



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.28 OF 2015

MALKIT SINGH PANDHAL.....APPLICANT

VERSUS

N.I.C BANK LIMITED.....1ST RESPONDENT

JOSEPH GIKONYO T/A GARAM INVESTMENT.....2ND RESPONDENT

RULING

1. **Malkit Singh Pandhal**, the Applicant, filed the notice of motion dated 30th January 2015 for five prayers marked 1 to 5 respectively. Prayers 1 and 2 have been dealt with leaving prayers 3, 4 and 5 which are subject matter of this ruling. Prayer 3 is for temporary injunction against **NIC Bank Limited** and **Joseph M. Gikonyo T/A** restraining them from advertising for sale, selling, disposing, interfering or in any other manner interfering with the plaintiff's property known as **Kisumu/Municipality/Block 8/204** pending the hearing and determination of this suit. Prayer 4 is for an order declaring the notices dated 27th June 2014, 1st October 2014 and 16th December 2014 issued by the Respondents as illegal, unlawful, null and void and therefore set aside. The last prayer is for costs. The application is based on the nine grounds on the notice of motion, supporting and further supporting affidavits sworn by Malkit Singh Pandhal on 30th January 2015 and 17th March 2015 respectively.
2. The application is opposed by the Respondents through the replying affidavit sworn by Keneth Mawira on 20th February 2015.
3. The application came up for interpartes hearing on 18th May 2015 and counsel agreed to file written submission. The Applicant's counsel filed their submissions dated 28th September 2015 while Respondents counsel filed theirs also dated 28th September 2015 on the 29th September 2015.
4. The main issues for determination are as follows:
 - (a) Whether the Applicant has established a case for issuance of injunction at the interlocutory stage.
 - (b) Whether the three notices were lawfully issued and served in accordance with the law.
 - (c) Who pays the costs.

5. The Court has considered the grounds on the notice of motion, the affidavit evidence and submissions by both counsel and come to the following findings:

(a) That the Applicant's main complaint is that the Respondents have not served him with the requisite statutory notices in accordance with the law and the advertised sale of the suit land is therefore premature. As submitted by both counsel, the Applicant and one Surjit Singh Pandhal are the registered proprietors of Kisumu/Municipality/Block 8/204. That the two registered owners charged the title of the said land with 1st Respondent on 19th June 2013 to guarantee one Bhalvinder Singh Pandhal t/a Haul Mark Kenya Limited, (the borrower), a loan facility of Kshs.25 million. The charge was entered on the title as entry number 11 of 21st June 2013. (see copy of the certificate of official search annexed to the supporting affidavit). The charge document annexed to the replying affidavit indicate that it was signed by the Applicant, Surjit Singh Pandhal and Bhalvinder Sigh Pandhal, the borrower, in the presence of one I. E. N. Okero advocate. The document, at page one, gives the address of Surjit Singh Pandhal and Applicant as Post office Box Number 967-40100 Kisumu while that of the borrower is indicated as Post office Box Number 835-40100 Kisumu. The charge document provided at clause 30.3 under the heading of " Notices" as follows:

"Any notice required or authorized by law or by this charge shall be deemed to have been properly served by the Bank on the Chargors and or the Borrower if left at the charged property or at the principal place of business of the Chargors, and or the Borrower or sent by registered post to the Borrower's last known postal address or sent by telex or facsimile to the chargors, and or the Borrower's last known relevant address. Any notice hand delivered as aforesaid shall be deemed to have been given upon delivery at the relevant address and any notice sent by registered post shall be deemed to have been served on the addressee at 10.00 am, on the Seventh succeeding business day following the day of posting notwithstanding that it be undelivered or returned undelivered and, in proving service, it shall be sufficient to prove that the notice or demand was properly addressed and posted. Any notice or demand sent by telex or facsimile shall be deemed to have been served at the time of transmission."

(b) That though the notice from 1st Respondent to the Borrower dated 6th January 2014 is addressed to post office Box 835 – 40100 Nairobi instead of Post office Box 835-40100 Kisumu, the Borrower is not a party in this application and has not provided any affidavit to deny having received the said notice. The notice by the 2nd Respondent dated 16th December 2014 giving 45 days notice for the public auction of 20th February 2015 indicates that it was to be sent by registered post to Surjit Singh and Malkit Singh of Post office Box 835 - 40100 Nairobi " and/or " 967- 40100 Kisumu. The second address is the one belonging to the Applicant and the other chargor. The Respondents have annexed to the replying affidavit a copy of the notices sent to the borrower dated 22nd May 2014 to the effect that the loan facility was in arrears and requiring immediate payment of Sh.27,703856/64. Again the Borrower who is not a party in this proceedings has not provided an affidavit to deny receipt of the said notice. Also annexed are the statutory notice under Section 90(1) of The Land Act 2002 dated 27th June 2014 addressed to the Applicant and another, through post office box number 967 – 40100 Kisumu giving three months notice and notice of intention to sell the charged property dated 1st October 2014 to Applicant and another at the same address. Both notices are indicated that they were to be sent by registered post. The Borrower and Surjit Singh Pandhal have not disputed having received the notices addressed to themselves. The Respondent had discharged their duty in issuance of the statutory notices. There is no copy of a notice issued by the Respondents that was addressed to only Surjit Singh Pandhal that has been availed by the Applicant to confirm his deposition that the notices were only served on the other Chargor. The statutory notices were to both the Chargors and were addressed properly.

(c) That no spouse of the chargors {Surjit Singh Panbhal and Malkit Singh Pandhal} was

involved in the execution of the charge document and there is not clause in charge document that required the statutory notices to be served on the Chargor's spouses. The court is aware of the overriding interests of spouses under Section 28(a) of the Land Registration Act 2012. However the notice of motion and the suit herein were not initiated by a spouse of either of the Chargors and that ground is not available for the Applicant who willingly executed the charge document and is taken to have done so with full appreciation of his obligations under the said document, to be the basis of stopping the 1st Respondent from exercising their right of sale.

(d) That by the time the 1st Respondent issued the first notice of 22nd May 2014 to the Borrower and the subsequent one dated 27th June 2014 to the Applicant and SurjitSingh Panbhal, the loan facility was in arrears. This has not been controverted and it follows therefore that the notices were issued lawfully. The notices were served in accordance with the law and are therefore not illegal, unlawful, null and void and the court finds no reasons to set them aside at this stage.

(e) That the 1st Respondent has provided a copy of valuation report dated 28th October 2014 giving both the open market and forced sale value of the charged property which rebuts the Applicant's claim that no valuation has been done before advertising the property for sale. The fact that a valuer appointed by the Applicant has come up with different valuation figures is not enough to fault the process initiated by the 1st Respondent to exercise their right of sale.

(f) That the fact that the Applicant disputes the interest and other fees charged on the loan by the 1st Respondent is not enough to make the 1st Respondent exercise of right of sale illegal so long as the loan facility has fallen into arrears. The charged property is a Commercial property whose value is easily determinable and in case the Applicant succeeds in any of the prayers, after the hearing of the main suit appropriate orders will be issued. The 1st Respondent is not said to be an institution of straw that is not capable of meeting any decree that is likely to be issued against it.

6. That for reasons set out above the court finds that there is no merit in the application dated 30th January 2015 and the same is dismissed with costs. The interim orders are hereby vacated.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/11/2015

Dated and delivered this **4th day of November 2015**

In presence of

Applicant N/A

Respondents N/A

Counsel Mr Olel for plaintiff/Applicant

Mr Omolo for Onyikwa for Defenant/Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/11/2015

4/11/2015

S. M. Kibunja J

Oyugi Court clerk

Parties absent

Mr Omolo for Onyikwa for Defendant present

Court: Ruling delivered and dated in open court in presence of Mr Olel for plaintiff /Applicant and Mr Omolo for Onyikwa for Defendant/Respondent.

Mr Olel: I pray for a copy of ruling and leave to appeal.

Mr Omolo : No objection.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/11/2015

Court: (1) The DR to provide copies of the ruling to the parties upon usual payment.

(2) Leave to appeal granted.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/11/2015