



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. 7 OF 2019

NW.....PLAINTIFF/APPLICANT

V E R S U S

MURATA SACCO LTD.....1ST RESPONDENT

MADUWANDE AUCTIONEERS.....2ND RESPONDENT

JKN.....3RD RESPONDENT

RULING

1. The applicant NW came to this court under a Notice of Motion which is under a Certificate of Urgency and seeks orders that a temporary injunction be issued restraining the respondents jointly and severally either by themselves, servants, agents and anybody or authority however claiming through them from selling by public auction, private treaty or in any manner disposing and or dealing with the property known as Mwerua/Kabiriri/xxxx pending the hearing and determination of this suit. The applicant was seeking a temporary injunction pending the hearing of the Notice of Motion interparties and the same was granted on 19/9/19.

2. The application is based on the following grounds:-

- a) That the land Mwerua/Kabiriri/xxxx is matrimonial property.
- b) That the 1st and 3rd respondent charged the land Mwerua/Kabiriri/xxxx without seeking the applicant's consent.
- c) That Mwerua/Kabiriri/xxxx is registered in the names of JKN the 3rd defendant.
- d) That the 3rd defendant/respondent and applicant are husband and wife.
- e) That the suit property is to be sold in a public auction scheduled to take place on 20th September 2019 as the 3rd defendant defaulted on payment.
- f) That in the event of the sale taking place, the applicant and her children will be rendered destitute.
- g) That spousal consent is mandatory before a family property is charged and to the extent that the plaintiff/applicant was kept in the dark, the resultant charge is void and legally untenable.
- h) That it is in the interest of justice that the application be granted as prayed.

3. The brief facts of the case are that the applicant and the 3rd respondent are husband and wife as shown by annexure N.W.1 and they live on land parcel No. Mwerua/Kabiriri/xxxx where they have a matrimonial home. The applicant avers that the 1st & 3rd respondent charged the said land parcel without seeking her consent as provided under **Section 12(5) of the Matrimonial Property Act, No. 49 of 2013**. The applicant came to learn that the said land parcel was to be sold by public auction on 20/9/2019. That though the land is registered in the name of the 3rd respondent, Jeremy Kibicho Nyamu, it is matrimonial property where she lives with their children and if it is sold, they are likely to be rendered destitute. She was kept in the dark when the property was charged without seeking her consent and the charge is therefore legally untenable.

4. The 1st respondent opposed the application and filed a Replying Affidavit sworn by Pius M. Hiira the Credit Manager of the 1st respondent. His contention is that the dispute relates to use and possession of land parcel No. Mwerua/Kabiriri/xxxx (to be referred to as the

said land) which is the preserve of the Environment and Land court.

5. That the title to the said land was offered as security to secure a loan of Kshs 3,500,000/- to be advanced to Mutithi extension Rice Farmers Co-operative Society Limited. The property was in charge in accordance with the law having secured the requisite documents as demanded by the Land Registrar. That upon being charged as shown on the charge document annexure PMH 1a & b it became a commercial property and a commodity for sale. The 3rd respondent failed to repay the loan and 1st respondent had no option but to auction the said property to recover the loan amount. That there is no evidence tendered to prove that the property was their matrimonial home as it was acquired in 2014, Twelve years after they celebrated the marriage. It is the contention of the 1st respondent that the applicant and the 3rd respondent have colluded so that they can avoid to repay the loan amounts now in arrears. That the application is bad in law and does not disclose a reasonable cause of action and ought to be dismissed.

6. On his part, the 3rd respondent filed a replying affidavit sworn on 11/10/19 and confirms that the applicant is his wife but has not colluded with her in any way. He confirms that they have built their matrimonial home on the said land. He contends that the 1st respondent misled him to have the suit land charged as security for a loan which was for purchase of machinery for Mutithi Rice Farmers Co-operative Society. He was not informed that spousal consent was required. The 1st respondent had promised to discharge the title upon purchase of the machines which would be acquired as asset finance.

7. The 3rd respondent depones that the charge was an informal charge and security cannot be sold by public auction without the lender filing a suit in court for recovery and eventual orders of sales. The 3rd respondent depones that proceeded to offer for sale the said land by public auction without following the laid down procedures. The respondent further depones that the loan has been repaid in full on 24/3/2018.

8. The application proceeded by way of written submissions. I have considered the application. There are two issues which arise for determination. That is jurisdiction.

- Whether the applicant has satisfied the conditions for the grant of injunction.

1) **Jurisdiction**

9. The 1st respondent has deponed that this is a dispute which ought to be heard and determined by the Environment and Land Court. It is trite that the issue of jurisdiction is everything and where the court lacks jurisdiction it should not make one more step in the matter it must down its tools. This has been stated in **Owners of Motor Vessels 'Lilian S' -v- Caltex Oil Kenya Ltd 1989 K.L.R-1** where it was stated:-

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. **Jurisdiction is everything.** Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

The 1st respondent submits that the preamble to the **Environment and Land Court Act** states that:-

“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.”

10. He also submits that it is the Environment and Land Court which has jurisdiction as provided under **Section 13 of the Act** which states:-

“Where for any reason effect cannot be given completely to the testator’s apparent intention, effect shall nevertheless be given thereto so far as is possible.”

11. I have considered the submission. The genesis of this dispute is a charge over the property known as Mwerua/Kabiriri/2984. It is a commercial dispute arising from a contractual relationship between a lender and borrower and the title was used as collateral to recover the loan. The 3rd respondent defaulted in repaying the loan and the 1st respondent engaged its agents, 2nd respondent to recover the loan. The dispute is Civil in nature and is for the recovery of the loan monies advanced to the 3rd respondent. The applicant moved to court to protect her interests in the matrimonial property. The Constitution gives High Court unlimited original jurisdiction in Criminal and Civil matters. **Article 165(3) (a)** provides:-

“Subject to clause (5) the High court shall have –

Unlimited jurisdiction in Criminal and Civil matters.”

The **High Court (Organization and Administration) Act 2015 at Section -5-** provides for jurisdiction of the High Court and states –

“The Court shall exercise –

a) The jurisdiction conferred to it by Art.165(3) & (6) of the Constitution and

b) Any other jurisdiction original or appellate conferred to it by an Act of Parliament.”

12. Having stated that the dispute is commercial in nature, to recover money based on contrary, this court is clothed with jurisdiction. Indeed at Para 17 the 1st respondent's affidavit has stated that it is a commercial property and at Para 19 that they contracted 2nd respondent to realize the outstanding loan owed by the 3rd respondent. I am reinforced in this finding by the decision in **Co-operative Bank of Kenya Limited –v- Patrick Kangethe Njuguna & 5 Others C.A No. 83/2016 (2016) eKLR – Court of Appeal** where it was stated:-

“By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. While exclusive, the jurisdiction of the ELC is limited to the specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act, none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides inter alia that “subject to Clause (5), the High Court shall have – (a) unlimited original jurisdiction in Criminal and Civil matters. For the above reasons, the appellant’s objection on jurisdiction was rightly dismissed.”

2) Whether the applicant has met the conditions for the grant of injunction.

The principles for the grant of injunction have been well laid out in the case of **Giella –v- Cassman Brown (1973) E.A 358**. These are –

- ◆The applicant must show a prima facie case with probability of success.
- ◆That the applicant might suffer irreparable loss which may not be compensated by an award of damages.
- ◆ If the court is in doubt, it will decide the application on a balance of convenience.

In the case of **Uhuru Highway Development Limited –v- Central Bank of Kenya & 3 Others Civil Appeal No. 126 of 1995** in the Court of Appeal of Kenya where Justice Tunoi JA (as he then was) stated that In the case of **Wairimu Mureithi –v- City Council of Nairobi Nai CA 5 of 1979(unreported) Madam JA said:-“The former Court of Appeal whose main Judgment was delivered by Mustafa, JA, with whom Wambuzi, P, and Law, VP (as they were then respectively) agreed, said in Abdul Salim and Others –v- Okong’o and Others Civil Appeal No. 44 of 1975 (unreported) that the conditions for the grant of an interlocutory injunction were well settled then in East Africa, and he could see no reason to depart from them. They were stated in Giella –v- Cassman Brown and Co. Ltd (1973) EA 358 at 360. Mr. Gachuhi for the appellant referred us to the decision of the English House of Lords in American Cyanamid –v- Ethicon (1975) 1 ALL ER 504. Mustafa JA also said in Abdul Salim (supra) that the decision to the contrary in American Cyanamid case did not alter the situation here.”** According to Mustafa JA. *“The conditions are (1) the probability of success (2) irreparable harm which would not be adequately compensated for by damages and (3) if in doubt, then on a balance of convenience.”*

The applicants claim is based on **Section 12(5) of the Matrimonial Property Act No 49/2013** which provides:-

“The matrimonial Home shall not be mortgaged or leased without the written and informed consent of both spouses.”

13. The applicant has annexed evidence to show that her matrimonial home is on the said land and she lives there with the 3rd respondent and her children. The 1st respondent and the 3rd respondent did not seek consent from the applicant before charging the property. The 1st respondent was expected to do due diligence and confirm the situation on the ground before charging the property. I find that the applicant has established a prima facie case with probability of success. The 1st respondent had engaged the 2nd respondent to auction the said property. The circumstances envisaged under **Order 40 rule (1) Civil Procedure Rules** have been established. It states:-

“the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

14. On the issue of irreparable loss, the objective of an injunction is to ensure a party who has a good case does not suffer irreparable loss.

In the case of **Alice Awino Okello –v- Trust Bank Ltd & AnorLLR No.625 (CCK) which** was quoted in the case of **Kisimani Holdings Ltd & Anor –v- Fidelity Bank HCCC Number 744 of 2012(2013) eKLR** where the Court of Appeal stated:....” *The balance of convenience is in favour of the Applicant as the sale of one’s property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances.”*

15. Sale of matrimonial home is a grave matter which will result in substantial and irreparable loss and the court ought to prevent such loss at the interlocutory stage pending the conclusive determination of the matter.

In Conclusion: -

16. I find that this court has jurisdiction to entertain the suit which has been filed by the applicant. I find that the application has merits. I

order that:-

1. A temporary injunction do issue to restraining the respondents jointly and severally either by themselves, servants or agents from selling by public Auction, private treaty or in any manner dealing with the property known as Mwerua/Kabiriri/xxxx pending the hearing and determination of the suit.

2. Costs to the applicant.

Dated at Kerugoya this 26th day of February 2020.

L. W. GITARI

JUDGE