



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC APPEAL CASE NO. 23 OF 2018**

**OLWAL GABRIEL OTIENO.....APPELLANT**

**VERSUS**

**KENYA WOMEN FINANCE TRUST LTD.....RESPONDENT**

**RULING**

1. The Appellant filed the notice of motion dated the 24<sup>th</sup> October 2018 seeking for temporary order of injunction restraining the Respondent, either by itself, its servants, agents and/or employees or anyone claiming to derive authority from and/or acting on its behalf from trespassing onto, selling, disposing off, or in any other manner dealing with the appellant's land parcels Kisumu/Ojola/1621 and 2013, the suit properties, pending the hearing and determination of the appeal. The application is based on the eight (8) grounds on its face marked (1) to (8) and supported by the affidavit sworn by Olwal Gabriel Otiemo on the 24<sup>th</sup> October 2018. The Appellant's case is that he filed a suit against the Respondent seeking for permanent injunction before the Chief Magistrates court Kisumu. That he also filed an application dated the 22<sup>nd</sup> January 2018 for an order for temporary injunction which was heard and dismissed on the 10<sup>th</sup> September 2018. That the Appellant then filed an appeal against the trial magistrate's ruling upon which this application is predicated.

2. The application is opposed by the Respondent through the Replying affidavit sworn by Bernard Odongo, the Branch Manager with the Respondent, on the 9<sup>th</sup> November 2018. It is the Respondent's case that the Appellant had willfully and lawfully guaranteed one Birter Nyaboke Nyamao a loan of Kshs. 3,000,000/= with charges over the two suit properties. That the Respondent issued the statutory notices after default as required under the law. That upon there being no regularization of the loan, the statutory power of sale was exercised in accordance with the law after issuance of the notices required and valuation had been done.

3. The application came up for hearing on the 3<sup>rd</sup> December 2018 when the learned Counsel for the parties agreed to file and exchange written submissions. The Counsel for the Appellant and Respondent then filed the written submissions dated 4<sup>th</sup> February 2019, and 15<sup>th</sup> March 2019 respectively. The learned Counsel for the Appellant submits that though the Respondent has annexed copies of the statutory notices addressed to the appellant and another, they have not established how they were served. That the intended sale was premature as the ninety (90) days' notice was not served hence denying the Appellant the right of redemption. That the Respondent did not obtain spousal consent and the application should be granted. The Respondent's counsel submitted that the Appellant has not established a prima facie case for temporary injunction to issue as required in **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. That the Appellant has not been making payment as required for the Kshs. 3,000,000/= loan facility. That the Respondent sent the first notice dated the 27<sup>th</sup> April 2017 demanding Kshs. 495,769.90, which was not paid. That the next notice is the one dated the 23<sup>rd</sup> August 2017 demanding Kshs. 821,609.91 and upon failure to comply, they exercised the power of sale.

4. The following are the issues for the court's determinations;

**a) Whether the Appellant has made a prima facie case for temporary injunction to issue at this interlocutory stage of the appeal.**

**b) Who pays the costs.**

5. The Court has carefully considered the grounds on the application, the affidavit evidence, the written submissions by both Counsel and come to the following determinations;

**a) That though the Appellant filed the Memorandum of Appeal dated the 9<sup>th</sup> October 2018, the record of Appeal has not been filed to date. That the court has no way ascertaining the contents of the lower court ruling of 10<sup>th</sup> September 2018 especially the matters of the law and facts considered therein.**

**b) That though the Appellant alleges that the Respondent did not disclose how the statutory notices dated the 27<sup>th</sup> April 2017 and**

23<sup>rd</sup> August 2017 were served, the Court has perused the two notices and noted that the first one marked “**BO-5**” carries a note after “**Dear Sir/Madam**” to the effect that “**Advance copy via registered mail.**” That as the Appellant has not disputed the address attributed to him, the issue of whether or not he indeed received the notices is an issue to be pursued during the hearing of the main suit, which is still pending in the lower court.

c) That the affidavit evidence tendered so far shows that the loan facility given to Birter Nyaboke Nyamao and guaranteed by the Appellant is yet to be cleared. That it is only fair and just that the borrower and guarantor continue sufficing the loan facility in accordance with the loan agreement with the Defendant as this appeal is heard and determined.

d) That the Respondent has annexed to their replying affidavit two affidavits by the Appellant and Birter Nyaboke Nyamao sworn on 30<sup>th</sup> April 2014, under which the latter consents as a spouse to the charging of the suit land by the former. That it is therefore not true that the Respondent failed to obtain the spousal consent.

e) That the Appellant has therefore failed to establish a prima facie case, or to show what irreparable loss he would suffer. That the balance of convenience tilts towards not granting the injunction.

6. That for the reasons set out above, the court finds no merit in the motion dated 24<sup>th</sup> October 2018 and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JULY 2019**

**In the presence of:**

Appellant Absent

Respondent Absent

Counsel Mr. Anyumba for the Appellant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**