



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.113 OF 2014

SIMON MUTETI MUTUNE.....PLAINTIFF/APPLICANT

=VERSUS=

CO-OPERATIVE BANK OF KENYA LIMITED.....DEENDANT/RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Plaintiff's amended Notice of Motion dated 17th June 2014 seeking for the following orders:

(a) That pending interpartes hearing and determination of this application and suit an order of temporary injunction do issue restraining the defendant either by itself and/or its authorized agents, servants, employees or otherwise whomsoever from occupying, entering, trespassing, alienating, selling, advertising for sale, registering, transferring to its and/or a third party the ownership and possession of all that property known as Land Parcel No. Kilifi/Madeteni/477 situated in Matsangoni, Kilifi County and/or dealing with the said parcel of land in any manner detrimental to the Plaintiff's interest.

(b) THAT costs of this application be provided for.

The Plaintiff's/Applicant's case:

2. The Plaintiff's Application is premised on the grounds that on or about 2007, the Defendant advanced to the Plaintiff Kshs.1,000,000 which facility was secured by the Plaintiff's land parcel number Kilifi/Madeteni/477; that the Plaintiff paid the agreed installments and as at 28th May 2014, the outstanding balance was Kshs.1,048,083.45 and that the purported sale of the suit property by the Defendant was illegal because no statutory notice was served upon the Plaintiff.

The Defendant's/Respondent's case:

3. In the Replying Affidavit, the Defendant's Credit Officer deponed that the Notice of Motion dated 17th June 2014 is defective for not being supported by an affidavit and that there is another pending suit between the parties being Nairobi HCCC No. 549 of 2009 where the same issues between the same parties herein are pending adjudication.
4. The Defendant's Credit Officer has further deponed that before realising its security the Respondent served on the Plaintiff a three (3) months statutory notice as required under Section 74 of the repealed Registered Land Act by registered post and after serving on the Plaintiff the notification of sale, the suit property was advertised in the Standard Newspaper.
5. It is the Defendant's case that it sold the suit property in a public auction on 29th May 2014, and the purchaser completed the sale on 13th June 2014; that the property was sold for Kshs.5,700,000 which was way above the forced sale value and that the Applicant failed to service his loan since the year 2009.

Submissions:

6. Despite being directed to file his submissions by the court, the Plaintiff/Applicant did not do so. The Defendant's advocate filed his submissions and list of authorities on 9th February, 2015 and 19th August 2014 respectively. I have considered the said authorities and submissions.

Analysis and findings:

7. The Plaintiff's amended Application dated 17th June 2014 is not supported by an affidavit. To the extend that the Plaintiff has alleged in the Application that he was never served with a statutory notice and that the suit property was sold at a price which was low and contrary to the provisions of the law, he should have filed a Supporting Affidavit and deponed to those facts.
8. Consequently, the said Application is incurably defective for lack of an Affidavit.
9. The Plaintiff has also not denied that there is a pending suit being Nairobi HCCC No. 549 of 2009; Simon Muteti Mutune Vs Co-operating Bank in which the Plaintiff herein has sought the same remedies that he has sought in this suit. The Plaintiff did not disclose to this court the fact that there is an existing suit between the same parties over the same subject matter.
10. In fact, the Plaintiff averred in his Plaint that there is no other suit pending between the parties over the subject matter, an averment he knew was untrue.
11. On those two grounds alone, I find that the Application before me is defective and an abuse of the court process and I dismiss it with costs.

Dated and delivered in Malindi this 20th day of March, 2015.

O. A. Angote

Judge