



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 385 OF 2018

BEATRICE KWAMANGALA KUTONDO.....PLAINTIFF

VERSUS

PETER ITUMO NGOVE.....1ST DEFENDANT

STANBIC BANK.....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion Application dated 3rd October 2018 by which **BEATRICE KWAMANGALA KUTONDO** (the Plaintiff/Applicant) seeks the following Orders: -

“1. SPENT

2. SPENT

3. THAT pending the hearing and determination of this suit, an order of injunction be issued restraining the Defendant/Respondents whether by themselves, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling taking possession of leasing, transferring, charging or otherwise in any manner whatsoever interfering with LAND REFERENCE NUMBER 4894/396 (original L.R Number 4894/2012)

4. THAT costs of this application be provided for.

(2) The application which was premised upon **Order 40 Rule 1(a), 10(1)(a)** of the Civil Procedure Act and all enabling provisions of the law, was supported by the Affidavit of even date and the Supplementary Affidavit dated **19th August 2019** sworn by the Plaintiff/Applicant.

(3) The 1st Defendant/Respondent **PETER ITUMO PIUS NGOVE** opposed the application and relied upon his Replying Affidavit dated **11th April 2019**. The 2nd Defendant **STANBIC BANK LTD** filed a Replying Affidavit dated **29th March 2019**.

(4) The application was canvassed by way of written submissions. The 1st Defendant/Respondent filed his written submissions on **6th September 2019** whilst the 2nd Defendant/Respondent filed its submissions on **30th September 2019**.

BACKGROUND

(5) The Plaintiff/Applicant is the legal wife to the 1st Defendant/Respondent. During the subsistence of their marriage the couple acquired a parcel of land being **LR 4894/369 (original LR Number 4894/2012)** (hereinafter the “**suit property**”). They built upon the suit property their matrimonial home.

(6) On or about **31st August 2018**, the Plaintiff/Applicant came to learn that her husband (the 1st Defendant) had secured from the 2nd Defendant Bank a loan facility for **Kshs.30,000,000** using the suit property as security. This the Plaintiff alleges was done without her knowledge and/or consent as a spouse. The Plaintiff faults the 2nd Defendant Bank for failing to conduct due diligence and in failing to seek and obtain her consent as a spouse before registering the charge. The Plaintiff/Applicant also faults the 1st Defendant for giving a false statutory declaration to the Bank, stating that he was not married yet in reality he was at the material time legally married to the Plaintiff.

(7) The Plaintiff contends that the absence of spousal consent for the charge vitiates the capacity of the 1st Defendant, to charge the suit property to the bank, and seeks a declaration that the purported charge of the suit property in favour of the 2nd Defendant/Respondent is null and void. The Plaintiff claims that following the separation of the couple in **August of 2018** she continues to occupy the suit property together with her children and thus may be rendered homeless should the Bank move to realize its security. The Plaintiff is apprehensive that she stands to suffer irreparable loss and damage which cannot be compensated by an award of damages if the injunctive orders sought are not granted.

(8) In response the 1st Defendant concedes that he was indeed legally married to the Plaintiff at the time when the suit property was acquired. However, he denies that he and the Plaintiff acquired the suit property together and insists that there was no agreement or joint registration of the suit property. The 1st Defendant denies that the couple resided in the suit property as their matrimonial home and claims that they have at all times resided in the Kasarani area of Nairobi. That it was not until **August 2018** when due to disagreements the couple separated, that the Plaintiff of her own volition left, took some of her belongings and moved into the house the 1st Defendant was in the process of constructing on the suit property.

(9) The 1st Defendant concedes that he did secure a facility with 2nd Bank and that he did register a charge against the suit property. However, the 1st Defendant states that he is solely responsible for the repayments of that loan.

(10) The 1st Defendant contends that under **Section 13** of the **Matrimonial Property Act** spouses can acquire property separately and that having acquired the suit property in his individual capacity, the registration of the same in his name cannot be said to have been fraudulent. Finally, the 1st Defendant submits that he was at liberty to utilize the suit property as he wished including taking out a loan facility against security of the same.

(11) In their Replying Affidavit the legal officer with the 2nd Defendant Bank denies having failed to exercise due diligence. It is confirmed that the 1st Defendant approached the Bank on **1st December 2016** and secured a loan facility of **Kshs.30,000,000** repayable in equal monthly installments of **Kshs.373,056.24** for 24 months. It is averred for the bank that in the home loan application form, the 1st Defendant indicated that he was single (not married) and that as such no special details were applicable. That the 1st Defendant indicated that he was the sole owner of the suit property and this was confirmed by the Title Deed which bore only the name of the 1st Defendant as proprietor. Therefore the Bank denies that it failed to exercise due diligence in the matter in view of the fact that the 1st Defendant had indicated that he was not married. It is averred that the 1st Defendant indicated to the Bank that he was the sole proprietor of the suit property and availed to the Bank a copy of the Title Deed which confirmed this fact (Annexure “AN2” to the Replying Affidavit dated **29th March 2019**) In the circumstances the Bank contends that it had no legal obligation to seek and obtain spousal consent from the Plaintiff.

ANALYSIS AND DETERMINATION

(12) The present application seeks orders for an interlocutory injunction. In the circumstances the Plaintiff/Applicant must satisfy the conditions set out in the case of **GIELLA VS CASMAN BROWN (1973) E.A 358** in which the Court stated as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

PRIMA FACIE CASE

(13) The definition of what constitutes a prima facie case was set out in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) E.A** where the court held as follows:-

“So what is a prima facie case. I would say that it is a case in which on the material presented to the court or 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.”

The Court went on to clarify that:-

“...a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

(14) The Applicant contends that the Respondent Bank failed to secure her consent as a spouse before proceeding to charge the suit property which she terms as “**matrimonial property**”. The Applicant further contends that her interest in the suit property is protected by virtue of **Section 93(2)** of the **Land Registration Act 2012**. It is submitted that the Respondent acted dishonestly by indicating to the Bank that he was not married when he sought and obtained the loan facility in question.

(15) The basis of this Application is that the Applicant is apprehensive that the Bank may proceed to sell or auction the suit property to her detriment. The facts indicate that the property is not under threat of any sale on auction at all. The loan is currently being regularly serviced and is not in arrears. There has been no default by the 1st Plaintiff towards the repayment of any of the loan installments. The Bank have not issued any letter of demand or any statutory notices in respect of the suit property. There is therefore at the present time no danger of sale of

the suit property. In the premises I find that the present application is premature and I find that no prima facie case has been established.

IRREPARABLE HARM

(16) The Plaintiff/Applicant pleads that in the event the suit property is sold she stands to suffer irreparable harm as this is the matrimonial home which she occupies with her children. Firstly, as evidenced by the Title Deed the sole proprietor of the suit property is the 1st Defendant. As such the Plaintiff/Applicant has no legal claim over that property. Her claims of dishonesty and malice on the part of the 1st Defendant as well as the Applicant's claim to right of occupation of the suit property as the matrimonial home, are matters which cannot be determined at this interlocutory stage. These are issues which can only be determined at a full hearing of the suit at which evidence is called. In any event the value of the suit property is quantifiable and in my view an award of damages would suffice as adequate compensation in the event the court decided in favour of the Plaintiff/Applicant. It must be reiterated that at this stage there exists no threat of sale of the suit property.

BALANCE OF CONVENIENCE

(17) At the present time the loan facility secured by the 1st Defendant by charging the suit property is up to date. It is not in arrears and payments are being made to the bank as and when required. There exists no risk of sale of the suit property. The balance of convenience clearly favours the Defendants.

For the above reasons, I find no merit in this present application I decline to grant the interlocutory orders sought. Costs of the application are awarded to the 1st and 2nd Defendant/Respondent.

Dated in **Nairobi** this **29th** day of **May 2020**.

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Justice Maureen A. Odera