



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.225 OF 2015

**NELLIE ENIGNUS WAMALWA.....PLAINTIFF/
APPLICANT**

VERSUS

RAFIKI DEPOSIT

TAKING

**MICRO FINANCE (K) LIMITEDDEFENDANT/
RESPONDENT**

JUDGMENT

1. **Nellie Benignus Wamalwa**, the Applicant, filed the originating summons dated 28th August 2015 seeking for the following orders;

- a) That the application be certified urgent.
- b) That temporary injunction be issued pending the hearing of the summons restraining **Rafiki Deposit taking Microfinance (K) Ltd**, the Respondent, from "**selling, disposing off by way of public auction, private treaty or howsoever the suit premises being Kisumu/Konya/4949**".
- c) That the Respondent be directed to "**postpone the sale of the suit property through the public auction,, private treaty or howsoever to allow the applicant sufficient leave to propose a scheme of payment or to secure a sale by private treaty**".
- d) That costs be provided.

The originating summons is based on the seven grounds on its face marked (a) to (g) and supported by the affidavit sworn by **Nerllie Benignus Wamalwa** on the 26th August 2016.

2. The originating summons is opposed by the Respondent through the replying affidavit shown by **Paul Ouma**, who is the debt recovery manager with the Respondent sworn on the 9th December 2015.

3. The originating summons came up for hearing on the 8th June 2016 when Mr. Yogo and M/S Kageni Advocates for the Applicant and Respondent respectively made their oral rival submissions.

A) The Applicant's case is that she was never served with the statutory notices before the sale of the suit property was advertised to take place on 2nd September 2015 as she had travelled to Uganda on 19th August 2015. She attached a copy of her passport page confirming that she had

exited to Uganda through Busia on the 19th August 2015. That she then filed this claim as the suspension notice of the auction by the Respondent had not been served on her. The Applicant therefore prays for prayers 2 and 3 of the originating summons.

B) The Respondent's case on the other hand is that the borrower and Chargor (Applicant) have defaulted in repayment of the loan. The Respondent annexed to their replying affidavit copies of the statutory notice dated 6th February 2015 addressed to the **Directors Mellech Engineering and Construction Co. Ltd** of P.O. Box 78102-00507 Nairobi and certificate of postage to the same address. They also annexed a second certificate of postage addressed to **Nellie Denigus Wamalwa** of P.O. Box 254-40100 Nairobi. It is the Respondent's case that the address used on the certificate of posting is the one the Applicant had elected to use under the Charge document. That the last paragraph of the notice dated 6th February 2015 contained the right to redeem the charged property by paying the sum of Kshs.16,289,050/45 together with the accrued interest. The notice was for three months to regularize the loan account. The Respondent also attached a copy of the auctioneers notice giving 45 days dated 24th June 2015 which was addressed to **Nellie Benignus Wamalwa** of P.O. Box 254 - 40100 Kisumu and notification of sale that were indicated to have been "**fixed to the main door of the proprietor on 1st July 2015**". The counsel for the Respondent submitted that though the sale had been advertised for 2nd September 2015 it was however suspended on realizing that the Applicant had not been served with the 40 days' notice required to be served under **Section 96 of the Land Act** No.6 of 2012. That the notice dated 24th August 2015 was thereafter issued giving 40 days' notice to **Nellie Benignus Wamalwa** of P.O. Box 254-40100 Kisumu and a copy thereof plus a certificate of posting of the same date are annexed to the replying affidavit. That the Respondent's counsel was informed by to the Applicant's counsel of the steps the Respondent had taken but the Applicant is yet to regularize the loan accounts.

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

- a) Whether the loan facility advanced to Mellech Engineering & Construction Co. Ltd, the borrower, by the Respondent and secured by a charge on land parcel **Kisumu/Konya/4949** owned by the Applicant, the chargor, was in arrears of the date the Respondent commenced the process to realise the security through public auction advertised to take place on 2nd September 2015.
- b) Whether the requisite notices had been issued and served on the borrower and changor.
- c) Whether the Respondents power of sale had arisen.
- d) Whether the orders sought should be granted.
- e) Who pays the costs.

5. That the court has considered the grounds on the originating summons, the affidavit evidence by both parties, the oral rival submissions by parties counsel and concluded as follows:

- a) That as conceded by the Applicant at paragraph 6 of her supporting affidavit, the loan facility was in arrears by the time the Respondent commenced the process of realizing the security.
- b) That the charge document dated 20th November 2013 gives the chargor's address as P.O. Box 254-40100 Kisumu while that of the borrower as P.O. BOX 78112 -00507 Nairobi. The charge document at clause 42 made provision on service of notices as follows;

“ That any notice or demand required or authorized by law or by this charge to be served by the Financier on the Chargor and/or the Borrower shall without prejudice to any other effective mode of making the same be deemed to have been properly

served on the Chargor and/or the Borrower if served on the chargor and/or the borrower if served on the personal representative of the chargor and/or the Borrower at the Chargor's and/or the Borrower's last known postal address in Kenya or if served in any of the above mentioned ways on an attorney holding the power of attorney where under such power of attorney the attorney is authorized to accept such service or if left in a conspicuous place on the charged property..... In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by post four days after posting (notwithstanding that it be undelivered or returned undelivered save where there is statutory provision to the contrary) or if sent by facsimile on the completion of transmission. Where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted."

The certificate of positing of registered postal article marked "PO2" in respect of the borrower is properly addressed to the address of the borrower that is in the charge document and in accordance with clause 42 above, they were properly served with the statutory notices dated 6th February 2015 and marked " PO1". The same cannot be said about service on the chargor as the relevant certificate of postage was addressed to "Box 245 -40100 NBI" (Nairobi) instead of Box 254 -40100 Kisumu. The court comes to a finding that the Chargor had not been served with the statutory notice as required Under **Section 90 of the Land Act** No.6 of 2012.

c) That the issuance and service of the notice dated 24th August 2015 under **Section 96 of the Land Act** was properly served on the Chargor but is legally no substitute for the 90 days' notice under **Section 90** of the said Act.

d) That flowing from above, the Respondent's power of sale had not arisen by the time they advertised to auction the charged property on 2nd September 2015. That this does not mean that the loan facility the Respondent had given the Borrower, and secured by the Applicant on the charged property was not in arrears. The Applicant concedes as much and appears to be seeking for the court's intervention to get her more time to regularize the loan account. That is an area the court is not willing to go into.

6. That in view of the foregoing originating summons dated 28th August 2015 has merit and is allowed in the following terms:

a) That the process commenced by the Respondent to realise the charged property and the advertisement for auction initially set for 2nd September 2015 is hereby stopped as it was premature for reasons that Applicant/Chargor had not been properly served with the notice under **Section 90 of the Land Act** No.6 of the 2012.

b) That each party will bear their own costs.

c) That for avoidance of doubt the Respondent is at liberty to commence the process to realize the charged property in accordance with the law if the loan facility is still in arrears.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF JULY 2016

In presence of;

Plaintiff/Applicant Absent

Defendant/Respondent Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016

13th July 2016

S.M. Kibunja J.

Oyugi court assistant

Parties absent

Counsel absent

Court: The ruling delivered in open court in absence of both parties and their counsel.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016