



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**LAND CASE NO.25 OF 2015**

**USHABEN JASHVANTSINH SOLANKI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KAJALBEN JASHVANTSINH SOLANKI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**VERSUS**

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

**RULING**

**1. Ushaben Jashvantsinh Solanki and Kajalben Jashvantsinh Solanki**, hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> Applicant, through the notice of motion dated 29<sup>th</sup> January 2015 seeks for temporary injunction orders restraining the **Bank of Baroda (Kenya) Limited**, Respondent, from “selling, alienating, transferring, auctioning, disposing and or in any other manner dealing with the Plaintiffs’ peaceful and quiet enjoyment over all that piece of parcel of land known as **Kisumu Municipality/Block 5/55** pending the hearing and determination of this suit.” The application is based on eleven grounds among them being that the statutory notice of redemption has not been served, that the Respondent has been paid Ksh.27,000,000/= and is demanding a further Ksh.80,000,000/= and that the reconciliation of the accounts has not been done. The application is supported by the affidavit sworn by 1<sup>st</sup> Applicant on the 29<sup>th</sup> January 2015.

2. The application is opposed by the Respondent through their replying affidavit sworn by Banambar Behera on 27<sup>th</sup> February 2015.

3. The court gave directions on 14<sup>th</sup> March 2016 that written submissions be filed. The counsel for the Respondent filed theirs dated 13<sup>th</sup> May 2016 on the 17<sup>th</sup> June 2016 while the Applicants counsel filed theirs dated 16<sup>th</sup> September 2016 on 30<sup>th</sup> September 2016.

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

a) Whether the Applicant have established a case with a probability of success in accordance with the principles laid out in the case of **Giela -V- Cassman Brown & Co. Ltd** [1973] E.A.358, for temporary injunction to issue at this interlocutory stage.

b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, the written rival submissions by counsel and concluded as follows:

a) That though the Applicants' main grounds of contesting the amount the Respondent is demanding under the loan facility is that the amount outstanding is disputed and the accounts have not been rendered, the Respondent has annexed to their replying affidavit copies of bank statements covering the period of July 2009 to September 2012 and work sheet summary covering July 2012 to January 2015 with an outstanding figure of Ksh.84,070,755.29. That the Applicants have not disputed having received the bank statements and they have not availed any evidence that they had disputed or contested any of the calculations therein.

b) That while the Applicants had alleged that the statutory notices, including the redemption notices, had not been served by the time the Defendant commenced the process to realize the charged property, the Respondent has availed the copies of the notices served and evidence of service. That the court is satisfied that the statutory requisite notices had been issued and properly served on the Applicants.

c) That the loan facility is obviously in arrears as even the Applicants at paragraph 11 of the supporting affidavit alluded to

an offer they had made to get a third party buy the property through a private treaty. That the Respondent has also availed copies of correspondence engaged with the Applicants towards

the same end. The court makes a finding that the Applicants would not have offered to look for a buyer of the charged property unless they were satisfied that their loan account was in arrears.

d) That there are many decisions of superior courts to the effect that a dispute as to the interests, charges levied and amount of the loan that is outstanding on their own does not suffice to stop the

chargee from exercising their right of sale that has arisen. [See **Sammy Japheth Karuku –V- Equity Bank & Another** Mombasa HCCC No.84 of 2013].

e) That the claim by the Applicants that if the suit property is sold and they are later successful cannot be compensated through damages has no merit. That when the Applicants offered the suit property as security for the loan facility, it became a commodity for commercial transaction whose value is capable of being established through valuations. [See **Kihara –V- Barclays Bank (K) Ltd** (2001) 2 EA 420.

f) That there is nothing on the facts presented by the Applicants to show that the Respondent would be unable to pay the Applicants damages were they to be successful. [See **Maithya –V- Housing Finance of Kenya & Another** [2003] IEA 133].

g) That from the foregoing the court finds that the Applicants notice of motion dated 29<sup>th</sup> January 2015 is without merit and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF DECEMBER 2016

In presence of;

Plaintiffs/Applicants            Absent

Defendant/Respondent           Absent

Counsel                               Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/12/2016**

7/12/2016

Coram as before

Parties absent

Counsel absent

Cut: Ruling dated and delivered in open court in absence of all parties and counsel. The Deputy Registrar to communicate.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/12/2016



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