REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND CASE NO.265 OF 2014

JITENDRA B. DHOKIA.....PLAINTIF/APPLICANT

VERSUS

BANK OF BARODA LTD.....DEFENDANT/RESPONDENT

RULING

Jitendra B. Dhakia the Applicant, filed the notice of urgency dated 8th September 2014 for four (4) orders. Prayer 1 was for the application to be Certified Urgent and prayer 4 was for costs. The second prayer was for temporary injunction pending the hearing of the application. This s ruling is concerned with prayer 3 which is in the following terms:

" 3 An order of temporary injunction against the defendant, its agents or representatives from advertising for sale, selling, disposing, interfering or in any other manner interfering with the plaintiff's property known as **KISUMU/MUNICIPALITY/BLOCK 7/443** pending the hearing and determination of this suit."

The Applicant has set out seven grounds marked (i) to (vii) and in support of the application has a supporting affidavit sworn by the Applicant on the 8th September 2014. The Applicant has deponed that through the Charge over the suit property in favour

of Dhokia Transporters Ltd, hereinafter refered as the Borrower, was limited to Ksh.25 million, which amount has since been fully paid. The Respondent, Bank of Baroda Ltd has without his consent consolidated all the financial facilities given to the Borrower and taken the suit property as part of the securities, which it intends to realise.

The Respondent, opposed the application through the replying affidavit sworn by Banabar Behera, on 8th October 2015. The Respondent position is that the application is only meant to delay its statutory power of sale which has arisen and that all the procedural process have been complied with after the Borrower, Dhokia Transporters Limited, failed to service the six loans set out in paragraph 12 of the replying affidavit. The Respondent had also filed grounds of opposition dated 25th September 2014. The Applicant then filed further supporting affidavit sworn by Jitendra Ashwin Dhokhia on 3rd December 2014 in answer to the replying affidavit. The Respondent in turn filed a further replying affidavit sworn by Banambar Behera on 14th January 2015 in answer to the further supporting affidavit.

When the application come up for hearing on 18th September 2014, Counsel entered a consent that status quo be maintained and that written submissions be filed.The Applicant's counsel filed their submission dated 4th March 2015 while the counsel for Respondent filed theirs dated the 1st August 2015.The court has considered the grounds on the application, the four affidavits and rival submissions

and found as follows:

(a) That both counsels have in their submissions pointed out that the main consideration.

was whether the Applicant has established a case for issuance of injunction order as guided by principles set out in the **Giella – v – Cassman Brown & CO Ltd** (1973) E.A 358 for issuance of temporary injunction. The Applicant's contention was that the charge over the suit property was for financial facility to be advanced by the Respondent to the Borrower to a maximum of Ksh.25 million.The Applicant contends that the amount has been cleared and the Respondent had erred in consolidating all the financial facilities accorded to the said Dhokhia Transporters Ltd and holdings that the charge to the suit land was part of the securities presented for the combined amount.The Respondent has defended its action to pool together all the financial facilities they had given the Borrower and to hold that the charge on the suit land was part of the securities agreed to be provided for the total funds advanced to the Borrower.

The Applicant annexed to the supporting affidavit a copy of the charge document dated 4th March 2011.It appears to be dully executed by Jitendra Aswin DhokhIa as the chargor, and has two signatures each for the Borrower and the chargee.The chargor is the Applicant herein while the chargee is the Respondent.

The Respondent attached what is refered to as a letter of offer dated 3rd February 2011 in support of their case. The court has considered the charge document and the letter of offer and on the facts so far presented, it is clear the suit property **KISUMU/MUNICIPALITY/BLOCK 7/443** was one of the properties to be valued under clause 7.2 of the letter of offer. The property also appears at charge 25 headed "**SECURITY/DOCUMENTS"** at subclause 3 among the properties to be charged for the financial facilities to be advanced to the Borrower.It is also clear that under clause 10 (d) of the charge, the chargee (Respondent) was authorised to " hold on the property and assets of the chargor (Applicant) and the Borrower or any part of thereof for or in respect of all or any part of the indebtedness of the chargor and the Borrower to the Bank howsoever arising or any interest thereon".Under clause 10 (k) and (L) the charge document, the Respondent was allowed to tack (make) further advances as provided for under Section 83 of the Registered Land Act (repealed) and to consolidate all or any of the liabilities accounts in which the Applicant and Borrower owed the bank. This clearly shows that the position taken by the Applicant faulting the Respondent's step of consolidating the Borrower's liabilities and holding that the title he had charged with the Respondent was part of the securities for all the loan facilities was wrong.

The Respondent cannot be faulted on their move to consolidate the Borrower's liabilities and on their intention to realise the securities offered in accordance with the law for reasons of non payment. On this score, the court find that the Applicant has failed to establish a prima facie case with a probability of success.

(b) That from the affidavit evidence and submission offered by the Applicant, that he had cleared the Ksh.25 million, that position obtains only if no interests was chargeable on the amount offered and if the decision to consolidate the Borrower's liabilities was found to be erroneous.The finding in (a) above shows the charge document allowed consolidation of the liabilities and tacking of the advances in favour of the Borrower against the security offered..Clause 8.2 of the letter of offer shows the security to be offered was for payment of various items including interests, fees, commission, costs, charges and expenses among others.The facts presented by the Applicant falls short of showing that the Borrower and himself have settled all the obligations owed to the Respondent under the charge. Accordingly, the court finds that there is no good cause to stop the Respondent from taking the legal steps necessary to realise their security. In case the Applicant to be victorious after the main hearing, he would not be without recourse as the suit property has been valued and damages would be adequate compensation (see **Kihara – v – Barclays Bank (K)** Ltd (2001)2 E.A 421) where the court held that " as the plaintiff had put up the property as security for the loan with full knowledge that should he default, it would be sold, he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages." The applicant has therefore not proved that he stands to suffer

irreparable loss if injunction orders are not issued.

c. The charge document does not state that interest was not chargeable. The provisions of Section 69(a) of the Registered land Act (Repealed) and now Section 88(1)(a) of Land Act No.6 of 2012 clearly states that in every charge the chargor is obliged to pay the principal sum on the day appointed and pay interest or any part thereof that remains unpaid at the rate and time frame specified.The position taken by the applicant that no interest was payable is not supported by the available evidence.The balance of convenience is also not available to the Applicant as to stop the Respondent from realising their security will mean the Borrower's unpaid liability will continue to attract interest thereby increasing the total liability. This will not be beneficial to the Applicant were he to be unsuccessful in the end and the Respondent proceeds to realise the security for the high amount.

That for reasons set out above the court finds no merit in the Applicants application dated 8th September 2014. The said application is dismissed with costs and the status quo orders of 18th September 2014 are consequently vacated.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **30th day of September 2015**

In presence of

Plaintiff/Applicant N/A

Defendant/Respondent N/A

Counsel - Mr Oteino for Defendant/Respondent and Mr Omondi T. for Otieno Yogo Advocate for Plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/9/2015

s.m. Kibunja J

Oyugi Court clerk

Parties absent

Mr. Otieno for Defendant/Respondent

Otieno Yogo for Applicant represented by Mr Omondi T.

Matter is for Reading of the Ruling.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/9/2015

Court: Ruling Delivered in open court in presence of Mr Otieno for the Defendant/Respondent and Mr. Omondi T. for Otieno Yogo Advocate for plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/9/2015