



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT KISUMU**

**ELC CASE NO.280 OF 2015**

**AL. HYDER TRADING COMPANY LIMITED.....1ST**  
**PLAINTIFF**

**RANA SHAUKHAT ALI WARYAM ..... 2ND**  
**PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK LIMITED.....1ST**  
**DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS .....2ND**  
**DEFENDANT**

**RULING**

1. **AL Hyder Trading Company Limited** and **Rana Shaukhat Ali Waryam**, the 1st and 2nd Plaintiffs respectively, filed the notice of motion dated 21st October 2015 contemporaneously with the plaint of even date seeking for temporary injunction restraining **Diamond Trust Bank Kenya Limited** and **Joseph M. Gikonyo T/A Garam Investments**, the 1st and 2nd Defendants respectively, from selling and interfering with Plaintiffs quiet use and occupation of **Kisumu Municipality/Block 10/24** pending the hearing and determination of this suit. The plaintiffs based their application on the nine grounds on the face of notice of motion and is supported by the affidavit of **Rana Shaukrat Ali Waryam** sworn on the 21st October 2015.
2. The application is opposed by the Defendants through the replying affidavit of **Marius Kajira** sworn on 28th October 2015.
3. The application came up for hearing on 29th October 2015 and after hearing the counsel for the parties, the court granted prayer 2 pending the hearing and determination of the notice of motion. The court also directed that the application be dealt with through written submissions. The Plaintiffs' counsel filed their written submissions dated 11th November 2015 on the 16th November 2015 while counsel for the Defendants filed theirs dated 9th November 2015 on the 12th November 2015. The submissions are as summarized, hereinbelow:

a) **PLAINTIFFS COUNSEL'S SUBMISSIONS;**

That the 1st Plaintiff obtained financial facilities from the 1st Defendant that were secured on three Charges registered against **Kisumu Municipality/Block 10/24** owned by the 2nd Plaintiff. That the 1st Plaintiff has regularly liquidated the repayments when they became due and regularized the repayment that fell unto arrears. That this application was occasioned by the advertised sale of the charged property set for 6th November 2015 without the Plaintiffs being served with the requisite statutory notices

required under the **Land Act**,

absence of a forced sale valuation report and dispute on the amount outstanding. The counsel submitted that the Plaintiffs, had not been served personally with the notices and therefore they have met the threshold for grant of temporary injunction orders sought as announced in the case of **Giella -V Casman Brown Ltd** [1973] E.A 358. The plaintiffs were not granted opportunity to dispose of the charged property before the 1st Defendant exercise of their right of sale. That the charged property is where the 2nd Plaintiff's matrimonial home is situated and the wife was never served with any notice and the family would therefore suffer irreparable loss. That the balance of convenience tilts in favour of the Plaintiffs as the 2nd Plaintiff who is in occupation is making arrangements to sell off the property with the 1st Defendant's approval so as to pay off the loan.

b) **DEFENDANTS COUNSEL'S SUBMISSIONS:**

That the 1st Defendant extended to the 1st Plaintiff four financial facilities amounting to Ksh.25,285,953 that were guaranteed by the 2nd Plaintiff and secured with three charges over his land parcel **Kisumu Municipality/Block 10/24**. That the 1st Plaintiff routinely defaulted on the loan obligations and as at 27th January 2014 was in arrears of Ksh.1,594,747/49 that had persisted for over 90 days. That after the Plaintiffs failed to regularize the loan arrears repayment, a demand notice dated 14th February 2014 was done to the 1st Plaintiff and copied to the 2nd Plaintiff, **Amina Omar Faraj and Muhammed Rafiq and another**. Then a three months statutory notice dated 6th May 2014 was addressed to the 2nd Plaintiff and copied to the 1st Plaintiff, **Amina Omar Faraj, Muhammed Rafiq and another**, pursuant to **Section 90 (3) of the Land Act 2012**. By then the arrears was Ksh.2,294,536/60 as at 24th April 2014. That after the Plaintiffs failed to pay the arrears, the 1st Defendant instructed the 2nd Defendant under the letter dated 18th August 2014, to issue the 45 days redemption notice and thereafter advertise the property through public auction. That the redemption notice and notification for sale dated 20th August 2014 were issued and served to one **M. Rafiq** and through registered post addressed to **Rana Shaukat Ali Waryan of P.O. BOX 9774 -40100 KISUMU**. That the auction was advertised for 24th October 2014 but later cancelled upon the Plaintiffs request to be given more time to regularize the repayments. That after waiting for about eight months without the Plaintiffs paying up the arrears, the 1st Defendant issued a 40 day notification for sale pursuant to **Section 96 of the Land Act**, addressed to the 2nd Plaintiff and copied to 1st Plaintiff, **Amina Omar Faraj, Muhammed Rafiq and another**, dated 5th June 2015. That after the 40 days notice lapsed the 2nd Defendant issued the 45 days redemption notice addressed to the 2nd Plaintiff and notification of sale dated 29th August 2015 and received by one **Muhammed** on 1st September 2015 and posted by registered mail. That the public auction was then scheduled for 6th November 2015. That the 2nd Plaintiff wrote to the 1st Defendant the letter dated 4th September 2015 seeking for time to sell the charged property through private treaty and use the proceeds thereof to off set the loan. That the 1st Defendant accepted the request with conditions which the 2nd Plaintiff failed to meet and instead filed this suit. The counsel referred to case of **Giella -V Cassman Brown Ltd** [1973] E.A 358, Nairobi HCC No.2044 of 2001 **Moses Ngenye Kahindo -V- Agricultural Finance Corporation** and **Nguruman Ltd -V- Jan Donde Nielsen & 2 Others** [2014] eKLR on the principles guiding the issuance of temporary injunction at the interlocutory stage and submitted that the Plaintiffs have not met the test of establishing a prima facie case with a probability of success as defined in the case of **Mrao Ltd -V First American Bank of Kenya Ltd & 2 Others** (2003) KLR 125.

The counsel further submitted that the Plaintiffs have not made any payments to liquidate the arrears since December 2014 and that as at 26th October 2015, the arrears were at Ksh.6,672,454/04 as per annexure MK 17 to the replying affidavit. That the 1st Defendant statutory power of sale has arisen and the Plaintiffs should not be allowed to impeach it in the manner they are attempting to do. The counsel referred the court to the following other cases; HCC No.3125 of 1995 **John P.O. Mutere & Another -V- Kenya Commercial Bank** cited in **Housing Finance Company of Kenya -V- Ngige Kitson Mondo** (2006) eKLR, HCC No.414 of 2004 **Francis J.K. Ichatha -V- Housing Finance Company of Kenya Ltd** cited in **Daniel Kamau Mugambi -V- Housing Finance Company of Kenya Ltd** (2006) eKLR, **Jane Wanja Miriti -V- Fina Bank Ltd & Another** (2012) eKLR, **National Bank of Kenya Ltd -V- Pipeplastic Samkolit (K) Ltd & Another** [2001] KLR 112, **Fina Ltd -V- Ronak Ltd** [2001] 1 E.A 54,

in support of his submission that where there has been default, the mortgagee should not be prevented from exercising its power of sale even if there exists a dispute as to the amount unless the same is paid in court. The counsel went on to submit that a valuation of the charge property will be carried out before the auction is conducted so as to comply with **Section 97 of the Land Act** which obligates the Chargee to obtain the best reasonable price. That absence of a recent valuation report is not enough to impeach the exercise of the 1st Defendant power of sale as the Plaintiffs would, if dissatisfied, move the court under **Section 97(1)(b) of the Land Act** to void the sale or for damages or both. The counsel referred to Malindi ELC No.5 of 293 **Webwaka Trade Ltd -V- Diamond Trust Bank Ltd** on that position. That the charge property has ascertainable value and damages would be adequate if the Plaintiffs were to be successful in the main claim. The counsel referred the court to the cases of **Andrew Ouko -V- Kenya Commercial Bank & 3 others** (2005) eKLR and **Andrew Muriuki Wanjoli -V- Equity Building Society & Another** {2006} eKLR in support of his submission. That the Plaintiffs are undeserving of the orders sought for material non disclosure that disentitle them of the equitable relief of injunction., even if they had established a prima facie case with a probability of success. The counsel referred the court to the case of **King -V- The General Commissioners for the Purposes of Income Tax Act for the District of Kensington** [1917]. IKB 456 and **Alghusein Establishment -V- Eston College** [1991] 1 All ER 267 and submitted that the application dated 21st October 2015 should be dismissed with costs.

4. The issue for determination is whether the Plaintiffs have established a prima facie with a probability of success for issuance of temporary injunctive orders at this interlocutory stage. Put conversely, has the Plaintiffs presented material fact that are sufficient to impeach the 1st Defendant exercise of its statutory power of sale at this stage.

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

a) That the 1st Defendant extended four financial facilities totalling over Ksh.25,million to the 1st Plaintiff upon the directors namely **Amina Omar Faraj, Muhammed Rafiq** and **Rana Shaukat Ali** executing in acceptance the letters of offer in between 2011 and 2013. The named directors also signed the memorandum of acceptance undertaking and agreeing to guarantee the performance by the 1st Plaintiff of its loan obligations. The directors named **Amina Omar Faraj**, as the spouse to the director named **Rana Shaukat Ali Waryan**, consented in writing to the creation of the Charge over the **Kisumu Municipality Block 10/24**.

b) That the 2nd Plaintiff offered the title of his land **Kisumu Municipality /Block 10/24** as security for the financial facilities offered by the 1st Defendant to the 1st Plaintiff. That the 2nd Plaintiff executed the Charge documents which were also signed by **Muhamed Rafiq** and **Amina Omar Faraj** as directors of the 1st Plaintiff before registration.

c) That the 1st Plaintiff fell into arrears in the financial facilities repayments in 2014 prompting the 1st Defendant to write a demand letter dated 14th February 2014. That after the 1st plaintiff failed to regularize the repayments the 1st Defendant issued and served the statutory notice dated 6th May 2014. The statutory notice is addressed to the 2nd Plaintiff as the chargor and copied to the 1st Plaintiff and its other two directors namely, **Amina Omar Faraj** and **Muhammed Rafiq**. The Plaintiffs have disputed service of the statutory notice and therefore argue that the 1st Defendant statutory power of sale has not arisen. The evidence provided by the Defendants through the replying affidavit shows that both the demand notice and statutory notice were actually issued and served to the Plaintiffs and the other two directors to the 1st Plaintiff. One of the two directors is also the spouse to the 2nd Plaintiff and were served through personal service to **Muhammed Rafiq** and registered post. The Defendants have annexed copies of the notices including notification of sale and redemption notices bearing signatures of **Muhammed Rafiq** in acknowledgement of service and registered posting certificates in the replying affidavit which have not been disputed and or challenged by the Plaintiffs. The claim that the statutory notice, redemption notice and notification of sale had not been issued and properly served on both the 1st Plaintiff as the borrower, the 2nd Plaintiff as the Chargor and guarantor and **Amina Omar Faraj**, who had given consent to charge the property cannot possibly be true. The director named **Mohammed Rafiq** on whom personal service was effected has not come forward to dispute that fact and the appended

signature.

d) That by the time the Defendants advertised the public auction set for the 6th November 2015 which prompted the Plaintiffs to file this suit, and specifically the notice of motion dated 21st October 2015, the financial facilities advanced to the 1st plaintiff and secured on the 2nd Plaintiff land parcel **Kisumu Municipality/Block 10/24** had been in arrears over several months to a total of about Ksh.9,993,115/26 as at 28th May 2015. That amount must have increased due to the interests, if no payments have been made since. The Plaintiffs seem to contest the amount outstanding and claims to have asked the 1st Defendant for an explanation on the items on interests charged. The Superior Court has time and again declined to be involved in setting the terms of the contracts between the Chargees/Mortgagees and Chargors/Mortgagors. The courts have taken the position that its duty is to enforce the terms of the contracts agreed between parties. This court has expressed itself on that issue in Kisumu H.C.C.A No.36 of 2012, **Joseph Ojwando Okanda -V- Cooperative Bank of Kenya Ltd**. The following other decisions have also addressed the same position; **Morris & Co. Ltd -V- Kenya Commercial Bank Ltd & Another** 2 E.A, **Maltex Commercial Agencies Supplies Ltd & Another -V- Euro Bank Ltd** (In liquidation) (2007) eKLR, **Mrao Ltd -V- First American Bank of Kenya Ltd & 2 others** [2003] eKLR, **Hyundai Motors Kenya Ltd -V- East African Development Bank Ltd** [2007]eKLR and **Elijah Kipngeno Arp Bii -V- Kenya Commercial Bank Ltd** (2001) KLR 458. The following decided cases cited by the Defendants counsel in their submissions are also spot on the same position. HCCC NO.3125 of 1995 **John P.O.Mutere & Another -V- Kenya Commercial Bank** quoted in **Housing Finance Company of Kenya -V- Ngige Kitson Mondo** (2006) eKLR, HCC NO.414 of 2004 **Francis J.K Ichatha -V- Housing Finance Company of Kenya Ltd** quoted in **Daniel Kamau Mugambi -V- Housing Finance Company of Kenya Limited** (2006) eKLR, **Jane Wanja miriti -V- Fina Bank Limited & Another** (2012) eKLR, **National Bank of Kenya Ltd -V- Pipeplastic Samkolit (K) Ltd & Another** (2001) KLR 112 and **Fina Bank -V- Ronak Limited** (2001) IEA 54. This court can only stop the Chargee's exercise of its statutory power of sale where it has arisen, if the Chargor avails evidence of payment of the amount demanded, or where the same is paid in court. No such evidence of payment of the amount demanded by the 1st Defendant has been availed by the Plaintiffs to this court to allow this court exercise its discretion in favour of the Plaintiffs.

e) That the 2nd Defendant has, in both occasions, after receiving instructions from the 1st Defendant to auction the charge property, advised in writing that a valuation of the property be carried out by the 1st Defendant before the auction date set. The counsel submitted that the 1st Defendant is well aware of its obligation under **Section 97 of the Land Act** to ensure the best reasonable price is obtained. He has further submitted that the absence of forced valuation report is not enough to impeach the intended auction and relied on Malindi ELC No.5 of 2013 **Webwaka Trade Limited -V- Diamond Trust Bank Ltd** where Angote J. said the following about **Section 97 of the Land Act**;

**" Section 97 (1) of the Land Act provides that a Chargee while selling a property by public auction should obtain the best price reasonably obtainable at the time of sale. The Act then provides the remedies that the Chargor has in the event the Chargee sells the property below the market value.**

**In view the fact that the Plaintiff has a recourse under Section 97 (1) (b) of the Land Act to apply to the court for an order that the sale is void, this court cannot at this stage stop the said sale."** This court concurs with the position taken by the honourable judge on that issue.

f) That having found that the spouse of the Chargor (2nd Plaintiff) was served with the requisite notices, as were the Plaintiffs, and had consented to the charging of the property knowing very well that was where their matrimonial home was situated, the court find that the value of the property is capable of being ascertained and the Plaintiffs would not suffer any irreparable loss if the Defendants proceeded to auction it. The 1st Defendant has detailed the two opportunities they accorded the Plaintiffs to regularize the repayments and seek for a private buyer of the property but the Plaintiffs failed to utilize the opportunities. The court therefore agrees with the Defendants counsel's submissions that the Plaintiffs obtained the temporary injunction in terms of prayers 2 through failure to make full disclosure. The Plaintiffs are therefore not entitled to the equitable relief sought.

6. That having found as above, the court finds that the Plaintiffs notice of motion dated 21st October 2015 is without merit and is hereby dismissed with costs to the Defendants. The interim orders issued on 29th October 2015 is hereby vacated.

It is so ordered.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 19TH DAY OF APRIL 2016**

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr Ouma for Plaintiffs/Applicant

Mr Emukule for Mohamed Madhau for Defendant/Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**19/4/2016**

19/4/2016

S.M. Kibunja J.

Oyugi court clerk

Parties absent

Mr Ouma for Plaintiffs/Applicants

Mr Emukule for Mohamed Madaiu for Respondent

Court: Ruling delivered in open court in presence of both Mr Mr Ouma for Plaintiffs/Applicant and Mr Emukule for Mohamed Madaiu advocate for Respondents.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**19/4/2016**