



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.130 of 2017**

**JACKSON MACHOGU BAGWASI.....1<sup>ST</sup> PLAINTIFF**

**LYDIA MORAA BAGWASI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

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

**RULING**

1. **Jackson Machogu Bagwasi and Lydia Moraa Bagwasi**, the Plaintiffs, seeks vide notice of motion dated 31<sup>st</sup> March 2017 for **Bank of Baroda (Kenya) Limited**, the Defendant, to be restrained from interfering with, selling, disposing, transferring any interest in Kisumu **Municipality/Block 10/287** pending the hearing and determination of this suit. They also seek for the notices of 8<sup>th</sup> March 2017 and 21<sup>st</sup> November 2016 declared null and void, reconciliation of account number [Particulars withheld] by a neutral competent entity and that costs be in the cause. The application is based on the ten grounds on its face and is supported by the affidavit sworn by 1<sup>st</sup> Plaintiff on the 31<sup>st</sup> March 2017.

2. The application is opposed by the Defendant through the replying affidavit of Barnambar Behera, the branch head, sworn on unspecified date in April 2017.

3. That on the 4<sup>th</sup> May 2017 Mr. Awino and Menezes, for the Plaintiffs and Defendant respectively, appeared before the court and directions on filing of written submissions among others were given. The counsel for the Plaintiffs filed their written submissions and further submissions dated 18<sup>th</sup> May 2017 and 12<sup>th</sup> June 2017 while counsel for the Defendant filed their undated submission on the 30<sup>th</sup> May 2017.

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

- a) Whether the Plaintiffs have made a prima facie case with a probability of success for temporary injunction order to issue at this stage.
- b) Whether the Plaintiffs have made a reasonable case for an order of taking of accounts 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, written submissions and various decisions of superior courts cited by both counsel and come to the following determination;

a) That as per the letter of offer and charge document dated 9<sup>th</sup> May 2011 and 23<sup>rd</sup> May 2011 respectively, and which both sides have provided copies of, the 1<sup>st</sup> Plaintiff was given financial facilities totaling Ksh.20,000,000/= to be repaid within 84 monthly installments. The financial facility was secured with a charge over land parcel **Kisumu Municipality/Block10/287** belonging to the 1<sup>st</sup> Plaintiff.

b) The charge was duly registered on the 23<sup>rd</sup> May 2011 as confirmed by the certificate of official search dated 27<sup>th</sup> March 2017.

c) That the Plaintiffs basis of contesting the Defendant action of advertising to auction the said land is that the amount claimed to be outstanding is not correct in view of the advice the Plaintiffs have received from Interest Rates Advisory Centre vide their reports dated 23<sup>rd</sup> March 2015 and 24<sup>th</sup> February 2017. The report of 23<sup>rd</sup> March 2015 indicates a difference of Ksh.3, 811,877/29 between their balances and that demanded by the Defendant. The report of 24<sup>th</sup> February 2017 contains a difference of Ksh, 4,784,610/32 on the balance demanded by the Defendant and the one found to be due. That the available affidavit evidence confirms that the 1<sup>st</sup> Plaintiff is in arrears and the Defendant cannot be faulted for commencing the process to realize the security.

d) That the findings in the reports referred to in (c) above have been disputed by the Defendant who in paragraph 36 of the replying affidavit have set out details of other financial facilities requested for by the 1<sup>st</sup> Plaintiff from the Defendant and disbursed which have not been considered in the reports. The particulars of the overdrafts and other correspondence set out in the said replying affidavit have not been disputed by the Plaintiffs by filing a further affidavit. The court finds the explanation given by the Defendant to be sufficient in explaining the differences noted in the two reports.

e) That the finding in (d) above leads the court to the conclusion that the 1<sup>st</sup> Plaintiff has been in arrears and default of his obligation under the loan agreement and the Defendant was therefore in order to issue and serve him with a statutory notice under **Section 90 (2) of the Land Act No.3 of 2012** as they did. The copy of the statutory notice dated 21<sup>st</sup> September 2016 and notice to sell under **Section 96 (2)** of the said Act have been annexed to the 1<sup>st</sup> Plaintiff's affidavit and marked **JMB 11 and 16** respectively.

f) The 1<sup>st</sup> Plaintiff complains that the 2<sup>nd</sup> Plaintiff, who is his wife, was not served with the statutory notices. The Defendant has responded that the charged property is registered in the name of the 1<sup>st</sup> Plaintiff only and that they were never informed that the charge property was a matrimonial home. The court has perused the copy of the certificate of lease for **Kisumu Municipality/ Block 10/287** and noted that it was issued on the 16<sup>th</sup> May 2011, which is the same date the 1<sup>st</sup> Plaintiff got registered as proprietor. The certificate of official search dated 27<sup>th</sup> March 2017 confirms that the charge was registered on 23<sup>rd</sup> May 2011, which is about eight (8) days after the 1<sup>st</sup> Plaintiff got registered as proprietor. The short period between the 1<sup>st</sup> Plaintiff becoming the registered proprietor and the date the charge was registered leaves doubt as to whether the Plaintiffs had established the matrimonial home on the said land by the time the transaction between the 1<sup>st</sup> Plaintiff and Defendant were processed and completed.

g) That the suit property (charged property) appears to have been acquired through the loan facility, subject matter of the suit and then used as security. The agreement having been executed in May 2011 was obviously before the enactment of the **Land Act No.3 of 2012** which commenced on 2<sup>nd</sup> May 2012. The Defendant was therefore not obligated to get the 1<sup>st</sup> Plaintiff's spouse's consent before registering the charge.

h) That it follows that as the 1<sup>st</sup> Plaintiff was a sole registered owner of the suit land, and there is no

evidence that he had notified the Defendant that he had established his matrimonial home with 2<sup>nd</sup> Plaintiff on the said land, the Defendant was not obligated to serve the 2<sup>nd</sup> Plaintiff with any of the statutory notices issued in the exercise of their power of sale.

i) That for reasons set out above the Plaintiffs notice of motion dated 31<sup>st</sup> March 2017 is without merit and is dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF NOVEMBER 2017**

In presence of;

Plaintiffs	Absent
Defendant	Absent
Counsel	M/S Oketch for Odeny for Plaintiff Mr. Maganga for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/11/2017

**22/11/2017**

Efore S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/S Oketch for Odeny for Plaintiff/Applicant

Mr. Maganga for Defendant/Respondent

Court: The Ruling dated and delivered in open court in the presence M/S Oketch for Odeny for Plaintiff and Mr. Maganga for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/11/2017**