



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 23 OF 2018

HADIJA SHEE ABU.....PLAINTIFF

VERSUS

JOHN LOPEZ LUTUKA KIBWENGE.....1ST DEFENDANT

MWANANCHI CREDIT LIMITED.....2ND DEFENDANT

DISTRICT LAND REGISTRAR, KIAMBU.....3RD DEFENDANT

ENKANASA LIMITED.....4TH DEFENDANT

MISTAN AUCTIONEERS.....5TH DEFENDANT

RULING

1. Before me is an application by way of Notice of Motion filed on 12th June, 2018, and brought inter alia under Articles 40 & 45 of the Constitution, Section 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules . **Hadija Shee Abu**, the Plaintiff/Applicant principally seeks an order that ***“pending the hearing and determination of this suit, the Respondents, their servants, agents and or employees be restrained from transferring or in any way whatsoever interfering with the Plaintiff’s/Applicant’s herein quiet possession and occupation of parcel of land No. Kiambu Municipality Block 111/231”***. Two prayers sought in the alternative are of similar import. Or in the alternative, this court be pleased to issue an injunction against the Respondents, their servants, agents and or employees to restrain from transferring or in any way whatsoever interfering with the Plaintiff’s/Applicant’s herein quiet possession and occupation of parcel of land No. **Kiambu Municipality Block 111/231**.

2. The application is premised on the ground that the above property (hereinafter the suit property) is the matrimonial home of the Applicant and her alleged husband **John Lopez Lutuka Kibwenge** (the 1st Defendant/Respondent) which was charged to Mwananchi Credit Limited (2nd Respondent) without the Applicant’s spousal consent. Hence the charge thereby created was invalid.

3. **Hadija Shee Abu** swore a supporting affidavit deposing that she is the 1st Respondent’s legal wife and that the suit is the matrimonial property where she resides with her family and that she was at risk of being rendered homeless pursuant to the realisation of the charged property by the chargee. She contended that she contributed to the acquisition and development of the suit property and that the charge created by the 1st Respondent over the suit property was illegal for want of spousal consent and is invalid. In two further affidavits, the Applicant averred that the suit would be rendered nugatory if the 2nd Defendant proceeded with the public auction as scheduled.

4. The 2nd Respondent filed a replying affidavit on 25th June 2018 through **Dennis Mwangeka Mumbo**. Asserting to be one of the directors of the 2nd Respondent, he deposed that the 1st Respondent caused a two charges to be created over the suit property, being collateral to secure a loan in excess of KShs. 60,000,000/=, and that at the time, the said borrower swore an affidavit indicating that he was not married and as such no spousal consent was required. That pursuant to default by the borrower, the lender commenced the process of realisation of the security, but that the borrower filed a suit in the High Court at Kiambu which was settled by consent, the terms of which allowed the borrower to repay the outstanding sums by agreed instalments or in default the charged property be sold; that the borrower defaulted once more, hence the resumption of the process of realisation of the security. He further deposed that the Applicant had then approached the Court purporting to be the borrower’s spouse and claiming that she did not consent to the charge created over the suit property ; that subsequent investigations had revealed that the Applicant and the 1st Respondent had never contracted any legal marriage and that the certificate of marriage proffered by the Applicant was declared fake. It was contended that the Applicant has not exhibited any evidence of her contribution to the acquisition or development of the suit property as alleged and that her motion is a weak attempt to defeat the realisation of security.

5. A further affidavit was filed on behalf of the 2nd Respondent where it was deposed that the suit property had already been sold by public auction on 28th June 2018 and as such the suit had been overtaken by events.

8. While the motion was pending, the Applicant amended her plaint on two occasions. In the further amended plaint filed on 26/9/18 the Applicant enjoined the **District Land Registrar, Kiambu, Enkanasa Limited and Mistan Auctioneers** as the 3rd to 5th Defendants respectively. The 4th Defendant/Respondent filed grounds of opposition and Replying affidavit to the Applicant's motion on 23rd November 2018. The affidavit is sworn by **Nelson Rianto Saina** who describes himself as a director of **Enkanasa Limited**. The affidavit is to the effect that the Applicant lacks *locus standi* to sue, because, the Applicant, in asserting a marital relationship to the 1st Defendant/Respondent had relied on a forged marriage certificate. As a consequence of which, the couple was charged in **Cr. Case No.1755 of 2016** with various offences, including Making of a false document without authority contrary to Section 357(a) of the Penal Code; that a **Judicial Review Application No 621 of 2017 R v Inspector General of Police and others** brought by the Applicant and 1st Defendant/Respondent to stop the prosecution had been dismissed; that the 4th Respondent is an innocent purchaser for value pursuant to a public auction, conducted on instructions of **Mwananchi Credit Ltd** (2nd Defendant/Respondent) on 27th June 2018; that the sale was lawful, and in execution to the consent order recorded on 31st July 2017; that the transfer of the property to the 4th Respondent was lawfully effected by the 3rd Defendant/Respondent and therefore the application is without merit.

9. The motion was canvassed by way of written submissions which the parties' counsel also orally highlighted. The Applicant submitted that she had established a *prima facie* case with probability of success as held in the case of **Giella vs Cassman Brown Co. Ltd (1973) EA 358**. She reiterated that she is the 1st Defendant's legal wife and that the couple was blessed with five issues. It was submitted that a spouse and or child had a right to a home, and no one could deny the right merely because the right to the home is not registered. She relied on the case of **Mugo Muiru Investments Limited vs EWB & 2 others (2017)**. Further, the Applicant submitted that Section 79 (3) of the Land Act required spousal consent to a charge created over matrimonial property. It was submitted that if the sale was not stopped, the Applicant and her children risk being rendered homeless, and consequently suffer damage that cannot be compensated by an award of damages. The court was urged to determine the application on a balance of convenience as was the case in **Mbuthia vs Jimba Credit Finance Corporation & Another (1988) KLR**.

10. The 2nd Defendant submitted that the suit property is not registered in the name of the Applicant but in the name of **Enkanasa Limited** hence the Applicant has no interest in the said property. It was argued that if the orders sought are granted, the same shall be in vain as the registered proprietor of the suit property is not a party to this suit. (these submissions had been filed prior to the filing of the Further Amended Plaint). To support this proposition, counsel cited the case of **James Titus Kisia vs said Majid (2013) eKLR**. It was further contended that the application had been brought for the ulterior purpose of shielding the 1st Defendant/ Respondent from the process of the law pursuant to the parties' consent that was adopted as an order of the court in High Court Civil Case No. 18 of 2017 on terms inter alia that in default of the said 1st Defendant herein failing to pay any instalment agreed, execution by way of selling the subject property would follow. In the 2nd Defendant's view, the instant motion does not satisfy the principles envisaged in the case of **Giella vs Cassman Brown Company Limited (1973) EA 358**, and hence should be dismissed with costs. The 1st Defendant did not participate in the motion in any way.

11. The court has considered all the material canvassed in respect of the motion. A brief history of this matter is pertinent. Between 2014 and 2016 the 1st Defendant charged the property described as **LR No. KIAMBU/MUNICIPALITY BLOCK 111/123** to the 2nd Respondent to secure certain loan facilities, repayable on terms agreed in the Charge and Further Charge Instruments. In both instances, the 1st Respondent swore affidavits to the effect that he was unmarried and therefore no spousal consent was necessary. The 1st Defendant defaulted in making payments and the lender moved to exercise its statutory power of sale. This prompted the 1st Respondent to file **Kiambu Civil Case No.18 of 2017** against the lender (the 2nd Defendant/Respondent) for the purpose of stopping the sale. However, on 31st July 2017 the parties recorded a consent to settle the suit in terms that:

“i) The Plaintiff is indebted to the 1st Defendant in the tune of Kshs. 60,000,000/=.

ii) The Plaintiff shall liquidate the debt owing to the 1st Defendant in instalments of KShs.10,000,000/= per month commencing 31st August 2017.

iii) In default, execution by way of sale of the charged property Kiambu Municipality Block 111/231 to proceed.”

12. Three weeks later however the present Applicant approached the court via a motion by which she sought to be enjoined as a party to the suit and that the court be pleased to review the consent recorded. On grounds that she was the lawful wife of the borrower (1st Defendant/Respondent herein), the suit property was matrimonial property and that her consent had not been sought concerning the charge to the bank, as required by the provisions of the Land Act, and therefore, the charge was null and void. The lender opposed the motion and filed its responses, including an affidavit asserting that the Applicant had relied on a forged marriage certificate and that pursuant to investigations by the Directorate of Criminal Investigations, the present Applicant and the borrower (1st Defendant herein) were arraigned in court to answer related criminal charged. The lender also filed a notice of preliminary objection whose main ground was that the court was *functus officio* on account of the consent order adopted earlier by the court. The court upheld the preliminary objection stating that the Applicant's alleged grievances could not **“be properly foisted on the present suit which has been compromised”**. Subsequently the Applicant filed the present suit before the Environment and Land Court at Thika, but on 26/6/18 the suit was transferred to this court. In her motion the Applicant repeats the grounds placed before the court in **Civil Case No. 18 of 2017**.

13. The principles governing the grant of interim injunctive orders are settled. For the purposes of the instant motion, the court must determine whether the Applicant has brought her application to the required threshold for the grant of an interlocutory injunction under Order 40 Rule 1 of the Civil Procedure Rules which provides that:

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute is in danger of being wasted, damaged or wrongfully sold in execution of a decree ; or
- b).....

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. What are the applicable principles? The decision of the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) e KLR** is particularly illuminating as to the principles to be considered with respect to the granting of interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents they may be conveniently noted in brief 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.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

15. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a *prima facie* case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to *prima facie* standard.

16. Regarding the meaning of “*prima facie case*” the Court stated:

“Recently, this court in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others** [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie* case is a case in 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.” (emphasis added)

17. A *prima facie* case is built upon evidence and the applicable law. In this matter, the Applicant’s substantive case as found in the Further Amended plaint is founded *inter alia* on the provisions of Sections 79(3) of the Land Act and the supporting affidavit evidence presently before the court. The definition of matrimonial property is found in Section 6(1) of the Matrimonial Property Act, which provides that:

“For the purposes of this act, matrimonial property means –

- a. The matrimonial home or homes;
- b. Household goods and effects in the matrimonial home or homes; or
- c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

18. Through her material the Applicant has attempted to make out the case summarized in her submissions that:

“...the Applicant’s main contention is that the 1st Defendant caused the suit property which is their matrimonial home to be charged to the 2nd Defendant without her consent while the 2nd Defendant’s main contention is that the 1st Defendant whilst executing the legal charges, swore an affidavit and deposed that he was not married ...”

19. The Applicant’s case is grounded on the provisions of the Land Act and the Land Registration Act. With regard to the latter, she places reliance on Section 93(3) which provides that:

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house— (a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or (b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.”

20. On the other hand, Section 79(3) of the Land Act provides that:

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

21. The Applicant’s claim is based on her alleged marriage to the 1st Defendant/Respondent. It is not in dispute that when the Applicant first approached this court in HCCC 18 of 2017 she presented a marriage certificate in a bid to assert that she was the 1st Respondent’s wife and had not assented to the disputed charges on what she claimed to be matrimonial home/property. Pursuant to subsequent investigations, the certificate was disowned by the Attorney General’s office *vide* their letter dated 29th September 2017, marked **DMM1** and annexed to the Replying affidavit of **Dennis Mwangeka Mombo** filed on 25th June 2018. The letter from the Attorney General’s office to the County Criminal Investigations Officer, Nairobi states in part:

“RE: MARRIAGE BETWEEN JOHN LOPEZ LUTUKA AND HADIJA SHEE ABU

We refer to your above referenced letter dated 28th September 2017. We wish to state that the office has conducted a marriage search in our marriage register and confirm that we do not have any records of a marriage solemnized between John Lopez and Hadija Shee Abu.

Further we have established that the attached certified copy of the alleged marriage certificate did not originate from this office and the signature appended on the same is a forgery.”

22. The Applicant and 1st Defendant/Respondent are facing criminal charges arising from this and other matters. Thus, in subsequently approaching this court, the Applicant asserted in her first supporting affidavit at paragraphs 2 and 3 that she was the **“legal wife of the 1st Defendant”** and that the suit property is **“matrimonial property housing my family and children.”** No documentary evidence was attached to the initial supporting affidavit, but in the further affidavit filed on 22nd June 2018, the Applicant proffered, without making specific reference thereto in the body of her said affidavit, a letter supposedly emanating from the Chief High Ridge Location of Westlands Sub-County, dated 20th June 2018. This letter in part states:

“RE: HADIJA SHEE ABU ID NO [...]

This is to confirm that the above-named person is a resident of my area of jurisdiction. I further confirm that she is married to MR LUTUKA KIBWENGE JOHN LOPEZ ID. NO [...] under customary marriage. Since year 2008 they have been staying in their matrimonial home LR NO. 111/231 Runda Estate. They have 5 children...”

23. The letter does not state the source of the information, not even the personal knowledge of the writer, whose asserted geographical jurisdiction over Runda estate appears doubtful. In yet a further affidavit in response to the Replying affidavit of the 2nd Respondent of 25th June 2018, the Applicant deposes concerning the matters relating to the forged marriage certificate and resultant criminal charges, in part, that:

“the averments... are in relation to active court proceedings in a competent court of law and no judgment has been rendered The issue of my family ... can easily be verified by the local authorities within my area of jurisdiction”.

24. The Applicant’s case stands and falls on the question of her alleged marriage to the 1st Defendant/Respondent during the material period. This allegation has been put to doubt by the strong assertions and tentative evidence put forth by the 2nd Respondent. Thus, on the face of it the Applicant has not demonstrated the infringement of any right due to her as a wife, having failed to furnish even tentative proof of her capacity as the alleged wife of the 1st Respondent and therefore the probability of her case succeeding at the trial. Not only is there no *prima facie* proof that the Applicant is a wife to the 1st Respondent, there is no plausible evidence that she resides in the suit property. The Applicant has failed to demonstrate a *prima facie* case. The court therefore need not consider likelihood of her suffering irreparable damage or the balance of convenience, save to state that in this instance, the failure to prove a *prima facie* case dims the likelihood that the Applicant stands to suffer irreparably if the orders sought are denied.

25. Moreover, even if the Applicant had succeeded in demonstrating a *prima facie* case, the discretionary orders she sought would still have been denied. On account of the fact that, the suit property has in fact already been sold by way of a public auction, held on the 27th June 2018, to the 4th Respondent Company and transferred to it on 13th July 2018. These two are essentially the actions that the Applicant by her motion sought to stop, and in my view the decision of the Court of Appeal in **Eric v J. Makokha and Others v Lawrence Sagini and Others, Civil Application No. NAI 20 of 1994** as cited by the 2nd Respondent's counsel are apt for this case.

26. An injunction is an equitable remedy to which the principles of equity do apply. In the case of **Eric v J. Makokha** the Court of Appeal considered the grant of an injunction where the action sought to be restrained had already occurred. The court delivered itself thus:

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the court. So, its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said “Equity, like nature will do nothing in vain.” On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it”

27. An interim injunction is issued to maintain the *status quo* pending the trial so that if the Applicant should eventually obtain a judgment in his favour, “the Defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual”. See **Assanand v Pettitt [1989] KLR 241**.

26. The 4th Respondent as an innocent purchaser of property sold by the chargee in exercise of its statutory power of sale is protected by the provisions of Section 99 of the Land Act which provides that:

“(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or nonapplication of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price; (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

29. In **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] e KLR Havelock J** (as he then was) while considering the provisions of Section 99 of the Land Act cited with approval the statement made in **Bomet Beer Distributors Limited and Another v Kenya Commercial Bank Limited and 4 Others [2005] e KLR** to the effect that:

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

30. The learned judge proceeded to observe in the case before him that:

“As I have detailed above, the Plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction. Section 99 of the Land Act, 2012 details the protection to which the purchaser of the suit property at auction is entitled. ... That Section now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages.”

31. Similarly, the 4th Respondent in this case is protected by the provisions of Section 99 of the Land Act. More so as in this case, without proof of marriage between the Applicant and the 1st Defendant, it may well be believable that the Applicant is merely acting as a proxy for the said Defendant, with the aim of defeating the chargee's statutory right of sale. In **Nancy Kahoya Amadiva v Expert Credit Ltd and Another [2015] e KLR** the Court of Appeal said of a purchaser in circumstances similar to the present:

“...the 2nd Respondent’s action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd Respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we are to interfere with this power, the acceptance of a charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security.”

32. I think I have said enough to demonstrate that the Applicant’s motion is for dismissal. The motion filed on 12th June 2018 is accordingly dismissed with costs to the 2nd and 4th Respondents, being the only Respondents herein who participated in the motion.

SIGNED ON THIS 12TH DAY OF JUNE 2020 AND DELIVERED VIA eMAIL TO THE PARTIES ON 12TH DAY OF JUNE 2020

C. MEOLI

JUDGE