The applicant had given his postal address in the charge document and guarantee as Post Office Box Number 1992 Kitale. On 20/1/2016, the first respondent notified the applicant of the default by the borrower. The notification also served as notice under Section 96 of the Land Act of 2012. This notice was duly mailed by way of registered post to the address given.

7. Clause 26(2) of the charge document provided as follows:-

“A demand shall be deemed to have been duly made:-

1.2.1

1.2.2 If sent by registered post 4 days after the time when the demand was put in the post and in proving delivery it shall be sufficient to prove that the same was properly addressed and put in the post”.

The first respondent has exhibited a letter addressed to the applicant duly addressed and bearing the stamp of the postal corporation. Though this letter was returned to the sender as it was not collected, the first respondent cannot be blamed for that as there is no explanation from the applicant why this happened. It was the duty of the applicant to collect his registered parcels from his postal address. If for any reason the rental box had been closed, it was the duty of the applicant to inform the first defendant of this. It is very possible for mischievous persons to go open their rental boxes and if they see a notification to pick a parcel, they leave it there until the parcel is returned to the sender. I do not want to say that this is what happened in this case but it is possible.

8. The first respondent discharged its duty once it placed a properly addressed letter in the post addressed to the applicant. The first respondent has demonstrated that it sent a properly addressed letter though it was later returned unclaimed. As I said before, the applicant has not offered any explanation as to why this happened.

9. The Auctioneer was given instructions to proceed with the sale. A notification of sale was duly prepared and was personally served upon the applicant. The applicant signed it and he has annexed a copy of it to his affidavit. The notification for sale was received on 25/5/2016. The Auctioneers Rules require that not less than 40 days notice be given. The notification was served on 25/5/2016. The charged property was advertised for sale on 21/6/2016. This was a period of less than the 40 days required. However be that as it may and considering the fact that the applicant is not disputing the loan he guaranteed, I find that giving of less time is a ground upon which an injunction can be given in the circumstances. The applicant states that he is ready and willing to repay the amount. If he wishes to have the loan re-scheduled to enable him repay, he can do that but he should not stall the process. It is on this basis that I find that applicant has not demonstrated any prima facie case as to warrant injunction orders. I proceed to dismiss the application with costs to the respondent. Injunction orders which had been given on 20/6/2016 and subsequently extended are hereby discharged.

It is so ordered.

Dated, signed and delivered at Kitale on this **10th** day of **October, 2016.**

E. OBAGA

JUDGE

COURT

Ruling signed at 3.00 pm in the absence of parties who were aware of the date and time of delivery of ruling.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

10/10/2016