



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 308 OF 2016

KENYA INDUSTRIAL ESTATES LIMITED.....PLAINTIFF

VERSUS

POST BANK CREDIT LIMITED (IL).....1ST DEFENDANT

JAMES ONYANGO JOSIAH t/a

NYALUONYO AUCTIONEERS.....2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....3RD DEFENDANT

LAND REGISTRAR, KISUMU COUNTY.....4TH DEFENDANT

MICHAEL GEORGE OLUOCH NYAMODI (Representative of the

Estate of the late VERONICA AKONG'O NYAMODI.....5TH DEFENDANT

RULING

1. Kenya Industrial Estates Limited, the Plaintiff, vide Notice of Motion dated 21st November 2016 seeks for Post Bank Credit Limited (In liquidation), and James Onyango Josiah T/A Nyaluonyo Auctioneers, the 1st and 2nd Defendants respectively, “either by themselves, their servants, employees, nominees, assigns and agents or any other person or authority connected therewith be restrained by an interim injunction order from offering for sale, selling, disposing, occupying or in any way dealing with or alienating the proprietary interest in property Title Number Kisumu/Municipality Block 2/102” pending the hearing and determination of this suit. The application is based on the ten (10) grounds on its face marked (a) to (j). The application is also supported by the affidavit sworn by Faith Anyango Onyango, the Ag Manager, Legal Services of the Plaintiff, on the 21st November 2016.

2. The application is opposed by the 1st Defendant through the replying affidavit sworn by Michah L. Nabori, the Liquidation Agent of the 1st Defendant on the 3rd April 2017. It is also opposed by National Bank of Kenya Limited, the 3rd Defendant, through the replying affidavit sworn by Paul Chelanga, the Manager Recoveries of the 3rd Defendant, on the 24th July 2017.

3. The application came up for hearing on the 27th September, 2017 when directions on filing and exchanging of written submissions were given. Consequently the Learned Counsel for the Plaintiff and 1st Defendant filed their written submissions dated 22nd September 2017 and 15th February 2018 respectively.

4. The following are the issues for Court’s determination;

a) Whether the Plaintiff has established a prima facie case with possibility of success for temporary injunction order to issue at this stage.

b) Who pays the costs.

5. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence by the Plaintiff, 1st and 3rd Defendants, written submissions, authorities cited and come to the following conclusions;

a) That from the copy of the Certificate of Official Search for Kisumu/Municipality Block 2/102, attached to the Plaintiff’s

supporting affidavit marked FAO-3 issued on the 28th September 2016, the following are apparent;

- That the land was registered first in the name of Veronicah Akong'o Nyamodi on the 11th December 1992 and certificate of lease issued.
- That the Plaintiff filed a caution against the title claiming chargee's interests on the 23rd November 1993.
- That on the 22nd May 1995, a restriction issued in Civil Suit No. 1408 of 1995 was registered.
- That a charge in favour of the 1st Defendant to secure Kshs. 1,200,000/= was registered on the 25th February 1993.

b) That the said Veronicah Akong'o Nyamodi is reportedly deceased and Michael George Oluoch Nyamondi , the 4th Defendant has been sued as the representative of the deceased's estate.

c) That from the finding in (a) above, the charge in favour of the 1st Defendant was registered several months before the Plaintiff's caution was filed. That though the Plaintiff claim to have repossessed the suit property through correspondence in 2004, the certificate of official search referred to above and dated 28th September 2016 shows that the land was still in the name of the said Veronicah Akong'o Nyamodi. That the Court is obligated under **Section 26 of the Land Registration Act No. 3 of 2012** to take the person named in the certificate of title issued by the Land Registrar as the absolute and indefeasible owner until that person's title is successfully impugned in accordance with the law. That further though the Plaintiff filed a caution claiming chargee's interest on the 23rd November 1993, there is no evidence of a formal charge having been registered.

d) That as there is no evidence availed so far to the Court to confirm that the title to the suit land issued to Veronicah Akong'o Nyamodi, the deceased, has been successfully impugned, then the 1st Defendant has the right to realize their security as no party has challenged their claim that their statutory power of sale has arisen in respect of the arrears and default in the loan repayment.

e) That the moment the Plaintiff allotted the suit land to Veronicah Akong'o Nyamodi and she proceeded to process and get registered as the owner of the leasehold to Kisumu Municipality/Block 2/102, the land became private property that could be transacted upon subject to the conditions of the lease set thereon. That apart from filing the caution, there is no evidence that the Plaintiff took legal steps to challenge the registration of the deceased as the registered proprietor of the leasehold interest.

f) That from the foregoing, the Court finds that the Plaintiff has failed to establish an arguable case on the basis of which injunction orders could issue at this stage. That the Plaintiff has also not shown what irreparable loss they are likely to suffer if the injunction order is not issued and the balance of convenience do not tilt to their favour.

6. That following from the foregoing, the plaintiff's notice of motion dated 21st November 2016 is found to be without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 16TH DAY OF MAY 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Mwasigwa for Oraro for 1st Defendant and for

Ojuro for 3rd Defendant

M/s Mwaro for Nyamweya for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE