



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO.289 OF 2016**

**JOHN OMONDI OKETCH.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION .....DEFENDANT**

**RULING**

1. **John Omondi Oketch**, the Plaintiff, filed the notice of motion dated 4<sup>th</sup> November 2016 under **order 40 rule 1(a)** of the Civil Procedure Rules and Sections **1A, 1B, 3A and 63 (c) of the Civil Procedure Act** seeking for temporary injunction restraining **Agricultural Finance Corporation**, the defendant, “from advertising for sale, auctioning, selling, disposing, alienating, transferring, 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 fifteen grounds on the notice of motion and is supported by the Plaintiff’s affidavit sworn on the 4<sup>th</sup> November 2016.

2. The notice of motion is opposed by the defendant through the replying affidavit sworn by John Mutuma, a legal officer with the Defendant, on the 9<sup>th</sup> November 2016.

3. The application came up for hearing on the 1<sup>st</sup> December 2016 when Mr. Odeny and Mainga, learned counsel for the Plaintiff and Defendant respectively, agreed to file written submissions. The Plaintiff’s counsel filed their written submissions dated 11<sup>th</sup> January 2017 on the 18<sup>th</sup> January 2017, while counsel for the Defendant filed theirs dated 15<sup>h</sup> February 2017, on the 21<sup>st</sup> February 2017.

4. The following are the issues for the determination by the court;

a. Whether the Plaintiff has established a prima facie case with a

Probability of success tissue at this stage.

b. Who pays the costs of the notice of motion.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, written submissions and come to the following determinations;

a. That the Defendant offered, and the Plaintiff accepted the offer of Ksh,586,250/= loan facility vide loan offer letter dated 8<sup>th</sup> May 2007 which the Plaintiff signed in acceptance on the 21<sup>st</sup> May 2007.

b. That through the Plaintiff's submissions at paragraph 4 stated that he received only Ksh.360,000/= though the suit property was charged for Ksh.586,000/=. paragraph 4 of the plaint dated 4<sup>th</sup> November 2016, paragraph 2 of the Plaintiff's statement and paragraph 3 of the supporting affidavit leaves no doubt that the loan facility was for kshs.586,000/=. The contents of the Plaint, written statement and supporting affidavit on the amount of the loan facility is in agreement with the figure given by the Defendant at paragraph 4 of the replying affidavit.

c. That the loan facility was secured against a charge over land parcel **Kisumu/Nyalenda 'A'/492** on the 22<sup>nd</sup> May 2007 as confirmed by the certificate of official search dated 23<sup>rd</sup> May 2007, marked JOO-1 annexed to the supporting affidavit.

d. That the plaintiff has based his application on two main grounds that the defendant's power of sale has not arisen as they have not served him with the prerequisite statutory notices and that the amount outstanding, if any, is disputed. That the question of the amount outstanding alone may not be a reasonable ground of stopping the chargee from exercising their power of sale subject to the chargee having discharged its statutory duty to serve the requisite notices.

e. That though the Plaintiff acknowledge only having received the notice sent by the auctioneer, dated 17<sup>th</sup> October 2016 forwarding a copy of the Daily Nation Newspaper of that day for an auction scheduled 8<sup>th</sup> November 2016, the Defendant has annexed copies of demand notices dated 2<sup>nd</sup> July 2009, 15<sup>th</sup> June 2010, 20<sup>th</sup> October 2012, statutory notice dated 5<sup>th</sup> December 2013 personally served on Plaintiff on the 19<sup>th</sup> December 2013, the 45 days redemption notice and notification of sale both served on the 6<sup>th</sup> September 2016 to a tenant named George. That these documents are addressed to the post office Box number **1821- 40100 Kisumu**, which is same address in the letter of loan offer and the title deed of the suit land. The Defendant has also annexed the auctioneer's certificate under **Section 15 (c)** of the auctioneers **Rules 1997**, detailing how he communicated with the Plaintiff over the mobile phone given therein before leaving the copies of the notices with the tenant named George in addition to serving them through registered post to his postal address, 1821 – 40100 Kisumu. The receipt for registered posting is also annexed and the court has no reasons to doubt that the Plaintiff received all of them as they were properly addressed unlike the one dated 17<sup>th</sup> October 2016 annexed to the supporting affidavit that had erroneously captured the address as 1821-4011 Nairobi instead of Kisumu and yet he acknowledge having received it.

f. That the evidence adduced clearly shows that the loan facility advanced to the Plaintiff by the Defendant is still in arrears and the Defendant had served the Plaintiff with the requisite statutory notices. That it follows therefore that the Defendant's power of sale had arisen by the time the auction set for 8<sup>th</sup> November 2016 was advertised.

g. That in view of foregoing the plaintiff has failed to satisfy the threshold set in the celebrated case of **Giera –V- Cassman Brown Company Ltd** (1975] E.A. 358 for temporary orders of injunction to issue at this stage.

6. That it follows that the notice of motion dated 4<sup>th</sup> November 2016 is without merit and is dismissed with costs

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF JUNE 2017

In presence of;

Plaintiff Present

Defendant Absent

Counsel Mr. Odeny for the plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**

21/6/2017

S.M. Kibunja Judge

Oyugi court assistant

Plaintiff present

Mr. Odeny for the Plaintiff.

Order: Ruling dated and delivered in open court in presence of the Plaintiff and his counsel Mr. Odeny.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**