



Nyangaga v Crater View Auctioneers & 2 others (Environment and Land Appeal E001 of 2023) [2023] KEELC 20273 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E001 OF 2023
MC OUNDO, J
SEPTEMBER 28, 2023**

BETWEEN

CHRISTINE OYOO NYANGAGA APPELLANT

AND

CRATER VIEW AUCTIONEERS 1ST RESPONDENT

REAL PEOPLE LIMITED 2ND RESPONDENT

SKYROCK ENTERPRISES LIMITED 3RD RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 19th January 2023 brought under the provisions of Order 40 Rule 1, 2 (1) & 9, Order 51 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A & 63 (e) of the Civil Procedure Act Cap 21 laws of Kenya, Section 103 of the Land Act and all other enabling provisions of the law where the Applicant/Appellant seeks the following orders:
 - i. Spent.
 - ii. Spent
 - iii. That pending the hearing and determination of the instant Appeal , this honorable court be pleased to issue an order of temporary injunction restraining the 1st and 2nd Respondents by themselves, agents, servants or otherwise from selling, transferring and or doing any other act which is prejudicial to the Appellant/ Applicant's land LR. No. Kericho/Kapsuser/4862.
 - iv. That the costs of this application be provided for.
2. The application was supported by the grounds therein as well as the supporting Affidavit by the Applicant sworn on 19th January 2023 for which she had deponed that she had secured a conditional injunction, in the trial court, pending the hearing and determination of her application for interim



orders. That despite having had complied with the conditions by depositing a third of the monies loaned (Ksh. 2,006,750/=) the application was subsequently dismissed and her property L.R. No. Kericho/Kapsuser/4862 was now due for sale any time wherein she was likely to suffer loss and damages which would not be adequately compensated in monetary terms unless the orders sought herein were granted.

3. On the 23rd January 2023, the court issued ex-parte interim orders that the parties maintain the status quo pending further directions wherein it had been ordered that the Application to be served upon the Respondents.
4. Upon service, the 1st and 2nd Respondents through their operations manager based at their Kisumu Branch filed their Replying Affidavit dated the 3rd February 2023 in response to the Application in which he deponed that the Applicant herein had guaranteed a loan to the 3rd Respondent, wherein she had sought for judgment to be entered against it on 17th October 2019 but had not been keen on executing the same so as to pay the balance owing to the 2nd Respondent. That the 2nd Respondent now sought to recover the amount owed to the 3rd Respondent from the Applicant since she was its guarantor based on the security she had voluntarily offered.
5. That the 2nd Respondent had not instructed the 1st Respondent to re-advertise the suit property so as to warrant the present application seeking orders of temporary injunction against them, by themselves, agents, servants or otherwise from selling, transferring and or doing any other act which is prejudicial to the Appellant/Applicant's land LR. No. Kericho/Kapsuser/4862.
6. That the Applicant was a perennial litigant who has made 3 similar applications which had been dismissed for want of merit. The matter herein was thus Res judicata and the court ought not to condone such clear abuse of the due process because the 2nd Respondent would be subjected to untold 'suffering and losses because the Applicant was not willing to clear the outstanding loan amount contained in annexures FI 2(a-b)
7. That the Applicant had not established a prima facie case so as to warrant the court to grant the orders of injunction that she sought and the balance of convenience tilted in favour of the 2nd Respondent since the Applicant "still had an outstanding balance of Kshs. 3,015,370/= as at 2nd February 2023.
8. There was no response from the 3rd Respondent wherein by consent, parties took directions to have the application disposed of through written submissions to which I shall summarize as herein under.

Applicant's submissions.

9. The Applicant gave a background of the matter in issue to the effect that she was the registered proprietor of L.R. No. Kericho Kapsuser/4862, which property at the request of the 3rd Respondent was offered as security for the advancement of a loan facility by the 2nd Respondent. That she executed a Deed of Guarantee and a Charge both dated 23rd November 2017 in favour of the 2nd Respondent for a loan facility in the sum of Kshs. 5,000,000/= repayable in monthly installments of Kshs. 298,240/= until payment in full which sum was advanced by the 2nd Respondent to the 3rd Respondent who then executed a contract with the Appellant/Applicant on the agreed terms. Subsequently, the 3rd Respondent defaulted in the repayment of the loan and her property was advertised for a sale on the 8th April 2019 thus prompting her to file the present Application seeking orders to stay the said sale in the interim.
10. That the court had granted the orders on condition that she paid to the 2nd Respondent a sum of Kshs. 2,006,750/=, which amount was promptly paid, and the sale scheduled for 8th April 2019 did



- not take place. That she had thereafter paid a sum of Kshs. 906,600/= towards the loan which was a clear indication of her good will to redeem her matrimonial property where she had since repaid a total sum of Ksh 3,231,380/= towards settling the loan.
11. That she had given reasonable proposal for the repayment of the loan, but did not receive any response. That there was no need to sell the property, which was likely to be sold at an undervalued price which would in turn be prejudicial to her interest, as there were alternative means of making good the loan.
 12. The Applicant framed her issues for determination as follows;
 - i. Whether the court should grant an order for temporary injunction?
 - ii. Whether the Applicant has established a prima facie case with a probability of success?
 - iii. Whether the Applicant will suffer irreparable injury/loss
 - iv. In whose favour do the balance of convenience lie
 13. The Applicant's submission was based on the provisions of Order 40(1) (a) and (b) of the Civil Procedure Rules, the decisions in the cases of *Giella vs. Cassman Brown & Company Limited* (1973) EA 358 and *The American Cyanamid Co. vs. Ethicom Limited* (1975) A AER 504 and *Mrao Ltd vs. Ltd vs. First American Bank of Kenya and 2 others*, (2003) KLR 125 where she submitted that she had established prima facie that she had a genuine and arguable case as she has presented material before the court indicating that she was willing to exercise her equity of redemption. That there had been a reasonable proposal on the table and she had made substantial payments towards clearing the loan as had been directed by the Honorable Court which proposal should not be clogged by the Respondents who were out to sell her property at an undervalued price.
 14. The Applicant then relied on the decision in *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR to submit that the subject property was a matrimonial property which if sold would render her and her children homeless. That injury which would have been occasioned could not be measured with reasonable accuracy and no monetary compensation would be able to redress it. That if the orders sought were not granted, she would suffer an irreparable loss.
 15. The Applicant then cited the decision in the case of *Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, to submit that that she would suffer greater harm if the injunction was not granted as her matrimonial property was on the verge of being sold despite tabling a reasonable proposal for repayment of the loan. That the Respondents would not suffer any harm as finally the loan they had advanced would be cleared. That with this in mind, the balance of convenience tilted in her favour. The Applicant submitted that based on the provisions of law and authorities cited and the grounds herein adduced, she had established the conditions required to grant her the temporary order of injunction as prayed. That her Application be allowed with costs.

1st and 2nd Respondents' Submissions.

16. In opposition to the application the 1st and 2nd Respondents' submissions were based on their main issue for determination as to whether the Appellant/Applicant was entitled to the orders of injunction sought. In this regard the submission was that the Applicant was undeserving of the orders sought for the reason that they had granted her the opportunity to redeem her property when she and the 3rd Respondent herein had been duly issued with the requisite 90 and 40 days statutory Notices of sale as well as the 45 days Redemption Notice prior to the advertisement of the suit property for sale by way of public auction. That in a Ruling by the Magistrate's Court delivered on 20th February, 2020 there



had been no contestation that these notices had been issued. As such the Applicant cannot claim that they were out to clog her equity of redemption.

17. That the Applicant was seeking an equitable relief of injunction yet her conduct was undeserving as she was being dishonest to the court when she claims that her proposal to repay the debt outstanding loan was not responded to/ignored by the 2nd Respondent. That the said proposal was made way back on 18th September 2019 wherein it had been rejected by the 2nd Respondent on the basis that the same was merely an afterthought made only after the 90 days Statutory Notice and the 40 days Statutory Notice had been issued. Moreover, the Applicant had been given conditions upon which her proposal would be considered vide the letter dated 29th March, 2019 (annexure FI 5) which she had failed to respond to as to whether she was agreeable with the said conditions or not.
18. That from the statement of account, it could clearly be discerned that the 3rd Respondent had not made any payments and/or that the Applicant was not keen on making any payments but was buying time and was untrustworthy, trying to paint a picture of someone ready and willing to pay the outstanding amount when the record clearly showed otherwise.
19. That whereas the Applicant alleged to have sought for judgment to be entered against the 3rd Respondent in the year 2019 yet she had been very keen not to disclose when the said request for judgment had been endorsed and why up until now she had never executed against the 3rd Respondent. That clearly she was aware that she could not recover anything from the 3rd Respondent whom she had guaranteed the outstanding loan amount and it was for that very reason that the 2nd Respondent was seeking to recover it since she stood as the guarantor of the said outstanding loan amount.
20. That the Respondents advertised the suit property for sale based only upon proper valuation having been done as the law required. Moreover, the issue of valuation was adequately dealt with by the trial magistrate in his ruling delivered on 20th February 2020 where it had been held that the valuation had been done in compliance with section 97 of the Land Act (annexure FI 2(b))
21. The Respondents further submitted that it was important to note that the 2nd Respondent had not instructed the 1st Respondent to re-advertise the suit property for sale so as to warrant the Applicant to file the instant application seeking orders of temporary injunction. That the Application lacked merit and more so since similar applications had been filed before the Magistrate's court wherein they had both been dismissed. That the Applicant had not met the threshold to be eligible for the grant of orders of injunction as was set in the case of *Giella vs. Cassman Brown and Co Ltd* ([975] EA 358 at 360 as no prima facie case was established.
22. That on the issue of substantial loss, if anyone was suffering substantial/irreparable loss even as at to date, then it was the 2nd Respondent who had been incurring losses due to the unpaid loan amounts which it would have re-invested to its money lending business since it was a financial institution. Reliance was placed on the decision in the case of *Selian Holdings Company Limited vs. NIC Bank Limited* [2017] eKLR.
23. That the Applicant could not be heard to say that the suit property was her matrimonial home and that she was at risk of being rendered homeless, because she knew very well that the moment she charged the said property and stood as a guarantor to the 3rd Respondent, that she had converted her property into a salable commodity upon the 3rd Respondent's default towards repayment of the outstanding loan amount. Reliance was placed on the decisions in case of *Matex Commercial Supplies Limited & Another vs. Euro Bank Limited (In Liquidation)* [2007] eKLR.



24. As for where the balance of convenience tilted, it was the 1st and 2nd Respondent's submission that the same tilted in their favour because the Appellant/Applicant still owed the 2nd Respondent an outstanding balance to the tune of Kshs, 3,015,370/= as at the 2nd February 2023(annexure FI 1)
25. That pursuant to the holding by the Court of Appeal in case of Godfrey Ngumo Nyaga vs. housing Finance Company of Kenya Limited, Civil Appeal No. 134 of 1987, and given that due process of the law was adhered to prior to the advertisement of the suit property for sale, the 1st and 2nd Respondents urged the court to let them exercise their statutory right of action. That the Appellant/Applicant's application dated 19th January, 2023 be dismissed with costs to them.

Determination.

26. I have considered the Applicant's Application seeking for interim orders of injunction pending the hearing and determination of an intended Appeal against the ruling and/or order of the trial Magistrate delivered on 20th December 2022. (see ground (ii) of the Application and para 5 & 6 of the Applicant's supporting Affidavit) I have also considered the authorities, as well as the reasons given for and against the said Application. I have further considered the 1st and 2nd Respondents' response and arguments against the grant of the orders sought, and further considered the authorities herein cited by both parties.
27. The provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules provide as follows:
 - (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from subordinate Court or tribunal has been complied with.
28. Section 79G of the [Civil Procedure Act](#) provides that Appeals from subordinate Courts must be filed within 30 days from the date of the decision to the effect that:

“Every Appeal from a subordinate Courts to the high Court shall filed within 30 days from the date of the Decree or order Appeal ed against excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the Decree or order.”
29. The Applicant herein has alleged that the decision in the present case was decided on the 20th December 2022 wherein a Memorandum of Appeal was filed on the 18th January 2023 which was within the time frame and therefore she had complied with the law and the Court was now seized with jurisdiction to determine whether or not to grant the injunction so sought, while exercising its appellate jurisdiction. That the present application filed to this court as a first appellate court was not res judicata.
30. That said and done, I wish to delve little bit into the facts of this matter being that it is not in dispute that the Applicant/Appellant herein is the proprietor of the impugned parcel of land being L.R. No. Kericho Kapsuser/4862, which property at the request of the 3rd Respondent was offered as security for the advancement of a loan facility by the 2nd Respondent. The Applicant had then executed a deed of guarantee and a charge both dated 23rd November 2017 in favour of the 2nd Respondent for a loan facility in the sum of Kshs. 5,000,000/= repayable in monthly installments of Kshs. 298,240/= till payment in full, which sum was advanced by the 2nd Respondent to the 3rd Respondent. Subsequently,



the 3rd Respondent defaulted in the repayment of the loan and the 1st and 2nd Respondents proceeded to exercise their statutory right of action.

31. It is further not contested that the Applicant had been duly granted an opportunity to redeem her property by the 1st and 2nd Respondents when she and the 3rd Respondent herein had been served with the requisite 90 and 40 days statutory Notices of sale as well as the 45 days Redemption Notice prior to the advertisement of the suit property for sale by way of public auction on the 8th April 2019.
32. The Applicant's argument was that through an application dated 28th March 2019 she had sought for and had been granted a conditional stay of sale upon payment of Ksh. 2,006,750/= which was an equivalent of a $\frac{1}{3}$ of the alleged amount in default. That she had complied with the terms of the stay only for the 2nd Respondent through the 1st Respondent to yet again cause advertisement of the property to be sold on the 29th October 2019 which then prompted her to file an application dated the 23rd October 2019 seeking stay of the said sale. The said application had been dismissed vide a ruling of the 20th February 2020 by the subordinate court.
33. Of interest to note however is that the Applicant has ingeniously failed to disclose the fact that pursuant to the dismissal of her application dated 23rd October 2019 by the subordinate court, she had filed a Notice of Motion dated 26th February 2020 before the Land and Environment Court in ELC Appeal No.1 of 2020 seeking stay of sale of the suit property pending the hearing and determination of an intended Appeal .
34. In its ruling of 28th April 2020 reported as Christine Oyoo Nyangaga vs. Crater View Auctioneers & 2 others [2022] eKLR the court had held as follows;

“I shall therefore not venture into whether or not the Applicant has satisfied the conditions for issuance of stay of execution as this matter is premature before this court. At this stage I find that none of the contentious issues raised by parties as to the substance of the dispute can be heard and determined as that is within the purview of the Trial Court. The temporary injunction remains in force for 30 days within which time the matter shall be placed before Trial Magistrate's court to dispense with the pending application dated the 28th March 2019.”

35. Subsequently in a new file being ELC Appeal No. E001 of 2023, the Applicant has again filed the current Application seeking for interim injunctive orders pending the hearing and determination of yet another intended Appeal against the ruling and/or order of the trial Magistrate delivered on 20th December 2022 and which Ruling and/or order was not annexed to the Application and neither was the intended Appeal alluded to in the Notice of Motion dated 26th February 2020 before the Land and Environment Court in ELC Appeal No.1 of 2020 been filed.
36. From summary of the above, it is clear from the conduct of the Applicant that she is a dishonest character who is trying to steal a match from the Respondents. In Moses Ngenye Kahindo vs. Agricultural Finance Corporation: HCC No. 1044/01, Nairobi Ringera J (as he then was) observed as follows:

“ And of course it requires no stressing that an injunction is a discretionary equitable remedy. If the Applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been”.



37. Indeed an injunction being an equitable remedy, if it is shown that the Applicant's conduct does not meet the approval of a court of equity, it is trite that such a court may decline to grant the same. On this ground alone, the court would be entitled to dismiss the application. However it might be useful to consider whether Applicant would have been entitled to an injunction had she met approval of the court.
38. I find two issues for determination arising therein namely:
- i. Whether the Applicant has satisfactorily discharged the conditions warranting the interlocutory injunction pending the hearing and determination of the Appeal.
 - ii. What orders this Court should make.
39. In considering an application for injunction pending Appeal, the Court is guided by the principles set in the case of Patricia Njeri & 3 Others vs National Museum of Kenya [2004] eKLR namely:
- i. An order for injunction pending Appeal is a discretionary one and the discretion shall not be exercised against an Appellant whose Appeal is frivolous.
 - ii. Discretion should be refused where it would inflict greater hardship than it would avoid.
 - iii. The application must show that to refuse the injunction would render the Appeal nugatory.
 - iv. The Court should also be guided by the principles in Giella vs. Cassman Brown Limited 1973 EA 358
40. In so stating the Court must first establish whether the Applicant/Appellant has demonstrated that they have a prima facie case with a probability of success, secondly whether he would suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts keeping in mind that there exists an Appeal which should not be rendered nugatory.
41. In the case of Charter House Bank limited vs Central Bank of Kenya & Others [2007] eKLR the Court held as follows:
- “The purpose of granting an injunction pending Appeal is to preserve the status quo and to prevent the Appeal, if successful from being rendered nugatory (see also Madhu Paper International Limited vs Merr [1985] KLR 840.”
42. In deciding whether the Appeal is arguable I shall warn myself not to go deep into the merits of Appeal itself but to consider the grounds raised in the Memorandum vis a vis the impugned decision, so as to form an opinion as to whether there is an arguable Appeal to grant the order of injunction or not.
43. The Applicant herein has argued that pursuant to a ruling delivered on 20th December 2022 by the Hon Chief Magistrate C Obulutsa, dismissing her application for an injunction, the 1st and 2nd Respondents were likely to sell the suit property herein which was her matrimonial home which would render her homeless and for which she would suffer substantial loss and damage for which an order of costs could not compensate.
44. At this point it is important to note that whereas there are orders that are capable of execution hence donating jurisdiction to the court, similarly there are other orders that do not donate jurisdiction to the court to grant any order of injunction or stay and which orders are normally referred to as negative orders. The nature of an order sought to be Appealed against can only be discerned for an annexure of



the impugned Ruling/order. In the present scenario, the said impugned order/ruling was not annexed to the Application and as such the court is at loss on the terms of the decision therein and would not be in a position to grant an injunction as there was omission of crucial relevant materials that the court would have needed to evaluate. The application for injunction is thus bound to fail on account of material non- disclosure. I thus find that the Applicant herein has not established a prima facie case to warrant the issuance of and injunction.

45. I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella –vs- cassman Brown Ltd* case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86* cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR* observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

46. In case I am wrong then I shall proceed and determine on the second condition that needs to be established in order for the court to grant an injunction. This condition is whether the Applicant will suffer irreparable injury/loss which cannot be compensated by an award of damages if the order for injunction is not granted. It is not in dispute that the Applicant who is the registered proprietor of L.R. No. Kericho Kapsuser/4862, at the request of the 3rd Respondent offered it as security for the advancement of a loan facility by the 2nd Respondent. Subsequently, the 3rd Respondent defaulted in the repayment of the loan and the Applicant’s property was advertised for sale on the 8th April 2019 pursuant to its remedies provided in Section 90(3) of the *Land Act*.

47. The Applicant who knew that by using her parcel of land as security, it became a commodity for sale in the event of default, now seeks an injunction for reason that the 1st and 2nd Respondents were likely to sell the suit property herein, which was her matrimonial home hence rendering her homeless for which she would suffer substantial loss and damage wherein an order of costs could not compensate. There was however no evidence of the notice of intention to sell annexed on the application.

48. In the case of *Moses Ngenye Kahindo .vs. Agricultural Finance Co-operation Nairobi HCCC No. 1044 of 2001 (Unreported)* the court had held that;

“A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he could suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question”

49. In the case of *Matex Commercial Supplies Limited & Another vs. Euro Bank Limited (in liquidation) [2007] eKLR* the court had held as follows:

“In my view any property whether it is matrimonial home or spiritual house, which is offered as a security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured. This court is concerned with the importance and the comfort such a home generates but once a party feels that the property is suitable for purposes of a security, it means the party has destroyed, defaced and/or degraded the sanctity and rituality of the said matrimonial home.



Of late there has been a tendency to enroll the courts into the preposterous viewpoint of what is commonly referred to as matrimonial home. The rite of marriage and the place where the marriage is celebrated usually has no relation to a contractual obligation which has matured. The issue whether a party attaches special sentimental value is not an issue meant for consideration in the grant of an injunction. My position is that where the property is the sole family home, it may attract considerable and significant sympathy from the court but short of that, nothing else attaches. In this case it is the persons who joined in the marriage who felt, the property was suitable merchandise for sale by making it a security for an overdraft. In my view the word matrimonial home is not a rule of conduct and/or general truth. It is obvious that matrimonial home can change depending on the circumstances. I am alive to the fact that the alleged matrimonial home may be memorable, it may be memorial and it may contain the family memoirs of the 2nd Plaintiff. I think it is time for the parties to have a local memorandum of understanding not to take the matrimonial property to the den of the lion. And once parties decide to deface that sanctified place by making it a security for a loan/overdraft, then that legal position cannot be relegated to a position lower than the material and sentimental position of the family unit. In this case, it is the family that made the decision to convert its property into saleable commodity, with all the risks accruing therefrom.”

50. I am in agreement with the above captioned decisions. The Applicant knew the consequences thereto that awaited L.R. No. Kericho Kapsuser/4862 the moment she charged the said property and stood as a guarantor the 3rd Respondent were it to default. She cannot now be heard to cry wolf!
51. Indeed if anything is to go by, I am satisfied that the 2nd Respondent will suffer greater prejudice if an injunction is granted as the Appellant/Applicant still owes it a balance to the tune of Kshs, 3,015,370/=. On the other hand the 2nd Respondent can comfortably compensate the Applicant in damages for any eventual loss or injury. I thus find that the balance of convenience tilts in favour of the 1st and 2nd Respondents. Consequently, the upshot of this court’s Ruling is that the Applicant’s Notice of Motion dated the 19th January 2023 and filed on 23rd January 2023 is not merited and the same is hereby dismissed with costs to the 1st and 2nd Respondents. The interim orders herein granted are vacated.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 28TH DAY OF SEPTEMBER 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

