



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO 46 OF 2019**

**JJR.....PLAINTIFF/APPLICANT**

**VERSUS**

**NIC BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SKT.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**GARAM INVESTMENT AUCTIONEERS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

- 1. JJR** has filed the application dated 24<sup>th</sup> January 2020 supported by her affidavit, seeking an injunction against **NIC BANK LIMITED, SKT, and GARAM INVESTMENT AUCTIONEERS** (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively) with regard to **LR No. xxxx/xxx (IR No. xxxxx)** pending the hearing and determination of the entire suit. She describes the property as matrimonial property which was charged by her husband **SKT** to the **NIC bank** without spousal consent. It is her contention that the property jointly purchased by herself and the 2<sup>nd</sup> respondent, on which they established their matrimonial home and have been residing in said property with the children since the year 2005.
- The matter was canvassed through written submission, where the applicant submitted that she has a prima facie case. The background to the application is that the 2<sup>nd</sup> respondent entered into a contract on 24/06/2015 using the suit property as a charge to secure a loan facility where the bank advanced **Kshs. 75,000,000/-** to **[Particulars withheld] VENTURES**, yet there was no spousal consent sought from her. Apparently she had initially filed **ELC case no. 83 of 2018**, seeking injunctive orders, and the court in allowing her prayers found that it was not clear whether she had signed the spousal consent.
- The 1<sup>st</sup> respondent is faulted on grounds that it never issued the applicant with the prescribed statutory notices as required by **Section 90 of the Land Act**. That the purported statutory notices being annexures NIC 3 and 4 to the 1<sup>st</sup> and 3<sup>rd</sup> respondents, and that the replying affidavit is only addressed to the 2<sup>nd</sup> respondent alone with no evidence that the applicant was duly served. She states that her address being **118-00502 Nairobi** is different from that on the purported statutory notice and notice of sale was addressed to.
- It is also argued that the applicant was never issued with a statutory notice under **section 96(2) of the Land Act**, and the bank is seeking to sell her property without having regard to the market value contrary to **section 98(1) of the Land Act**. She pokes holes at the bank's actions, saying it is seeking to sell the suit property without setting a reserve price contrary to the requirements of the **Auctioneers' Act and section 98 of the Land Act**. Further, that no redemption and notification of sale have been issued as per the **Auctioneers' Act and Rules**, nor was a forced valuation undertaken by a valuer as required by **Section 97(2) of the Land Act**.
- The applicant submitted that damages cannot be an adequate remedy in this case, as what she seeks transcends monetary value. She points out that she has occupied the suit land with her children since 2005 and has developed permanent house worth **Kshs. 100 Million**, and there are other developments underway which will be affected. The suit will be rendered nugatory in view of the prima facie case she has set out.
- The court is urged to consider that since the applicant is in possession and control of the land since 2005 it is desirable that the dispute be resolved before the property can be disposed of. That she has shown that her rights are likely to be contravened with if the order of interlocutory injunction is not granted.
- The 1<sup>st</sup> and 3<sup>rd</sup> respondents' replying affidavit is faulted as being defective because it has not been sworn under seal as required by law, and that it should be struck out.
- The applicant submitted that as per section 1A and 1B of the Civil procedure act and article 159 of the constitution the court sitting in

ELC No. 83 of 2018 had the power to transfer the matter to this honourable court.

9. The 1<sup>st</sup> and 3<sup>rd</sup> respondents did not file submissions. They however filed a grounds of opposition and a replying affidavit to the application. The replying affidavit was filed on 7<sup>th</sup> February 2020 and averred that the 2<sup>nd</sup> respondent offered a parcel of land (**LR No. xxx/xxx (IR No. xxxxx)** situate in the city of Nairobi to be charged as security for a loan of kshs. 75,000,000/- in respect to [**Particulars withheld**] **Ventures Ltd.**

10. That, the applicant herein freely and voluntarily executed a spousal consent on **24<sup>th</sup> June 2015**, the same was annexed as NIC-2. Contrary to the provisions of the charge the 2<sup>nd</sup> defendant and the borrower defaulted on repayment. On 7<sup>th</sup> March 2017, the bank issued and served a **3 months' notice** through the 2<sup>nd</sup> respondent and applicant's joint address of P.O. Box 654-300100 and demanded payment of the arrears. The same is evidenced by Annexure NIC-3 which is a copy of the statutory notice and postage receipt. The chargor neglected to make any payments.

11. Thereafter, the bank issued a **40 day notice of sale dated 16<sup>th</sup> June 2017** through the 2<sup>nd</sup> respondent and applicant's joint address (Annexure NIC-4). Upon the lapse of the 40 day notice the bank instructed the auctioneer to give the appropriate notices required by law as demonstrated by annexure NIC 5 is a copy of the auctioneer's notice. NIC-6 is an annexure containing the affidavit of an advocate of the high court in **ELC 83 of 2018** deponing that the applicant voluntarily executed the spousal consent to which he witnessed. The court in **ELC 83 of 2018** held with finality that it did not have jurisdiction to hear the suit and made the order transferring it to the High Court. The ELC suit was void and could not be transferred to another court. Therefore, the order of 19<sup>th</sup> November 2019 was void ab initio as the court had downed its tools and could not make an order regarding this suit. The respondents urge that the application be struck out as the applicant has not met the trite requirements for granting of an injunction.

### ISSUES FOR DETERMINATION

1. Whether the applicant has a prima facie case
2. Whether the applicant shall suffer irreparable damage
3. Balance of convenience
4. Whether the order transferring this suit from the ELC Court was void ab initio

The principles that the court should consider when considering an application for injunction are set out in the case of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358**. The Applicant must show that she has a prima facie case with a probability of success and that she stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

### WHETHER THE APPLICANT HAS A PRIMA FACIE CASE

The crux of the case advanced by the applicant is that she did not consent to the charging of the suit property for the loan facility of kshs. 75,000,000/-. In order to determine whether she has a case the court must determine the veracity of the claim that there was no spousal consent to the charge. Notably, this has the potential to determine the entire suit at this interlocutory stage.

NIC-2 is an annexure to the 1<sup>st</sup> and 3<sup>rd</sup> respondent's replying affidavit. It contains a spousal consent that was executed by the applicant in the presence of an advocate by the name of **Kiplagat Kalya**. The respondents relied on NIC-6, an affidavit sworn in ELC No. 83 of 2018 by the advocate confirming that the applicant signed the consent and he witnessed it. The applicant swore a supplementary affidavit that was filed on 18<sup>th</sup> February 2020 disputing the authenticity of the signature and claimed it was forged. The court should determine the probative value of the affidavit filed as an annexure to the replying affidavit as it is the only corroboration of the execution of the spousal consent by the applicant.

In **ODINGA & 5 OTHERS –vs-INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (I.E.B.C) & 4 OTHERS (2013)** the Supreme Court held;

**The petitioner has used an unusual way of availing affidavits as annexures or evidence as there were various further affidavits filed through the affidavit in reply which were not independent affidavits filed to stand on their own as evidence in the particular proceedings. Such affidavits evaded payment of filing fees and their probative value was questionable. The affidavits and the supporting affidavit of the petitioner are not commissioned. The affidavits are hereby struck out and expunged from the record'**

The copy of the affidavit does not stand on its own but it was filed in ELC 83 of 2018 which is essentially the same suit before it was transferred. The actual affidavit was filed on 9<sup>th</sup> July 2018. The upshot of the foregoing is that there is corroboration of the fact that the applicant gave spousal consent to the charging of the suit land. The duty of proving that the spousal consent was forged falls on the applicant at this juncture. The applicant has not provided any evidence from a document examiner with regards to the forgery. I opine that the argument that she did not consent to the charge does not hold water.

The applicant has also alleged that the applicant was never issued with statutory notices as per section 90 of the Land Act.

Section 90 of the Land Act states;

**(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**

**(2) The notice required by subsection (1) shall adequately inform the recipient**

**of the following matters—**

**a) the nature and extent of the default by the chargor;**

**b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**

**c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**

**d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

**e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.**

Section 96 of the Land Act states;

**Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell**

Annexure NIC-3 to the replying affidavit filed on 7<sup>th</sup> February 2020 contains the statutory notices under sections 90 and 96(2), (3) and the postage stamps indicating they were sent to the applicant. They were sent to the address that was contained in the spousal consent as her address.

Under Rule 15 of the Auctioneers Rules;

**Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**

**a) record the court warrant or letter of instruction in the register;**

**b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;**

**c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;**

**d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;**

**e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.**

The respondents deponed that they had issued the auctioneers had issued the notices as required by law and the same were annexed as NIC-5. In the absence of the said notices on record, the respondents fail to prove that they had complied with the law.

#### **WHETHER THE APPLICANT SHALL SUFFER IRREPARABLE DAMAGE**

In *Jimmy Wafula Simiyu v. Fidelity Bank Ltd* [2014] eKLR it was held that,

***“the fact that the mortgaged property is a matrimonial property will only become relevant if the applicant is alleging lack of consent of the spouse in the creation of the mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of mortgagee’s statutory power of sale has lawfully accrued, it will not be stopped or postponed because the mortgaged property is a matrimonial home.”***

In **Michael Gitere & another v Kenya Commercial Bank Limited [2018] eKLR** the court held;

*The general position is that an injunction ought not to be granted if the applicants may be compensated by an award of damages. Whereas in appropriate cases, the fact that the property being sold is a residential or family property may be considered in deciding whether or not to grant an injunction that consideration must be weighed against the fact that once a property is given as security, it becomes a commodity for sale and there is no commodity for sale to which a value cannot be attached. Otherwise financial institutions would be reluctant to extend financial accommodation to genuine borrowers whose only security is their place of abode.*

I am persuaded that the applicant consented to the charging of the suit property thus it became a commercial commodity. There will be no irreparable damage suffered in the premises.

#### **BALANCE OF CONVENIENCE**

The respondent failed to prove that the auctioneers notice was issued in accordance with **rule 15 of the Auctioneers Rules**. The application succeeds only to the extent that the respondent must ensure that the statutory requirements are complied with by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

#### **WHETHER THE ORDER TRANSFERRING THE SUIT FROM THE ENVIRONMENT AND LAND COURT ON 19<sup>TH</sup> NOVEMBER 2019 IS VOID AB INITIO**

The respondents deponed that the order was void for want of jurisdiction as it had downed its tools and could not make any further orders regarding the suit.

Section 18 of the Civil Procedure Act states;

**(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—**

**(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**

**(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—**

**(i) try or dispose of the same; or**

**(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**

**(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.**

**(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.**

I hold the view that the suit was transferred to the High Court in the interest of justice. In any event, the jurisdiction was with regard to the subject matter of the issue and not the transfer of the suit.

The applicant had raised issue on the replying affidavit however there is no defect with the same as it was duly signed and commissioned before filing.

I hold and find that the applicant has not met the threshold to warrant issuance of an injunction. What she has succeeded in demonstrating is only to the extent that the 1<sup>st</sup> and 3<sup>rd</sup> respondent have not proven that the auctioneers' notices were issued in accordance to the law. They are thus directed to regularize the same after which they are at liberty to carry on with the process.

**Delivered, Signed and dated this 10<sup>th</sup> day of March 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**