REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 4 OF 2018

FERDINAND KENGA KATUNDA.....PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK LIMITED..... 1ST DEFENDANT/RESPONDENT

GREEN CREDIT GROUP LIMITED..... 2ND DEFENDANT/RESPONDENT

STEPHEN KARANJA T/A DALALI

TRADERS AUCTIONEERS (A FIRM).....3RD DEFENDANT/RESPONDENT

GEOFFREY THUKU KOBIA..... 4TH DEFENDANT/RESPONDENT

ELIZABETH MUTHONI..... 5TH DEFENDANT/RESPONDENT

THE COUNTY LAND REGISTRAR, KILIFI..6TH DEFENDANT/RESPONDENT

Coram: Hon. Justice R. Nyakundi

Stephen Macharia Kimani Advocate for the plaintiff/applicant

Musinga Advocates for the 1st and 3rd defendants/respondents

Attorney General for the 6th defendant/respondent

R U L I N G

The applicant vide notice of motion dated 7.6.2018 sought an order of injunction to issue against the respondents to restrain them from interfering with the suit property **Kilifi/Chembe/Kibabamshe/192** or their employees, agents or assignees in selling the suit land under the guise of realizing the security of the alleged loan debt owed to the 1st respondent, as enjoined with the 2nd, 3rd, 4th, 5th respondents pending the hearing and determination of the suit. The substance of the grounds in support of the application is the specificity that there is no valid collateral legal instrument of charge registered in favour of the 1st respondent against title deed **Kilifi/Chembe/Kibabamshe/192**. In addition, the applicant stated other facts in support as premised in the affidavit dated 7.6.2018 in a rejoinder to the application.

The 1st, 3rd respondent relied on the grounds of opposition filed in Court on 12.7.2018. In the averments the respondent contends that the applicant is guilty of non-disclosure of material facts hence unworthy of the equitable remedy. Furthermore, to appreciate despite the misgivings he has admitted securing the charge instrument and therefore does not meet the threshold of an injunction. The 1st and 3rd respondent also a Preliminary Objection in terms of Article 162 (2) (b) of the Constitution and Section 4 of the ELC Act No. 19 of 2021. Having considered the notice of motion, corresponding affidavits, grounds of opposition and the Preliminary Objection as crafted by the 1st and 3rd respondents, the pertinent question is whether the applicant qualifies for an order of injunction.

Determination

The Law

In the **English case of Films Rover International {1986} 3 ALL ER 772** the Court held as follows:

> ***"A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice, if it should turn out to have been wrong."***

The **three tier pronged approach** as enunciated in **Giella v Cassman Brown {1973} EA**:

> ***"sets out the conditions to be met by an applicant before such a remedy can be granted:***
>
> ***(a). Is there a primafacie case with a probability by success.***
>
> ***(b). Does the applicant stand to suffer irreparable harm, if relief is denied.***
>
> ***(c). On which side does the balance of convenience lie.***
>
> ***Furthermore, the Court in responding to the prayers for interlocutory injunctive relief should always opt for the lower rather than the greater risk of injustice."***

Similarly, in **Esso Kenya Ltd v Mark Mukwara Okuya {1992} KLR 50, Gachuhi J.A. observed as follows see Odunga's book Pag 3851:**

> ***"The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course."* (See also Habib Bank A. G. Zurich v Eugene Marun Yakues CA No. 43 of 1982)**

Giving effect to the above principles, the applicant main complaints are that: The instrument of charge or the loan agreement used to secure the said loan were never sanctioned by the Land Control Board for the area, where the land is located. Secondly, if there was consent on that transactions it was tainted with fraud. Thirdly, the commercial transactions was triggered by the 2nd respondent who persuaded the applicant to release his title deed to secure the money purposely to purchase his land. Fifth, that the said title and two others were used by the 2nd respondent to siphon money from the 1st respondent bank. Fifth, that he is a stranger to the lease agreement made and attached by **Mr. A. Okuto**, **Simiyu Mulingo** marked as **exhibit B and D** respectively. Sixth, that the notification of sale by the 1st respondent based on loan default is illegal and irregular in violation of the statutory provisions.

In my view, the validity or invalidity of the charge instrument against **Kilifi/Chembe/Kibabamshe/192** cannot be effectively ascertained by way of affidavit evidence. Whether, the purported sale is illegal as initiated by the 1st respondent and all other consequential procedures in compliance with Land Control Board as alleged by the applicant may not by itself be a plain and clear case of an injunction. The conflicting aspects of the affidavit evidence raises the questions whether the applicant has demonstrated existence of a *primafacie case* with high probability of success at the trial. (1). That ground on *primafacie case* fails to come to the aid of the applicant.

Secondly, the applicant has a duty to satisfy the Court that if the injunction is denied he will suffer irreparable damage not capable of being remedied, in any event with an award of damages on perusal of the affidavits and pleadings, the 1st respondent is a financial institution which obviously has the financial muscle to compensate the applicant in the event he succeeds at the trial of the suit. It follows therefore that the respondents are capable of compensating for the loss that there may be when the dispute is finally decided in his favour. The applicant also fails to convince the Court on irreparable damage as a condition to grant the relief.

What about the balance of convenience?

In the affidavit evidence, the applicant depones as to the illegality of the charge signed, but makes no mention as what security he offered at the time he accepted to borrow money from the 1st respondent. He seemed to dwell on the chain of actors involved which tainted the loan agreement to render it unenforceable. In essence those are issues which ought to be canvassed at interpartes forum. All those allegations on illegality and fraud is an effort not demonstrative of taking of the money from the 1st respondent but to paint a picture that there is a *primafacie case* with a probability of success. This Court has already ruled that the element on *primafacie* is farfetched. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others {2003} KLR 1215** defined:

> ***"a primafacie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case, which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

If the loan agreement and others duly signed by the owners provide insufficient material, the equitable remedy would not be available to the applicant. The balance of convince tilts towards the respondents.

In the instant case, an application for injunction has failed to conform with the principles of **Giella v Cassman Brown (supra).** Being an

equitable remedy, I find it difficult to restrain the mortgagee from exercising its power of sale. The resolution is the temporary injunction is denied.

Reverting to the Preliminary Objection raised by the 1st and 3rd respondent it was imperative for the respondent to demonstrate that the Court's jurisdiction is ousted by the Constitution or statute. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd {1969} EA 696:**

> ***"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

The case in point which makes reference to the jurisdiction of the High Court on mortgagee and mortgagor agreement is as illustrated in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others, Civil Appeal No. 83 of 2016**:

> ***"Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it, according to the purpose of which that land is adapted. Neither the cujus doctrine nor Article 260, whether expressly or by implication recognizes charging land as connoting land use. Further, Section 2 of the Land Act recognizes a charge as a disposition in land. A disposition is distinguishable from land use. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with disposition of land. Saying that creation of an interest or disposition amounts to use of land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be "using" his land simply by virtue of having a floating charge/disposition over the property."***

In order to dismiss this Preliminary Objection, the Court refers to the facts alleged by the parties in relation to the cause of action and pursuant to the **Co-operative Bank case (supra)** this Court is seized of the matters in issue as a competent forum of adjudication.

Although the respondent alleges the issue of jurisdiction in the present application it's clear that no land use is involved. There is anecdotal evidence that suggests that the sums which the 1st respondent was demanding arose one of a loan agreement. There is an issue of the applicant having defaulted in making good the loan.

For all of these reasons, I will dismiss the notice of motion dated 7th June 2018 with costs to the respondents.

DATED, SIGNED and DISPATCHED via email ON 27TH DAY OF AUGUST, 2021

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R. NYAKUNDI

JUDGE

(info@musingaadvocates.co.ke, wamakumi@gmail.com)