



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.204 OF 2016

AUSCAR ODHAIMBO WAMBIYA.....PLAINTIFF

VERSUS

TIGONI ACCEPTANCE LIMITED.....DEFENDANT

RULING

1. **Auscan Odhiambo Wambiya**, the Plaintiff, vide notice of motion dated 25th May 2016 seeks for temporary injunction order restraining **Tigoni Acceptance Limited**, the Defendant, by themselves or agent from “selling, disposing of or otherwise interfering with the Plaintiff’s ownership of all that property described as land title No. **Siaya/Mulalia/1747**,” that he occupies pending the hearing and determination of this suit. The application is based on the four grounds on its face and supported by the affidavit of the plaintiff sworn on the 25th May 2016.

2. The application is opposed by the Defendant through the replying affidavits sworn by Christiano Oduol, a director to the Defendant, on the 30th May 2016 and 20th July 2016.

3. Mr. Otieno and M/S Opondo, learned counsel for the Plaintiff and Defendant respectively, appeared before the court on the 31st May 2016 when interim order of injunction was granted. The court also gave directions on the filing of written submissions. The counsel for the Defendant was the first to file their written submissions dated 22nd July 2016 followed by the Plaintiff’s counsel’s submissions dated 8th November 2016.

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

- a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction order to issue at the interlocutory state.
- b) What order to issue
- c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the written submissions by counsel and concluded as follows;

- a) That the Plaintiff concedes to having received Ksh,700,000/= financial facility from the Defendant in the middle of 2015 that was to be secured with a Charge over the Plaintiff’s land parcel **Siaya/Mulaha/1747**.

b) That the Plaintiff and the Defendant executed the charge document that is annexed to the Defendant's replying affidavit on the 8th October 2015. That even though no documentary evidence was availed by both parties, they both agree that the Plaintiff's spouse gave her consent to the charge in writing.

c) That both parties are in agreement that the Plaintiff received a further financial facility of Kshs.200,000/= in October 2015.

That though the Plaintiff claims that this additional financial facility was not to be secured by a charge on the suit land, the court agrees with the Defendant's position that paragraph 10. 3. 4 of the charge document duly executed by both parties allowed for the option tacking in the following words;

“ 10.3. The lender shall be at liberty without affecting its rights herein under at any time:-

10.3.1.

10.3.2.

10.3.3.

10.3.4. at any time and without notice to the chargor combine or consolidate all or any of the chargor's accounts with the lender and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the chargor's liabilities to the lender on any other account or in any other respect whether such liabilities be present, future, actual or contingent, primary, collateral, joint or several and whether such account and liabilities be current, deposit, loan or of any other nature whatsoever whether subject to notice or not, whether in Kenya shillings or in any other currency or in one or more branches of the lender in Kenya.”

d) That the Plaintiff's and Defendant's rights and obligations are as negotiated, agreed and captured in the charge document executed by both parties on the 8th October 2015. That the charge document contains the terms of the contract between the Lender (Chargee) and the Chargor, in this case the Defendant as the Lendor and the Plaintiff as the Chargor. That the rights and obligations of the parties is not affected by the failure or lateness in registering the charge document with the Land Registrar as the Plaintiff appears to hold.

e) That the Defendant's contention that the Plaintiff was in arrears of the repayment has not been disputed by the Plaintiff whose main complaint was on the date the charge appear to have been registered with the Land registrar, interest levied by the Defendant and failure to serve statutory notices to his spouse and himself. That whether or not the date of registration of the charge, reflected as 5th January, 2015 in the copy of the title deed annexed to the Plaintiff's supporting affidavit, was correct or in error may require to wait the hearing of the main suit to be settled with finality as either of the parties will be at liberty to call the Land Registrar as a witness and further to avail the source documents for confirmation. That in respect of the interest charged, the charge document is clear on that. That further, superior courts have time and again held that a dispute on the interest charged is not enough to stop the Chargee from exercising their power of sale where it has arisen.

f) That on the issue of service of notices, the court agrees with the Defendant that the demand notice dated 17th December 2015 contains a signature and other handwritten details of the Plaintiff at the left lower part, signaling receipt on some undisclosed date. The Defendant has further availed an affidavit sworn by one James Odhiambo Obondi on the 4th May 2016 detailing how he served the statutory notice dated 15th January 2016 on the Plaintiff and his wife Emily in the presence of Christiano Oduol, who the court takes to be the deponent of the replying and further

affidavits filed herein.

g) That the law requires the statutory notice to be for 90 days which period according to the said affidavit of service started to run from the 16th January 2016 which was the day of service, and was therefore to lapse on or about 16th April 2016. That the Auctioneer's notice dated 25th February 2016, which the court takes to be the redemption notice, was obviously issued before the 90 days period given in the statutory notice could lapse. That the Plaintiff has stated that no redemption notice was served on him and the Defendant has not availed any evidence on how the auctioneer's notice was served.

h) That in view of the finding in (f) and (g) above, the court finds that the action by the Defendant to advertice for the auction of the charged property without allowing the period of 90 days to lapse from the 16th January 2016, and thereafter serving the Plaintiff and his spouse who gave consent to the charge with at least a 40 days' notice under **Section 96 (2) of the Land Act No.6 of 2012** was illegal and the auction should be stopped.

6. That in view of the foregoing the court finds merit in the Plaintiff's notice of motion dated 25th May 2016 and the same is granted in terms of prayer 2 with costs. That for avoidance of doubts the Defendant is at liberty to issue and serve fresh statutory notices should there still be default in repayment in accordance with the charge document and the law.

It is so ordered.

S. M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mrs Onyango for Otieno for Plaintiff

Mr. Kowinoh for Opondo for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017

17th May 2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mrs. Onyango for Otieno for Plaintiff

Mr. Kowino for Opondo for Defendant

Court: Ruling dated and delivered in open court in presence of Mrs Onyango for Otieno for Plaintiff and Mr. Kowinoh for Opondo for the Defendant.

S. M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017