



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.156 OF 2016

SURJIT SINGH PANDHAL a.k.a

SUNJEET SINGH SAWAN SINGH.....1ST PLAINTIFF

MALKIT SINGH PANDHAL a.k.a

MALKIT SINGH SAWAN SINGH..... 2ND PLAINTIFF

VERSUS

BANK OF BARODA KENYA LIMITED DEFENDANT

RULING

1. Surjit Singh Pandhal a.k.a Surjeet Singh Sawan Singh and Malkit Singh Pandhal a.k.a Malkit Singh Sawan Singh, the Plaintiffs, vide the notice of motion dated 1st July 2016, seeks for temporary injunction restraining Bank of Baroda Kenya Limited, the Defendant, by itself, or agents “from advertising for sale, selling, disposing off, transferring, alienating, auctioning or in any other way interfering with or dealing with the Plaintiffs ownership or possession of land parcels title numbers **Kisumu Municipality Block 7/270, Kisumu Municipality Block7/262 and Kisumu Municipality Block 7/265**” pending the hearing and determination of this suit. The Plaintiffs also prays for costs. The notice of motion is premised on the twenty one (21) grounds on its face and affidavits sworn by Surjit Singh Pandhal on the 1st July 2016, 28th September 2016 and 9th November 2016.

2. The notice of motion is opposed by the Defendant through the replying affidavit sworn by Banambar Behera, the branch head of the Defendant’s Kisumu branch, on the 9th August 2016.

3. The application came up for hearing on the 29th May 2017 when Mr. Omondi for the Plaintiffs and Mr. Ragot for the Defendant made their oral rival submissions.

4. The following are the issues for determination by 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, the affidavit evidence, the submission by both counsel and come to the following determinations;

a) That there is no dispute that the Defendant advanced to the Plaintiffs financial facilities that were secured with legal charges on the Plaintiffs land parcels **Kisumu Municipality/Block 7/262, 265 and 270**.

b) That the Plaintiffs have taken issue with the Defendant's action aimed at realizing the charged securities on three main grounds: first that the statutory notices under **Sections 90 and 96 of the Land Act No.60 of 2012** have not been issued and served; that the interests charged offends **Section 44 (9) of the Banking Act** and that amounts of Ksh.8,000,000/= and 15,000,000/= have not been credited to the loan accounts.

c) That on the issue of Ksh.15,000,000/= alleged by the Plaintiffs to have been taken without authority from their account and credited to a third Party, namely Haulmart Kenya Limited, the Defendant has countered that argument and availed documentary evidence that shows that the transaction involved Ms General Equipment (1978) Limited and Ms Haulmart Kenya Limited. The court finds that the Plaintiffs have failed to prove the existence of any outward movement of Ksh.15,000,000/= from their account to Haulmart Kenya Limited on the alleged date.

d) That on the question of Ksh.8,000,000/= credited to the account of Haulmart Kenya Limited, the Defendant has established that the Plaintiffs were joint guarantors to the said company and that the amount was for overdraft repayments on an account which was in default.

e) That as has been held by superior courts in several decisions, where a chargor disputes service of a statutory notice, the chargee has the obligation to offer proof that the statutory notices were actually issued and served. That in this case the Plaintiffs have disputed that they were served with the notice required under **Section 90 (1) of the Land Act**. The Defendant exhibited their letter marked BB/5 dated 17th February 2016 which makes reference to "the contents of our letter dated 22nd October 2015, on the instructions of our above named client, M/S Bank of Baroda (Kenya) Limited, we issued to you a Statutory Notice pursuant to the provisions of **Section 90(1), (2)**," ostensibly as evidence. That had that notice been issued and served, there would have been nothing preventing the Defendant from exhibiting a copy and evidence of its service in their replying affidavit. That without a copy being availed to the court, it would be impossible to know its contents and to determine whether it complied with the requirements of **Section 90 (2) of the Land Act**.

f) That even though the letter dated 17th February 2016, marked BB/5, may suffice for purposes of the not less than forty (40) days' notice contemplated under **Section 96 (2) of the Land Act**, it is worthless in the absence of the notice under **Section 90 (1)** of the said Act. That the Defendant has no option but to do as the law requires of them, that is, to issue the statutory notices in compliance with **Section 90 (1)** of the Act before proceeding to issue the other notices under **Section 96 (2) of the Act and Rule 15 (c) of the Auctioneers Rules**.

g) That the dispute as to the amount outstanding does not on its own merit an order of injunction as the Defendant financial muscle has not been disputed and an award of damages would suffice in case the Plaintiffs were to succeed in the main suit.

6. That for reasons set out above, the court finds merit in the Plaintiffs notice of motion dated 1st July 2016 and the application is allowed in the following terms:

a) That an order of temporary injunction is hereby issued restraining the Defendant, by itself or agents, from selling or in any other manner alienating the three charged properties, namely, **Kisumu Municipality/Block 7/262, 265 and 270** without issuing and serving the Statutory Notice under **Section 90 (1) of the Land Act**. That should the Plaintiffs fail to comply with the notice, then the Defendant may exercise the options set out in **Section 90 (3)** of the Act and issue the notification of sale notices under **Section 96 (2) of the Act and Rule 15 (c) of the Auctioneers Rules**.

b) That as no evidence of advertisement of auction (sale) has been availed each party do bear their own costs.

c) That for avoidance of doubt the Defendant is at liberty to issue the Plaintiffs with the requisite statutory notices should the financial facilities accounts be in arrears or in default and proceed with realization of the charged properties notwithstanding this suit.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER 2017

In presence of;

Plaintiffs Absent

Defendant absent

Counsel M/S Indumuli for Omondi for Plaintiff

 M/S Alianative for Ragot for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/10/2017

24/10/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/S Alianative for Ragot for the Defendant

Mr. Indumuli for Omondi for the Plaintiffs

Court: ruling dated and delivered in open court in presence of M/S Alianative for Ragot for the Defendant and Indumuli for Omondi for the Plaintiffs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/10/2017