



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COVID CASE NO. 127 OF 2020

BETWEEN

HANNAH WANJIRU NJUGUNA.....PLAINTIFF

AND

SIMON NJUGUNA CHEGE.....1ST DEFENDANT

NAOMI WACUKA WACHIRA.....2ND DEFENDANT

OMMY LIMITED.....3ND DEFENDANT

GULF AFRICA LIMITED.....4TH DEFENDANT

RULING

Introduction and background

1. In her plaint, the plaintiff states that she is the wife of the 1st defendant and co-wife to the 2nd defendant. It is not disputed that the 1st defendant guaranteed banking facilities granted to the 3rd defendant (“the Company”) by the 4th defendant (“the Bank”). The guarantee was secured by a charge over the property known as Nairobi/Dagoretti/Karandi-ini/20 situated in Karandi-ini Area, Ngong road, Nairobi (“the suit property”) which was registered in 1st defendant’s name. The Bank has now issued a 45-day redemption notice to the 1st defendant and proposes to dispose of the suit property by public auction on 27th May 2020 thus precipitating this suit.

The application

2. Together with the plaint, the plaintiff filed a Notice of Motion dated 8th April 2020 made *inter alia* under **Order 40** of the **Civil Procedure Rules** seeking the following orders:

[1] That this application be certified as urgent and heard ex-parte in the first instance and service be dispensed with.

[2] That an injunction do issue restraining the Defendants/Respondents whether themselves, their agents or servants or whosoever from selling, alienating or transferring or otherwise dealing in LR No. Nairobi/Dagoretti/Karandi-ini/20 Karandi-ini Area – Ngong Road Nairobi City County pending the determination of this suit.

[3] That all further registration of any kind or rights interest in LR No. Nairobi/Dagoretti/Karandi-ini/20 Karandi-ini Area – Ngong Road Nairobi City County with any land registry and all registering authorities are prohibited until further orders of this Court.

[4] That costs be provided for.

3. The application was accompanied by the plaintiff’s supporting affidavit sworn on 8th April 2020 and a supplementary affidavit sworn on

18th May 2020. The 1st respondent filed a replying affidavit supporting the application. The Bank also opposed the application through the replying affidavit of Lawi Sato, its Legal officer, sworn on 12th May 2020.

4. The parties agreed to canvass the application by way of written submissions filed by the plaintiff and the Bank.

Plaintiff's Case

5. The plaintiff's case is set out in the plaint and the affidavits. She stated that she was the 1st respondent's second wife and that she got married to him under Kikuyu customary law and they have 3 children together. She stated that the suit property is family land which the 1st respondent is holding in trust for the family members. She took possession of the suit property after it was agreed by family members that she could occupy it. She further stated that she occupies the suit property as her matrimonial home together with her family and utilizes rent paid by the tenants to pay her and her family's bills. She also grows maize and vegetables for family upkeep.

6. The plaintiff also deponed that as the occupier of the suit property, neither she nor her family was consulted nor her consent sought when the suit property was charged to the Bank. She further states that the family was not consulted when the Bank granted the facility to the 3rd defendant.

7. From the facts as pleaded and deposed by the plaintiff, her case is that as the 1st respondent's wife, her consent ought to have been sought and granted before the suit property was charged by the Bank to secure advances to the 3rd defendant. Counsel for the plaintiff submitted that the suit property was matrimonial property within the meaning of **section 2** of the **Matrimonial Property Act** and by reason of **section 79(3)** of the **Land Act** and **section 93** of the **Land Registration Act**, the plaintiff's consent was required before charging the property hence the charge was invalid and unenforceable.

8. The plaintiff accused the Bank of failing to conduct due diligence on the matter and advancing money to the 3rd defendant in suspicious circumstances. The plaintiff urged the court to find that she had established a prima facie case with a probability of success.

The Bank's Case

9. The Bank's case was that in 2018, the Company, owned by the 1st and 2nd defendants, approached it for a loan facility which it extended through letters of offer dated 18th May 2018 and 11th September 2018. The facility was to be secured by a charge for Kshs. 10,000,000/- over the suit property which was registered in the name of the 1st defendant who, together with the 2nd defendant, had guaranteed the Company. The Bank stated that the 2nd defendant consented to creation of the charge after being presented as the spouse of the 1st defendant. Following default by the Company and despite extensive accommodations, concessions and indulgence extended by the Bank, the Company failed to service the loan on schedule causing the Bank to take steps to exercise its statutory power of sale.

10. The Bank contended that the plaintiff has not demonstrated on a prima facie basis that she is a spouse of the 1st defendant or that the suit property is the matrimonial home. Counsel for the Bank submitted that the plaintiff has not proved that she is married to the plaintiff as required under **section 59** of the **Marriage Act** hence she cannot sustain a claim that the charge over the suit property is invalid without her consent. Counsel cited **Elyjoy Kageno v Bank of Africa Kenya Limited and 3 Others [2018] eKLR** and **Stella Mokeira Matara v Thadeus Mose Mangenya and Another KSI ELC No. 209 of 2012 (UR)** where the court held that in such a case, the applicant had to prove a marriage and in addition show the existence of the matrimonial home on the suit property.

11. Counsel for the Bank further submitted that the plaintiff has not established a prima facie case on the balance of probabilities. Counsel added failure to grant an injunction will not result in irreparable harm as the plaintiff may be compensated by an award of damages in line with **section 94 (4)** of the **Land Act, 2012** which provides that a person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

12. Citing the case of **Andrew Wanjohi v Equity Building Society Limited & 2 Others [2006] eKLR**, counsel for the Bank also submitted that the balance of convenience is against the grant of an injunction. The Bank urged the court to dismiss the application.

Determination

13. The application before the court is for an interlocutory injunction under **Order 40 rule 1** of the **Civil Procedure Rules**. The principles for the grant of an injunction are well settled. The Court of Appeal in **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** reiterated the settled principles set out in **Giella v Cassman Brown [1973] EA 358** as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

14. The plaintiff seeks to restrain the Bank from exercising its statutory power of sale. There is no dispute that the statutory power of sale has arisen. The question for determination is whether the plaintiff has established, on a prima facie basis, that she is the 1st defendant's wife and was required to give her consent to the charge. In dealing with this issue I am also guided by the decision of the Court of Appeal in ***Stella Mokeira Motara v Thaddues Mose Mangenya & Another KSM CA Civil Appeal No. 63 of 2014 [2016] eKLR*** where it stated as follows:

[20] It was not sufficient for the appellant merely to raise issue or arguments as to why the 2nd respondent should not have been allowed to exercise its statutory right of sale of the suit properties, she was under an obligation to demonstrate that there had been an infringement of her rights and she was most likely to succeed in her suit against the respondents.

15. Since the suit property was charged in 2018, the legal basis of the plaintiff's claim is **section 79 (3)** of the **Land Act, 2012** which states as follows:

79.(3) A charge of a matrimonial home, shall be valid if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

16. The plaintiff's case was that she was the 1st defendant's wife, lived on the suit property which was the matrimonial home and that she had neither executed the charge nor assented to it. "Matrimonial home" is defined by the **Land Act, 2012** to mean "any property that is owned or leased by one or both spouses and occupied as their family home."

17. I note at this stage that **section 28(a)** of the **Land Registration Act** which provided that spousal rights over matrimonial property were overriding interests which would subsist and affect the property without being noted on the register was repealed by the **Land Laws (Amendment) Act, 2016**.

18. From the unchallenged documentation presented by the Bank, the 1st defendant presented the 2nd defendant as his wife. The fact that the 2nd defendant is a wife to the 1st defendant is not disputed by the plaintiff who accepts her as the co-wife. The 2nd defendant signed a spousal consent that she was the 1st defendant's wife and that the suit property formed part of the matrimonial home. The Bank therefore cannot be faulted for seeking consent from the 1st defendant's known wife who confirmed that the suit property was matrimonial property.

19. Since a spousal interest is not an overriding interest, was there anything that would have alerted the Bank to the fact that the plaintiff was a wife? I do not find any evidence. At any rate, the plaintiff has not furnished any documentary or other evidence to show that she is the 1st defendant's wife or that the Bank would have known that she is the 1st defendant's wife.

20. In order to succeed, the plaintiff must also demonstrate that the suit property is matrimonial property. In an attempt to establish this aspect of the claim, the plaintiff stated that she lived and farmed on the property. In her deposition, she stated that suit property comprises 6 kiosks from which receives rent. She also annexed photographs of the kiosks. On the other hand, I have looked at the valuation report prepared by Zenith (Management) Valuers Ltd dated 5th March 2020 which described improvements as follows, "Erected thereon are several semi-permanent structures which have not been considered in our report and valuation due to their transient nature." From the totality of the evidence presented, the suit property is an urban property fronting Ngong Road measuring about 0.0284Ha. The photographs show temporary kiosks and a motor vehicle repairs garage erected on the premises and it is unlikely given its size and location, the plot would have been used for farming as alleged by the plaintiff. On the other hand, nothing would have been easier than for her to show the house which she claimed she occupied with her children to demonstrate that her matrimonial home was on the suit property.

21. I find and hold that the plaintiff has not established that she is the 1st defendant's wife and that the Bank, exercising any due diligence, would have concluded as much. She has also not established that the suit property, registered in the 1st defendant's name, was matrimonial property. In short she failed to establish a prima facie case with a probability of success to enable the court grant an injunction against the Bank. That being the case and the suit property having been offered as security for a loan, there is no evidence that the plaintiff will suffer irreparable loss not compensable by damages if the injunction is not granted. Lastly, the balance of convenience is firmly against the plaintiff. She had not established a legal right to the property and the grant of an injunction would lead to escalation of the 1st, 2nd and 3rd defendant's indebtedness in relation to the value of the suit property thereby exposing the Bank to irrecoverable loss.

Allegations of fraud

22. Before I conclude, I would be remiss if I did not comment on the allegations of fraud and collusion made by the plaintiff in the supplementary affidavit and the 1st respondent in his replying affidavit.

23. It is trite law that a party's case is governed by the pleadings and a prima facie case with a probability of success is only in respect to the case pleaded in the plaint. In this case the plaintiff's case set out in the plaint was grounded on the fact that the suit property was her matrimonial home and her consent as a wife had not been sought before it was charged to the Bank. She did not plead any other allegations of fraud. The 1st defendant did not file any suit and the allegations of fraud against the Bank were not raised in any claim against the Bank and could therefore form the basis for the grant of the injunction in his favour or indeed the plaintiff's favour.

24. I therefore decline to comment or make any findings on those claims.

Disposition

25. For the reasons I have set out, I dismiss the Notice of Motion dated 8th April 2020 with costs to the 4th defendant.

DATED and DELIVERED at NAIROBI this 26th day of MAY 2020.

D. S. MAJANJA

JUDGE

Mr Ochoki instructed by Ochoki and Ochoki Associates Advocates for the plaintiff.

Ms Abuya instructed by Walker Kontos Advocates for the 4th defendant.