

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCOMM/E011 OF 2021

LUCY WAITHERA KAMAU.....PLAINTIFF

VERSUS

NOAH KARAGO NDINGURI.....1st DEFENDANT

EQUITY BANK (KENYA) LIMITED.....2nd DEFENDANT

KEYSIAN AUCTIONEERS.....3rd DEFENDANT

RULING

Introduction

1. In order to put the Plaintiff's application dated 31st March 2021 into a proper perspective, a concise review of her case as enumerated in her Complaint is necessary. Her case is that her husband who she has sued as the 1st defendant in this case is the registered proprietor of Title No. **Nairobi/Block 103/393**. She claims that since their marriage in 2006 to date, they have lived on the said property which is their matrimonial home. As a consequence, she claims that she has acquired an equitable interest in the property arising from her continuing contribution through raising their daughter, maintaining the family home erected thereon and providing companionship to her husband. She avers that she is entitled to an overriding interest in the property, hence spousal consent from her was a prerequisite before any dealings touching on the property.

2. She avers that despite the foregoing, her husband (1st defendant) vide a Further Charge dated 4th July 2017 registered on the 19th July 2017 charged the property to the 2nd defendant to secure a facility of **Kshs. 8,900,000/=** without her knowledge or consent. She avers that she only learnt about the borrowing on 17th March 2021 when the 2nd defendant sent valuers to value the property for purposes of auctioning it after the borrower defaulted. She claims that her husband admitted charging the property without her consent and also swearing an affidavit on oath stating that he was unmarried.

3. It's her case that the 2nd defendant failed to exercise due diligence prior to execution of the Further Charge including visiting the property. As a consequence, she avers that the Further Charge is not only tainted with fraud and illegalities but is void *ab-initio* because it was procured without spousal consent and fraudulently as particularized in the Complaint.

4. Additionally, she avers that on the 23rd March 2021, she established from her husband that the 3rd defendant had served him with a 45 days' notice dated 18th March 2021 under Rule 15 of the Auctioneers Rules, 1997 which Notice is illegal, irregular and premature because the 2nd defendant did not serve her with a Statutory Notice under section 96(2) (c) of the Land Act[1] as the spouse to the chargor, hence that the 2nd defendant's Statutory Power of sale has not crystallized under section 96 of the aforesaid Act; and that the 45 days' notice can only be issued upon the lapse of the 90 days Statutory Notice issued by the 2nd defendant. Consequently, she avers that the Further Charge is void *ab-initio* for want of express, written spousal consent from herself and prays for: -

a. A declaration that the TITLE NO. NAIROBI/BLOCK 103/393 registered in the names of the 1st defendant constitutes matrimonial property.

b. A declaration that the Further Charge dated 4th July 2017 and registered against the said title on the 19th July 2017 is null and void *ab-initio*.

c. A declaration that the 2nd defendant's Statutory Power of Sale has not yet crystallized due to non-compliance with mandatory provisions of section 96 of the Land Act No. 6 of 2012.

d. A permanent injunction barring the 2nd and 3rd defendants either by themselves, agents, servants and anybody claiming authority through them from selling, disposing TITLE NO. NAIROBI/BLOCK 103/303 by public auction, private treaty or in any manner whatsoever.

e. Costs of the suit and interest thereon from the date of filing suit until payment in full.

f. Any other relief(s) that this court may deem fit in the circumstances.

The application

5. Concurrent with the application, the Plaintiff filed a Notice of Motion of even date seeking an interim injunction barring the 2nd and 3rd defendants either by themselves, agents, servants and anybody claiming authority through them from selling/dealing with the said property by public auction, private treaty or in any manner whatsoever, pending the hearing and final determination of this suit. She also prayed for costs of this application to be provided for. Prayers (a) & (b) of the application are spent.

6. The core ground in support of the application is that the Plaintiff is married to the 1st defendant, that the said property is matrimonial home/property, and that the 1st defendant secretly charged the property without obtaining spousal consent from her. She states that the 2nd defendant's power of sale is yet to crystallize as no Statutory Notice has ever been served upon her as the 1st defendant's spouse under section 96(3) (c) of the Land Act[2] and unless this court intervenes, the suit property will be sold in disregard of the mandatory provisions of section 12 (1) of the Matrimonial Property Act[3] and section 96 of the Land Act, and that she stands to suffer irreparably.

The 2nd defendant's opposition to the application

7. On record is the Replying affidavit of Mary Katoni dated 7th May 2021 opposing the application on grounds that the application is vexatious, incompetent, misconceived, and an abuse of the court process. The 2nd defendant states that it agreed to advance loan facilities to the borrower and that the further charge was secured by Title number Nairobi/Block 103/393 owned by the 1st defendant as the absolute proprietor.

8. The 2nd defendant contends that the said title was among 4 other securities registered in favour of the 2nd defendant offered by the borrower to secure an aggregate facility of Kshs. 60,900,000/=. It is the 2nd defendant's case that the borrower defaulted in repayment and fell into arrears of Kshs. 41,770,784.09 as at 2nd March 2021 necessitating repossession and realization of the security. Further, that the 1st defendant being the Chargor was served with a 90 Days' Notice under Section 90 (1) of the Land Act and upon expiry of the notice, the 1st defendant was served with the Notice under Section 96 (2) of the Land Act prior to the intended sale. It is the 2nd defendant's case that the charger failed to regularize the account prompting the 2nd defendant to exercise its Statutory Power of sale.

9. Further, the 2nd defendant states that that the 1st defendant is the absolute proprietor of the above properties and that the Plaintiff is not the registered owner of the said property; and she has no *locus standi* to seek any relief against the 2nd defendant. Also, the 2nd defendant states that there is no privity of contract between the plaintiff and itself, that the 1st defendant swore an affidavit dated 27th of June, 2017 deponing that he is not married and that the property did not constitute matrimonial property, and in view of the said affidavit, it was not necessary to undertake any further inquiry before charging the property, and, that, the 1st defendant duly executed the charge instruments for the entire debt and can only be lawfully discharged upon settlement of the entire debt. Lastly, the 2nd defendant states that the Plaintiff has not satisfied the tests for granting injunctions and as a consequence of the 1st defendant, it continues to suffer irreparable loss since the debt is accruing.

The Plaintiff's Replying affidavit

10. The Plaintiff swore the Replying affidavit dated 10th May 2021 essentially reiterating/reinforcing the contents of her earlier affidavit and in particular her interests in the subject property and reiterated that she has established a *prima facie* case and that her legal rights have been infringed.

The 1st and 3rd defendant's

11. The 1st and 3rd defendants did not file any response nor did they participate in the hearing of the application.

The Plaintiff's advocates submissions

12. Mr. Tembino, the Plaintiff's advocate submitted that the Plaintiff has satisfied the tests laid down in *Giella v Cassman Brown*[4] to merit the injunction. Also, he submitted that the Plaintiff has established a *prima facie* case with a probability of success as defined in *Mrao Limited v First American Bank of Kenya Limited & 2 others*[5] and that she has demonstrated a right which has been infringed or likely to be infringed requiring protection by way of an injunction. To buttress his argument, he argued that the Plaintiff is the 1st defendant's spouse within the meaning of section 2 of the Matrimonial Property Act[6] and, that they live in the said property which is their matrimonial home. He submitted that the Plaintiff made a non-monetary contribution to the property, hence, she acquired a beneficial interest in the property which is an overriding interest within the meaning of section 28 (j) of the Land Registration Act.[7]

13. Regarding irreparable loss, Mr. Tembino submitted that if the sale proceeds, the Plaintiff will suffer irreparable damage because she is still in possession and the mere fact that the 2nd defendant is able to compensate her does not confer rights upon it to trump upon her beneficial and equitable interests.[8] Also, he submitted that damages cannot regularize an illegality. Lastly, on balance of convenience, he urged the court to prefer the lower risk and consider that if the sale proceeds, the Plaintiff will lose the matrimonial home as opposed to the 2nd defendant who will be at liberty to sell the property if the suit fails.

The 2nd defendant's advocates submissions

14. Mr. Ngwebere, the 2nd defendant's counsel submitted that the applicant has not satisfied the conditions set out in *Giella v Cassman*

Brown (supra). He submitted that the Plaintiff has not established a *prima facie* case. Counsel argued that the 1st defendant is the absolute proprietor of the property and that there is privity of contract between the Plaintiff and the 2nd defendant. He submitted that the 1st defendant swore an affidavit dated 27th June 2017 deposing that he was not married and that the property does not constitute matrimonial property. He relied on *Amina Adam & 3 others v Rosamma Alexander & 2 others*.^[9]

15. Counsel argued that the 1st defendant submitted an affidavit deposing that he was unmarried and that the property was not matrimonial home, and, that, the 2nd defendant did not require any prove beyond the said affidavit. For this proposition he relied on *Kennedy Kimutai Salat v Kanuli Information Technology Solutions Limited & another*^[10]

16. On irreparable loss, he submitted that the loan stands at **Kshs. 41,707,784/=** and it continues to attract interests. Further, he submitted that the applicant seeks to stop the 2nd defendant from exercising its Statutory Power of Sale which has already accrued. He urged the court to dismiss the application with costs.

Determination

17. A useful starting point it to mention that the purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the *status quo* pending the determination of the parties' rights. In granting such an injunction, the court is concerned with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

18. Even though the court has a wide discretion to grant injunctions, it does not confer the court with an unlimited power to grant injunctive relief because regard must be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights. In *Giella v Cassman Brown and Co. Ltd* (supra), the court set out the principles for granting interlocutory injunctions. Two years after the said decision, the *American Cyanamid Co. v Ethicon Limited*^[11] established a three-element test in the English courts in deciding if an injunction should be granted. These are: (a) there must be a serious/fair issue to be tried, (b) damages are not an adequate remedy, and (c) the balance of convenience lies in favour of granting or refusing the application. The Supreme Court of Canada in *R. J. R. Macdonald v Canada (Attorney General)*^[12] enumerated a three-part test for granting injunctions, namely: - (a) *Is there a serious issue to be tried?* (b) *Will the applicant suffer irreparable harm if the injunction is not granted?* (c) *Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

19. There is no doubt that the applicable tests are well settled. However, it is not enough to recite the tests in an application. An applicant bears the onus of demonstrating the said tests and satisfying the court that it should grant an injunction. That is the acid test an applicant must pass. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so." Platt JA in *Mbuthia v Jimba Credit Corporation Ltd*^[13] echoed the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid*.^[14] He stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

20. Lord Hoffman's exposition of the law in *Films Rover International Ltd v Cannon Film Sales Ltd*^[15] is useful. He stated that in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at the trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds or would succeed at trial. In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

21. To justify for an interlocutory injunction, the plaintiff must show a "sufficient likelihood of success." The prospects of succeeding at the trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms - carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

22. There is no doubt that the *prima facie* case test represents the law in relation to the grant of interlocutory injunctions. A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. The applicant must demonstrate a genuine case as opposed to a case aimed at unfairly preventing a defendant from exercising a genuine legal right. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases.

23. The following often cited excerpt from *Interlocutory Injunctions: Practical Considerations*^[16] is useful:

"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald v Canada (Attorney General)^[17]*"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."*^[18] *It is usually a brief examination of the facts and law.*

In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a stronger prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."

24. The question here is whether the Plaintiff has demonstrated a *prima facie* case with a likelihood of success. There is no dispute that her husband charged the title. It is common ground that her husband swore an affidavit stating that he is unmarried and that the property does not form part of matrimonial property. The Plaintiff is accusing the 2nd defendant of not exercising due diligence to ascertain the veracity of her husband's affidavit.

25. However, her husband's affidavit is not to be viewed in isolation. There is no contest that the subject charge was a Further Charge. The First Charge dated 12th November 2004 was registered on 17th November 2004 as entry number three in the encumbrances section of the said title. Clause 3 of the Further Charge reads that:- *"It has now been agreed by and between the parties hereto that the Bank will not call for immediate repayment of the First Charge Debt but it will continue the present banking facilities and financial accommodation to the Borrower and will grant to the Borrower further advances and banking facilities or other financial accommodation upon having the same secured to the Bank by way of further charge in the manner hereinafter appearing."*

26. First, this being a Further Charge on a continuing facility one wonders why the Plaintiff who carefully annexed the charge instrument avoided clarifying whether or not she was aware of the first charge and whether she could challenge the Further Charge without questioning the First Charge. Differently, put, can the Plaintiff challenge the Further Charge and leave the First Charge intact. The converse is whether the Plaintiff had consented to the First Charge.

27. Second, even though her claim is anchored on her husband's affidavit, no specific reliefs have been sought seeking to impugn the veracity of the said affidavit or against the 1st defendant. The import of this is that in the absence of an invitation to this court to make a finding on the validity or otherwise of the said affidavit, the assault on the affidavit still remains mere allegations which cannot surmount the prim facie test required at this stage.

28. Third, allegations that spousal consent was not obtained is an issue of fact which must be proved by evidence after a full trial which will require weighing both the relative strength of both party's case. This raises serious doubts as to whether she has established a *prima facie* case at this stage as define in the *Mrao* case (supra).

29. Fourth, whether the alleged failure to obtain spousal consent viewed in totality of the entire dispute will persuade the court to declare the Further Charge a nullity and leave the First Charge unscathed raises doubts as to whether she has surmounted the *prima facie* test case at this state.

30. Fifth, the Plaintiff alleged fraud on the part of the 2nd defendant. The law is that fraud he who alleges fraud must prove fraud. The threshold required is high, hence she will have the burden of demonstrating it. A casual examination of the facts of this case and the documents used to perfect the security leave me un persuaded that the Plaintiff has established a *prima facie* case to merit the injunction.

31. Sixth, there is no contest that her husband borrowed the money. There is evidence of default. There exists a charge instrument. A key consideration in a case of this nature is whether the chargee's Statutory Power of Sale has arisen and the manner in which the exercise of statutory power is under taken and whether the Plaintiff had established any basis to persuade the court to stop the 2nd defendant from exercising a legally accrued right.

32. Seventh, on the whole, upon evaluating the law, the facts and the test of *prima facie* case, it is my conclusion that the Plaintiff's arguments do not meet the threshold of establishing a *prima facie* case to merit the injunction sought.

33. The other test is whether the Plaintiff has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England*^[19] is worthy reproducing: -

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

34. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.^[20] Robert Sharpe, in *"Injunctions and Specific Performance,"*^[21] states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."* In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be compensated by way of damages.

35. The 1st Plaintiff offered its property as security. He is the registered proprietor. All the requisite documents were perfected including his affidavit stating that he was unmarried and that the property does not form part of matrimonial property. There is evidence that there is default in servicing the loan. The Plaintiff has not established how she will suffer irreparable harm in the event the 2nd defendant exercises its Statutory Power of Sale which has arisen on account of failure to pay the loan. In the event of her claiming succeeding, it can be quantified and damages awarded. The argument that she cannot be compensated by damages is manifestly fails. The Plaintiff/applicant has not met this

test.

36. On the propriety or otherwise of granting injunctions in cases of this nature, guidance can be obtained from *Woodcraft Industries Ltd & 3 others v EAST African Building Society*^[22] which held: -

"To give an injunction to restrain a party from exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce contractual rights. It would be to render securities useless."

37. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.^[23] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.^[24]

38. The court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. I find that the balance of convenience is not in favour of granting the injunction.

39. An injunction is an equitable remedy, meaning that the judge hearing the application has a discretion in making a decision on whether or not to grant the application. A judge must consider if it is fair and equitable to grant the injunction, taking all of the relevant facts into consideration. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.^[25] I am not persuaded that this is a proper case for the court to exercise its discretion in granting the orders sought.

40. In view of my analysis of the facts, the law and the conclusions herein above arrived at, it is my finding that the applicant's application dated 31st March 2021 does not satisfy the tests for granting the orders of injunction sought. Accordingly, I dismiss the said application with costs to the 2nd defendant.

Orders accordingly. Right of appeal

Dated, Signed and Delivered at Nairobi this 25th of May 2021

John M. Mativo

Judge

[1] Act No. 6 of 2012.

[2] Act No 6 of 2012.

[3] Act No. 49 of 2013.

[4] {1973} EA 358.

[5] {2003} e KLR.

[6] Act No. 49 of 2014.

[7] Act No. 3 of 2012.

[8] Citing *Kanorero River Farm Ltd & 3 Others National Bank of Kenya Limited* [2002] 2 KLR 207 as quoted in *Marple Brooks Projects Company Limited & Another-vs-I&M Bank Limited* [2019] eKLR and *Suleiman-vs-Amboseli Resort Ltd* [2004] 2 KLR 589 as quoted in *Vitabiotics Limited & Another-vs-Ripples Pharmaceuticals Limited & Another* [2015] eKLR

[9] {1993} e KLR.

[10] {2017} e KLR.

[11] {1975}1 AER 504.

[12] {1994} 1 S.C.R. 311.

[13] {1988} KLR 1

[14] {1975} AC 396 at 407.

[15] {1987} 1WLR 670 at 680-681.

[16] Steven Mason & McCarthy Tétraut, available at www.mccarthy.ca.

[17] Supra

[18] *Dole Food Co. v Nabisco Ltd* {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[19] Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[20] Supra note 3.

[21] Robert Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aurora, On: Canada Law Book, 1992), P 2-27

[22] HCCC No. 602 of 2000

[23] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[24] Ibid

[25] See Bosire J in *Njenga v Njenga* {1991} KLR 401