



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU

ELC CASE NO.232OF 2017

THE REGISTERED TRUSTEED

ARCHDIOCESE OF KISUMU.....PLAINTIFF

VERSUS

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

RULING

1. **Bank of Africa Kenya Limited**, the Defendant, moved the court through the chamber summons application dated 28th September 2017 seeking to set aside or otherwise vary the order of 14th July 2017 that was subsequently extended on the 20th September 2017 to the 23rd January 2018 among other prayers. The application is based on the ten grounds on its face and is supported by the affidavit of Muriuki Daniel Mwenda, an advocate from the firms of advocates on record for the Defendant.

2. The application is opposed by the Registered Trustees Archdiocese of Kisumu, the Plaintiff, through the replying affidavit sworn by Reverend Father Moses N. Omolo, a trustee of the Plaintiff, on the 30th October 2017.

3. The application came up for hearing on the 21st November 2017 when Mr. Owiti and Nyauke learned counsel for the defendant and Plaintiff respectively, made their oral submissions.

4. The following are the issues for determination by the court;

a) Whether the order of injunction of 14th July 2017 was obtained through deception, misrepresentation and non-disclosure.

b) Whether a similar application has already been dealt with in Kisumu ELC NO.203 of 2016 and if so, whether the application pursuant to which the order of 14th July 2017 was issued was res judicata.

c) Whether the Plaintiff is still indebted to the defendant and if so, whether the order of 14th July 2017 should be set aside and or varied.

d) Who pays the costs.

5. The court has carefully considered the grounds on the chamber summons, affidavit evidence, submission by both counsel, the court record and come to the following conclusions;

a) That the suit was commenced through the plaint dated 13th July 2017 and filed contemporaneously with a notice of motion of even date, under certificate of urgency seeking to stay the auction of the Plaintiff's land parcel Kisumu Municipality/Block 6/560, pending the interpartes hearing of the application in the first instance and thereafter the main suit.

b) That the notice of motion was presented before the ELC Kericho on the 13th July 2017, as this court was on annual leave. That the matter was certified urgent in terms of prayer one and interim order in terms of prayer two granted pending service and interpartes hearing.

c) That the interim stay order was extended on the 27th July 2017 by ELC Busia to 20th September 2017.

d) That on the 20th September 2017, Mr. Nyauke and Owiti for the Plaintiff and Defendant respectively, addressed the court after which the notice of motion was fixed for hearing on the 23rd January 2018 and interim order extended till then. The application subject matter of this ruling was then filed on the 5th October 2017.

e) That as deponed to in the supporting affidavit of Muriuki Daniel Mwenda at paragraph 5 and 7, the Plaintiff did not disclose that they had filed another suit being Kisumu ELC No.203 of 2016, against the Defendant that they had subsequently filed a notice to withdraw dated 4th July 2017 and amended on the 10th July 2017 only a few days before filing this suit.

f) That the Plaintiff did not disclose in their notice of motion dated 13th July 2017 that they had filed, prosecuted and lost a similar application for injunction in Kisumu ELC No.203 of 2016.

g) That the court has perused the pleadings and ruling dated 14th July 2017 in Kisumu ELC No.203 of 2016, and annexed to the supporting affidavit, and found that other than the difference in the phraseology in the wording of the prayers, this suit and the notice of motion both dated 13th July 2017, are more or less the same to the suit commenced vide the plaint dated 25th May 2016 and notice of motion of even date in Kisumu ELC No.203 OF 2016.

h) That though the Plaintiff appear to have withdrawn Kisumu ELC No.203 OF 2016, the fact that this court had already pronounced itself on the notice of motion dated 25th May 2016 vide its ruling of 14th June 2017, makes the issues raised in notice of motion dated 13th July 2017 herein *resjudicata*. The fact that the suit may have been withdrawn thereafter does not change that fact.

i) That had the Plaintiff disclosed in their notice of motion dated 13th July 2017 that the court had already pronounced itself on 14th June 2017 in a related application in Kisumu ELC No.203 of 2016, the court would not have granted or extended the *exparte* interim order as it did on the 13th July 2017, 20th July 2017 and 20th September 2017.

j) That the Plaintiff's notice of motion dated 13th July 2017 seeks for equitable orders and what is demanded of such a litigant is full disclosure and good faith. That when an order is issued without full disclosure or on the basis of a misrepresentation, the party deriving benefit out of such an order stands to lose out ones it is established, like in this case, that the order was obtained through misrepresentation and without full disclosure.

k) That for reasons set out above, the court finds merit in the Defendant's chamber summons

application dated 28th September 2017 and the exparte interim order issued in terms of prayer two of the notice of motion dated 13th July 2017 and extended on 20th July 2017 and 20th September is hereby set aside with costs to the Defendant.

l) Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Owiti for the Defendant/Applicant

 Mr. Mwamu for Nyauke for the Plaintiff/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

19/12/2017

19/12/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Owiti for the Defendant/plaintiff/Respondent

Court: Ruling dated and delivered in open court in presence of Mr. Owiti for the Defendant and Mr. Mwamu for Nyauke for Plaintiff /Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

19/12/2017



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