REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 151 OF 2016

SHALOM AGENCIES LIMITED..... 1ST APPLICANT

CHARLES OMOLO YUYA.....2ND APPLICANT

VERSUS

FAMILY BANK LIMITED..... RESPONDENT

R U L I N G

1. The application under consideration is essentially one for temporary restraining orders. It is a Notice of Motion brought under Sections 1A, 1B, 3A, and 63(e) of Civil Procedure Act (cap 21), Order 40 Rules 1(a), 2, 3, 4, and 9, Order 51 Rule 1, of Civil Procedure Rules, 2010, and all other enabling provisions of law. It is dated 9/11/2016 and was filed on 10/11/2016.

2. The application has four (4) prayers but the first two – prayers 1 and 2 – are now moot, having been considered at the exparte stage earlier. The prayers for consideration are now 3 and 4, which are as follows:

> Prayer 3: Pending the hearing and determination of this suit, the Defendant/Respondent company by itself, its officers, servants, and/or agents be restrained from selling the property known as SIAYA/KOCHIENG "A"/44 and/or from howsoever interfering with the said property.
>
> Prayer 4: The costs of this application be awarded to Plaintiffs/Applicants.

3. The two Applicants – **SHALOM AGENCIES LIMITED** and **CHARLES OMOLO YUYA** – are the Plaintiffs in the suit herein filed together with the application while the Respondent **– FAMILY BANK LIMITED** – is the Defendant. According to the Applicants, the Respondent intends to sell land parcel No. SIAYA/KOCHIENG "A"/44 for an alleged default in repayment of a loan amounting to Kshs.750,000/= earlier on advanced to the 1st Applicant. The 2nd Applicant had offered the land as security for the loan.

4. The Applicants averred that the loan is fully paid and the intended sale is therefore illegal. The Respondent was accused of intending to dispossess the 2nd Applicant of his land. The narrative that emerges from the supporting affidavit accompanying the application is that the land was offered as security sometimes in June 2016. The loan amounted to 750,000/= and the 1st Applicant has fully repaid it. The Applicants averred that the notices sent to them refer to a much larger amount, possibly relating to monies advanced under a different arrangement. The 2nd Applicant averred that his matrimonial home is on the land and stands to be rendered homeless if the orders sought are not granted.

5. The Respondent responded to the application vide a replying affidavit dated 26/1/2018 filed here on 29/1/2018. According to the Respondent, the intended sale was not for the 750,000/= loan *perse*, rather, it also was for other monies relating to another transaction which, under clause 14 of the charge document, the Applicants covenanted and/or agreed to be covered by the same security. According to the Respondent, the charged property could not be discharged or redeemed unless monies owing under the other separate transaction were also paid.

6. The separate transaction related to a guarantee amounting to 4,000,000/= offered to and accepted by the 1st Applicant to facilitate a business arrangement between the 1st Applicant and a third party – Nation Media Group. The guarantee was purposely meant to cover the 1st Applicant's liabilities to the 3rd party in the event the 1st Applicant defaulted in its obligations. And the 1st Applicant actually defaulted and the third party subsequently invoked and/or called in the guarantee.

7. The Respondent paid the amount covered - Ksh4,000,000 – to the third party and in turn then demanded payment of the same amount plus some interest to itself by the 1st Applicant. The 1st Applicant did not honour the demand, hence the intention by the Respondent to sell the land.

8. The response by the Respondent elicited the filing of a supplementary affidavit by the Applicants'. It was reiterated that the amount covered by the charge was Ksh.750,000. That amount, it was again reiterated, has been paid in full. It was denied that the charge related to any other transaction except the one of 750,000/=.

9. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 21/3/2018. The Applicant submitted that the charge covered only the loan of 750,000/= and was in no way related to the alleged bank guarantee relating to a different transaction. The case of **KISIMANI HOLDINGS LIMITED & another Vs FIDELITY BANK LIMITED [2013] eKLR** was cited and said to represent a situation similar to the one herein. To the Applicants, a clause almost similar to the one in the charge instrument in this case existed in the charge document for that case and the court, addressing its mind to it, held it was invalid in light of the provisions of Section 82 of the Land Act, 2012, which, again to them, addresses the issue of notices demanding amounts in excess of the amount covered.

10. The Applicants said they have established a *primafacie* case given the circumstances prevailing. They also submitted further that the Respondent cannot be heard to say that they can be compensated in damages when what is complained of is out-rightly illegal. Further, the balance of convenience was said to lie in favour of the Applicants as the notices issued by the Respondent are unlawful and invalid.

11. The submissions of the Respondent were filed on 19/3/2018. The Respondent referred to clause 13 of the charge instrument which contains an acknowledgement by the chargor that the right to consolidate the charge securities could not be restricted. The Respondent referred further to clause 14 where the 2nd Applicant covenanted to the right of the Respondent to consolidate the charge securities. Under the same clause, the Applicants could not redeem the property without paying other monies owed under other existing financial arrangements. The case of **JETENDRA B. DHOKIA Vs BANK OF BARODA LIMITED: ELC No. 265 of 2014, KISUMU** was cited to reinforce this position. Ultimately it was submitted that the Applicants have failed to meet the threshold necessary for a grant of temporary restraining order.

12. I have considered the application, the response made, rival submissions, and the suit as filed. According to the Applicants, the agreement with the Respondent concerned the loan of 750,000/=. This is made clear at paragraph 6 of the plaint where the Applicants, as Plaintiffs, plead:

> **"The 2nd Plaintiff avers that he guaranteed the repayment of the said Ksh.750,000 as per the charge registered on 23/6/2015 and nothing further".**

Curiously though, and having pleaded as such, the charge instrument is not one of the documents availed by the Plaintiffs.

13. To glean the contents of the charge instrument, one has to go to the response made by the Respondent. In the response, the charge instrument was availed as LA 0-3. At paragraph 14 of the charge document, it is stated as follows:

"14. Right of Consolidation.

> **It is hereby acknowledged and agreed by the chargor that there shall be no restriction on the right of the Bank of consolidating mortgage or charge securities and the bank hereby reserves the right to consolidate all mortgages and charges which the Bank may from time to time hold from the chargor on any account whatsoever and it is hereby declared that neither the charged property nor any other property of the chargor which at any time during the continuance of this security is subject to a mortgage or a charge in favour of or vested in the Bank shall be redeemed or discharged except on payment not only of the monies hereby or thereby secured but also of all monies secured by every such mortgage or charge (including this charge)."**

14. Both Applicants signed the charge instrument and by so doing, they signed on for the above clause. To reinforce the binding nature of the charge instrument on the chargor, clause 21 in the relevant part provides as follows:

"20.1 Representations and Warrants

The chargor represents and warrants that:

> **(a) this charge constitutes valid and legally binding obligations of the chargor enforceable in accordance with its terms"**

15. A look at clause 14 as quoted above will show that the Respondent had a free hand to consolidate the charge herein with other charges relating to other transactions. It is clear that the charge can properly be treated as a proper charge for the other transactions and it cannot be redeemed unless the obligations under the other transactions are fulfilled. And under clause 21, the chargor is telling the Respondents that this arrangement is **"valid and legally binding".**

16. When the Applicants then aver in the suit that the charge related only to 750,000/=, they are being less than honest. Further, when the Applicants counsel submits, as he did, that the notices issued are invalid for relating to other transactions, he fails to reckon with the full import, meaning, and purport of clause 14 in the charge instrument. He also fails to appreciate the unequivocal assertion by the chargor at clause 21 of the charge instrument that all terms of the charge document are **"valid and legally binding".**

17. And was the Respondent doing anything illegal by consolidating the charge?

Section 83 of the Land Act, 2012, provides as follows:

"83(1) Unless there is express provision to the contrary clearly set out in the charge instrument, a chargor who has more than one charge with a single charge on several securities may discharge any of the charges without having to redeem all charges.

(2) A charge who has made provision in accordance with subsection 1 for the consolidation of charges shall record that right in the register or registers against all the charges so consolidated that are registered.

(3) ……..

18. A reading of subsection 1 of the above provision shows that the Applicants would be right in their averment if, and only if, the issue of consolidation was not stated in the charge instrument. But as things stand now, such consolidation is clearly provided for at clause 14 of the charge instrument. The Applicants would also be deemed to be right if such consolidation was not captured in the register doing the registration of the charge. Again here, it is well shown that the Respondent took all the necessary caution as its rights under Section 82 and 83 in the Land Act, 2012, are well captured in the relevant register. This is well shown in the copy of search which is one of the documents availed by the Applicants themselves. The fact of the matter then is that the Respondent seems to be acting within the law.

19. In this matter, I do not feel bound or obliged to delve into detailed consideration as to whether the requisite principles for granting temporary injunctive relief have been met. The suit herein seems to be founded on a lie. And the lie is that the charged property is for 750,000/= only. Upon such suit, you cannot establish a *primafacie* case or even allege possible irreparable loss. The fact of the matter is that the Applicants should have read the fine letter of the charge instrument. That would have made them appreciate properly what they were binding themselves to. They would know that the security was for other transactions too.

20. I think the Applicants' counsel should also have drawn their attention to provisions of Section 83 of the Land Act, 2012, particularly given that a copy of search availed by them specifically makes reference to that Section. The application herein must also fail because it is based on the wrong premise; the wrong premise being that only the loan of 750,000/= was covered.

21. In light of all this, the application is found unmeritorious and hereby dismissed with costs.

Dated, signed and delivered at Busia this 30th day of January, 2019.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

1st Applicant: Absent

2nd Applicant: Absent

Respondent: Absent

Counsel for Applicants: Absent

Counsel for Respondent: Present

Court Assistant: Nelson Odame