



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.319 OF 2014

THERESA AUMA OLIECH.....1ST PLAINTIFF

JOSEPH OKELLI OLIECH.....2ND PLAINTIFF

STEPHEN ORUKO.....3RD PLAINTIFF

VERSUS

ANDREW OLIECH OPIYO.....1ST DEFENDANT

BANK OF AFRICA KENYA LIMITED.....2ND DEFENDANT

RULING

1. **Theresa Auma Oliech, Joseph Okello Oliech and Stephen Oruko**, the Plaintiffs, filed two notices of motion under certificate of urgency dated 9th September 2015 on the 10th September 2015. That one of the notices of motion was for leave to amend the plaint to enjoin **Bank of Africa Kenya Limited** as a party and was granted on 21st September 2015. The second application is for temporary injunction to restrain **Bank of Africa (K) Limited**, the 2nd Defendant, from “selling by public auction, private treaty, disposing of or in any other way inferring with the current registration status of all that parcel of land known **West Kisumu/Ojola/1168** “ pending the hearing and determination of this suit. The application is based on the 17 grounds on the notice of motion marked (1) to (17). It is also supported by the affidavit sworn by Joseph Okello Oliech, the 2nd Plaintiff, on the 9th September 2015.

2. The application is opposed by the 2nd Defendant through the replying affidavit sworn by Monica Kamau, a recoveries officer, on the 10th October 2016.

3. The counsel for the parties appeared in court on the 16th January 2017 and directions were given on filing of written submission. The counsel for the Plaintiffs filed their submissions dated 23rd January 2017 while counsel for the 2nd Defendant filed theirs dated 23rd March 2017.

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

a. Whether the Plaintiffs have established a prima facie case with a probability of success for temporary injunction to issue at this stage.

b. Who pays the costs

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

a) That the 1st Defendant guaranteed the financial facility accorded by the 2nd Defendant to one Nathaniel Oluoch Oliech, the borrower, totaling Kshs.1,000,000/= by a charge in favour of the 2nd Defendant over his land parcel **West Kisumu/Ojola/1168**. The charge was registered on the 15th September 2010 long before the enactment of the **Land Act No.6 of 2012** which made spousal consent in such transactions, a requirement of the law.

b) That as can be confirmed from the charge documents availed by the 2nd Defendant through the replying affidavit, the plaintiffs were not parties to the contract pursuant to which the borrower was granted the financial facilities by the 2nd Defendant, which facility was secured by a charge against the land parcel **West Kisumu/Ojola/1168**. That the 1st Defendant has not challenged the steps taken by the 2nd Defendant to realise the security but informed the court through counsel on the 16th January 2017 that he does not oppose the application. That the position taken by the 1st Defendant is interesting in that the Plaintiffs application do not in any way seek any prayers or order against him.

c) That there is no rebuttal or challenge to the 2nd Defendant's evidence and submission that their power of sale had arisen as they had served upon the borrower and the 1st Defendant all the statutory notices. That as submitted by counsel for the 2nd Defendant, the transactions involving the Defendants and Nathaniel Oluoch Oliech as the borrower was before the 2012 Land Laws that brought about the requirement of spousal consents and that those laws did not invalidate the already existing transactions and commitments that had been lawfully and procedurally entered into. (see **Barclays Bank of Kenya Ltd –V – Attorney General & another** [2015] eKLR). That it follows that the plaintiffs herein have failed to show the basis or capacity on which they challenge the 2nd defendant already accrued power of sale.

d) That the 1st Defendant was, and still is, the registered proprietor of the suit property. That he offered the land as security for the financial facility given by the 2nd Defendant to Nathaniel Oluoch Oliech, the borrower, while well aware of the inevitable eventuality that would befall the property were the payments to be in arrears. That in case the 1st Defendant did not get the Plaintiffs blessing at the time of the said transaction, the best they could do at this stage is help the 1st Defendant, and the borrower for that matter, to clear the outstanding payments so as to have the charge over the suit property discharged. That it is only after the discharge that they could then engage the 1st Defendant over the implementation of the family agreement over the suit land. That as it is now, the Plaintiffs do not appear to have any claim against the 2nd Defendant that would be the basis of issuing a temporary injunction.

e) That the foregoing leads the court to conclude that the Plaintiff have failed to establish a prima facie case against the 2nd Defendant with a probability of success. That in case the Plaintiffs were to finally be successful, the court takes notice that the financial strength of the 2nd Defendant has not been put into question. That as the borrower and the 1st Defendant have not challenged the steps taken by the 2nd Defendant to realize the security, the balance of convenience tilts against the Plaintiffs.

f) That the notice of motion subject matter of this ruling was filed under receipt No.6977728 dated 10th September 2015. That the notice of motion was then dated 9th September 2015 though the "9th " has since been cancelled out and replaced with "22nd." That cancelling out has not been explained. That the Plaintiffs and 2nd Defendant's have referred the application in the replying

affidavit, written submissions and oral submissions as the one dated 9th September 2015. That being the correct date of the notice of motion, and noting that the 2nd Defendant was only enjoined in this proceedings through the amended plaint dated 21st September 2015 and filed in court under receipt No.7018540 dated 22nd September 2015, it is therefore obvious that the notice of motion was filed before the 2nd Defendant became a party in this suit. That even though the parties did not address the court on that issue, the notice of motion was irregularly and unprocedurally filed on 10th September 2015 against a party who was then not a party in the proceedings. That the belated attempt to cancel out the “9th” to read “22nd” was also irregular, unprocedural and illegal as it was not countersigned by the one making the change.

6. That in view of the foregoing, the court finds that the notice of motion dated 9th September 2015 and filed on 10th September 2015 by the Plaintiff seeking for temporary injunction order against the 2nd Defendant to be without merit and is dismissed with costs to the 2nd Defendant. That the interim order of injunction issued on the 21st September 2015 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr. Otieno for Ragot for Plaintiff

Mr. Bagendor for Wasuna for 1st and 3rd Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Owiti for the 2nd Defendant

Mr. Onsongo for the Plaintiff

Mr. Amkhio for Indimuli for 1st Defendant

Court: Ruling delivered and dated in open court in present of Mr. Onsongo for Plaintiff, Mr. Arikho for Indimuli for 1st Defendant and

Mr Owiti for the 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017