



**REPUBLIC OF KENYA**

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

**ELC CASE NO.157 OF 2016**

**SURJIT SINGH PANDHAL ..... 1<sup>st</sup> PLAINTIFF**

**MALKIT SINGH PANDHAL.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**BANK OF BARODA KENYA LIMITED .....DEFENDANT**

**RULING**

**1. Surjit Singh Pandhal and Malkit Singh Pandhal**, the plaintiffs filed the notice of motion dated 1st July 2016 seeking for temporary injunction restraining Bank of Baroda Kenya Ltd, the Defendant from advertising for sale, selling, disposing of, transferring, alienating, auctioning, or in any other way interfering with or dealing with the Plaintiffs ownership or possession of land parcel **Kisumu Municipality/Block 7/173** pending the hearing and determination of this suit. The application is based on the eighteen (18) grounds on its face and supported by the undated affidavit sworn by **Surjit Singh Pandhal** that was filed with the notice of motion and the supplementary affidavit by the same deponent sworn on the 29th September 2016.

2. The application is opposed by the Defendant through the replying affidavit sworn by Banambar Behera, the Kisumu branch head to the Defendant, sworn on the 4<sup>th</sup> August 2016.

3. The application came up for hearing on the 9<sup>th</sup> February 2017 when Mr. Omondi and Ragot, learned counsel for the Plaintiffs and Defendant respectively, made their oral rival submissions.

4. The issues for determination by the court are as follows:

- a) Whether the Plaintiffs have made a prima facie case with a probably of success for issue of temporary injunction orders at this interlocutory stage.
- b) What orders to issue.
- c) Who pays the costs.

5. That the Plaintiffs case as summarized herein below

- That they are jointly registered as proprietors in common with land parcel **Kisumu Municipality/Block 7/173**, hereinafter referred to as the suit land.
- That they charged the suit property to secure financial facilities advanced to Maruti Pharmaceuticals through the charge documents executed on 20<sup>th</sup> May 2003 and registered on 4<sup>th</sup>

June 2003 and a further charge executed on 13<sup>th</sup> April 2005 and registered on the 25<sup>th</sup> June 2005.

- That on the 18<sup>th</sup> May 2016 the Defendant, through M/S Garam Investments Auctioneers, served a notification of sale on the 1<sup>st</sup> Plaintiff but did not serve the same on the 2<sup>nd</sup> Plaintiff.
- That in August 2011, Plaintiffs sold land parcels Kisumu **Municipality/Block 7/11, 64 and 55** to General Equipment [1978] Co, Ltd for Ksh.80,000,000/= (Eighty Million) out of which Kshs.15,000,000/= (fifteen million) was received by the Defendant. That out of the said Ksh.15, million deposited with the Defendant, Ksh. 10 million was to go towards reducing the loan owed by Maruti Pharmaceuticals Ltd which was then standing at Ksh.12.5 million but the Defendant transferred the amount to a third Party known as Haulmart Kenya unlawfully.
- That the Defendant has been charging uncontractual, illegal, unconscionable and usurious rates of interest not in keeping with the letters of offer and charge documents.

6. The Defendant case is as summarized as follows:

- That indeed the Plaintiffs guaranteed and secured the loan facilities advanced to M/S Maruti Pharmaceuticals with the charges on the suit property.
- That the Defendant was not a party to the sale agreement between the Plaintiff and M/s General Equipment (1978) Ltd for a purchase price of Ksh.80 million and therefore had no obligations to perform under the agreements.
- That on the alleged transfer of Ksh. 15 million and failure to credit Ksh. 10 million to M/S Maruti Pharmaceuticals account, the Defendant availed a copy of bank statement showing that M/s General Equipment (1978) Limited had transferred the said Ksh.15 million from their account to the account of M/s Haulmart Kenya Limited on 31<sup>st</sup> December 2011.
- That contrary to the 1<sup>st</sup> Plaintiff contention, the 2<sup>nd</sup> Plaintiff was served with the statutory notices in accordance with the law, as the two Plaintiffs and the principal debtor's postal address was the same, being Box 967 Kisumu. The Defendant availed copies of the notices and certificates of posting as evidence.
- That the Plaintiffs have been in perennial default in their repayment of the loan facilities and had engaged the Defendants in writing severally but failed to keep their proposals for payments to remedy the default.
- That the Defendant's power of sale has arisen and should be allowed to realize their security.

7. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the submissions by both counsel and come to the following determinations;

a) That though the 1<sup>st</sup> Plaintiff has deponed that the 2<sup>nd</sup> Plaintiff has not been served with the statutory notices before the Defendant commenced the process to realize the suit property through auction, the 2<sup>nd</sup> Plaintiff has not made out any deposition to that effect. The 1<sup>st</sup> Plaintiff's supporting and supplementary affidavits did not state that he was making the deposition on behalf of the 2<sup>nd</sup> Plaintiff and himself. That in the undated supporting affidavit filed on 1<sup>st</sup> July 2016, the 1<sup>st</sup> Plaintiff deponed as follows in paragraph 1; “ **... I am the 1<sup>st</sup> Plaintiff hence I am competent to make and swear this affidavit.**” That the deponent stated as follows in the supplementary affidavit sworn on 28<sup>th</sup> September 2016 at paragraph 1; “ **That I am a male adult of sound mind and disposition and the 1<sup>st</sup> Plaintiff herein hence I am competent to swear this affidavit.**”

b) That further to the finding in (a) above, the letter of offer, charge documents availed by the Plaintiffs, the copies of correspondence dated 16<sup>th</sup> December 2011, 6<sup>th</sup> March 2012 by the Plaintiffs to the Defendant, plus the statutory notices dated 22<sup>nd</sup> October 2015, 17<sup>th</sup> February 2016 and 17<sup>th</sup> May 2016 all carry the same postal address being 967 Kisumu. The court finds and hold that it would be farfetched for the 1<sup>st</sup> Plaintiff to have received his copies while the 2<sup>nd</sup> Plaintiff had not. That it is also surprising that the one who is alleged not to have received the statutory notices has not found it necessary to swear an affidavit to that effect.

c) That the explanation offered by the Defendant to the Plaintiffs claim that Ksh.15 million had been received by the Defendant and that the Defendant unlawfully credited Kshs.10 million to Haulmart Kenya Ltd is credible on the evidence so far availed to the court. The Defendant has availed documentary evidence to show that Ksh.15 million was moved from M/s General Equipments (1978) Ltd account to the recipient Haulmart Kenya Ltd account. That in the absence of any documentary evidence to support the Plaintiffs claim, then there is no basis for the court to hold that Ksh.10 million had been meant to go to the loan account in favour of M/S Maruti Pharmaceuticals.

d) That there is no doubt that the loan has been in arrears. That is apparent from the affidavits of the 1<sup>st</sup> Plaintiff and the Plaintiffs letter date 18<sup>th</sup> November 2015 and that of the Defendants dated 20<sup>th</sup> August 2015 annexed to the Defendant's replying affidavit. That the fact that the Plaintiffs may have an issue on the interest levied by the Defendant is not enough to stop the Defendant's right to realize the security as their power of sale has arisen.

8. That flowing from the foregoing the court finds no merit in the Plaintiffs notice of motion dated 1<sup>st</sup> July 2016. The notice of motion is therefore dismissed with costs and the interim orders issued ex parte is herein vacated accordingly.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF APRIL 2017

In presence of;

Plaintiffs        Absent

Defendant       Absent

Counsel         M/S Maina for Omondi for Plaintiffs

M/S Alianatine for Ragot for defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/4/2017**

12/4/2017

M/S Maina for Omondi for Plaintiff

Order: Ruling dated and delivered in open court in presence of

M/S Alianatine and M/s Maina holding brief for Mr. Ragot for the Defendant and Plaintiffs respectively.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

12/4/2017