



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.304 OF 2016

YUNITA ATIENO OMONDI.....PLAINTIFF

VERSUS

JOHN OMONDI OKETCH.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

KISUMU DISTRICT LAND REGISTRAR.....3RD DEFENDANT

RULING

1. **Yunita Atieno Omondi**, the Plaintiff, moved the court through the notice of motion dated 18th November 2016 seeking for temporary injunction restraining **John Omondi Oketch, Agricultural Finance Corporation and Kisumu District Land Registrar**, the 1st to 3rd Defendants respectively, “their employees, workers, agents and/or whomsoever jointly and severally from advertising for sale auctioning, selling, disposing, alienating, transferring, further charging, dealing and/or interfering whatsoever with the Plaintiff’s premises herein known as **Kisumu Nyalenda ‘A’/492** pending the hearing and determination of this suit.” The application is based on the seven grounds marked (a) to (g) on its face and supported by the affidavit sworn by Yunita Atieno Omondi on the 18th November 2016.

2. The application is opposed by Agricultural Finance Corporation, the 2nd Defendant, through the replying affidavit sworn by John K. Mutuma. On the 29th May 2017.

3. The application came up for hearing on the 29th January 2018 when Mr. Odeny and Kithinji, learned counsel for the Plaintiff and Defendant respectively made their oral submissions.

4. The issues for determination are as follows:

- a) Whether the Plaintiff has made an arguable case with a probability of success for temporary restraining orders to issue at this interlocutory stage.
- b) Who pays the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, oral submissions by learned counsel for the Plaintiff and 2nd Defendant and come to the following findings;

- a) That as confirmed through the copy of the title deed availed by both the Plaintiff and 2nd Defendant, land parcel **Kisumu/Nyalenda ‘A’/492** got registered on the 9th May 1989 in the names of John Omondi Oketch and Yunita Atieno Omondi, who are the 1st Defendant and Plaintiff in the suit. That at the proprietorship section, each of the two registered proprietors owns half share of the said land.
- b) That the 2nd Defendant has not disputed the Plaintiff’s contention that she did not sign the charge document under which the financial facility they accorded the 1st Defendant was allegedly secured against **Kisumu/Nyalenda ‘A’/492**. That further, the Plaintiff has disputed having had knowledge of the charge over the land before the advertisement of the auction of the land. That the 2nd Defendant has not availed any documentary evidence to prove their claim that she was present when they carried out the appraisal of the project before disbursing the loan.
- c) That whether or not the Plaintiff was present when the 1st and 2nd Defendant discussed, agreed and documented the financial

facility, the 2nd Defendant had a duty to ensure that the Plaintiff, as an equal proprietor to the suit land, had given her consent in writing to the offering of the land as security for the loan facility accorded the 1st Defendant. That without such consent, the Plaintiff is entitled to object to the sale of the suit land or at least her half share by the 2nd Defendant in their exercise of statutory power of sale which has obviously arisen.

d) That as the 1st Defendant has not disputed being in arrears of the loan facility he received from the 2nd Defendant and secured by a charge on the suit land, the court has a duty while protecting the interests of the Plaintiff, to equally ensure the 2nd Defendant's interests are safeguarded. That could be done by ordering the suit land to be partitioned equally and one half registered with the Plaintiff and the other the 1st Defendant. That thereafter the 2nd Defendant would then be at liberty to exercise their power of sale against the half portion registered with the 1st Defendant. That the other option would be to allow the Plaintiff the first option to buy the half portion owned by the 1st Defendant and pay the purchase price to the 2nd Defendant who would apply the proceeds towards liquidating the 1st Defendant's indebtedness. That the last option is to allow the 2nd Defendant to exercise their power sale over the suit land on condition that half the proceeds realized is released to the Plaintiff for her entitlement to the half share.

6. That having considered the fact that the 1st Defendant had filed **Kisumu ELC 289 of 2016** against the 2nd Defendant seeking for more or less similar prayers to those in this suit, and so as to accord the Plaintiff and her husband, the 1st Defendant, an opportunity to save the whole or part of the suit property while ensuring that the 2nd Defendant is not unfairly prejudiced, the court allows the Plaintiff's application in the following terms;

a) That pursuant to **Section 96 (1) of the Land Registration Act No.3 of 2012**, the Plaintiff is hereby ordered to ensure a valuation of the suit property is carried out and the report thereof filed with the court in twenty one (21) days. That the 2nd Defendant is at liberty to carry out a similar valuation if they have not done so already.

b) That thereafter the Plaintiff do give the 2nd Defendant an offer to purchase the 1st Defendant half share of the suit land in Seven (7) days.

c) That if the offer is accepted by the 2nd Defendant in seven (7) days from the date of receipt, the Plaintiff do pay the whole amount to the 2nd Defendant in 14 (fourteen) days.

d) That should the Plaintiff fail to comply with (a) (b) and (c) or any one of the them within the time given, the 2nd Defendant be at liberty to proceed to exercise their power of sale over the whole suit property, if the 1st Defendant will still be in arrears, on condition that half the amount realized be forwarded to the Plaintiff directly, or through the court, for her half share entitlement.

e) The costs of the application be in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF APRIL 2018

In presence of;

Plaintiff Absent

Defendants 1st Present

Counsel Mr. Odeny for plaintiff

Mr Arunda for the 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/4/2018

S.M. Kibunja Judge

Joane court assistant

1st Defendant present

Odeny for the Plaintiff

Mr Arunda for 2nd Defendant

Court: Ruling dated and delivered in open court in the presence of the 1st Defendant, Mr. Odeny for the Plaintiff and Mr. Arunda for the 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE