



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 111 OF 2019

JOSEPH KIPLAGAT CHEBORE.....1ST APPLICANT

DINAH ROTICH.....2ND APPLICANT

VERSUS

KENYA WOMEN MICROFINANCE BANK LTD.....1ST RESPONDENT

BRIMIA INNOVATIONS.....2ND RESPONDENT

RULING

The applicant filed an application dated 24th July 2019 seeking orders, in a nutshell, that there be interim orders against the respondents from further advertising for sale, disposing of, selling or otherwise interfering with the suit property Soy/Kapsang Block 5 (Ziwa) 111 pending the hearing and determination of this application interpartes. Further, that an interim injunction against the sale, disposing of, selling or otherwise interfering with the suit property pending the hearing and determination of the appeal.

The application is supported by an affidavit of the applicant herein.

APPLICANT'S CASE

The applicants submits that there is an eminent substantial and irreparable loss that he stands to suffer that cannot be compensated by monetary value. Should the appeal herein be successful the respondents will lack the capacity to compensate the applicant herein and a greater injustice will have been occasioned on the applicants.

He cites the case of *Amir Suleiman v Amboseli Resort Limited (2004) eKLR* and the case of *Films Rover International Ltd. And others v Cannon Film Sales Ltd (1986) 3 ALL E.R 772* in support of this submission.

The suit land is the substratum of the suit and any interference with the suit land will therefore defeat the ends of justice. The applicant relies on *Order 40 Rule (a) and (b) of the Civil Procedure Rules* in support of the application.

The applicant cites *National Commercial Bank Ltd vs. Ohint Corporation 2009* where the court relied on the case of *St. Patricks Hill School Ltd. Vs. Bank of Africa Kenya Ltd. (2018) EKLR* where it was

held that the purpose of an interlocutory injunction is to improve the chance of the court being asked to do justice after a determination of the merits upon trial.

The applicant cites the case of *Mrao Ltd vs. First American Bank of Kenya Ltd. (2003) EKLR* where the court of appeal held 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 case upon trial....it is a case which on the material presented to the court, a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter.*”

The applicant contends that the appeal before this court has high chances since the main suit is premised upon fraud.

The applicant required the examination of the signatures by the document examiner and is paramount since it's apparent on the face of the charge documents that the signatures involved therein are not the same, also the

applicant is of the contention that the signatures involved is not theirs. The signatures on the charge and the further charge are different as he never guaranteed any loan as claimed by the respondents.

The applicant relies on *Order 40 rule 1* and the case of **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another (2019) EKLK**.

In addition to the provisions of law the application is premised upon, the applicant relies on the provisions of *Order 51 Rule 10(1) and (2)* of the *Civil Procedure Rules* in support of his application. The applicant also cites the case of **Thomas Ratemo Ogeri & 2 others v Zachariah Isaboke Nyaata & Another – Kisii High Court Environment and Land Case No. 95 of 2004 (2014) EKLK** where the court chose to overlook technicalities for the sake of substantive justice. The applicant submits that the respondent's contention that the application cannot legally obtain as has been brought under the wrong provisions of law be dispensed with for *Section 3A* of the *Civil Procedure Act* exists to cure such issue of technicality.

The applicant filed an appeal that establishes a prima facie case with great chances of success, that should the order sought be denied he shall suffer

irreparable harm that cannot be compensated by monetary value since the land in question is family land whose sale would lead to eviction of the applicant's family.

1st RESPONDENT'S CASE

The respondent filed submissions on 17th January 2020.

The respondent opposed the application vide a replying affidavit sworn on 24th October 2019. The 1st respondent submits that the application should fail as the provisions under which it has been brought under do not clothe the court with the jurisdiction invoked by the applicants. The application is fatally defective.

The appellants will not suffer irreparable loss if the application is declined and the suit land sold in exercise of the 1st respondent's statutory power of sale as the suit land having been charged was converted to a commercial commodity with monetary value that can easily be ascertained and its loss can, therefore, always be made good by an appropriate award of monetary compensation.

ISSUES FOR DETERMINATION

- a) Whether the application is fatally defective for being brought under the wrong provisions.
- b) Whether the application for stay should be granted

WHETHER THE APPLICATION IS FATALLY DEFECTIVE FOR BEING BROUGHT UNDER THE WRONG PROVISIONS.

The respondent mainly opposes the application based on the ground that it has been brought under the wrong provisions of the law.

Article 159 (2) (d) gives Court this mandate; It provides –

“In exercising Judicial authority, courts and tribunal shall be guided by the following principles:

Justice shall be administered without undue regard to procedural technicalities.”

Order 51 Rule 10 of the *Civil Procedure Rules* provides;

(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

The application cannot therefore be declined on the basis that the statutory provisions under which it is brought are wrong or have not been stated.

WHETHER THE APPLICATION FOR STAY SHOULD BE GRANTED

The applicant submitted that he seeks to rely on *Oder 40* of the *Civil Procedure Rules*.

Order 40 provides;

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

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

Or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.**

The conditions for consideration in granting an injunction is now well settled in the case of *Giella vs Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

"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 adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

In *Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] eKLR* the court held;

"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 success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

The applicant claims that there is a dispute as to the signatures involved with regards to the charge and the further charge. However, upon examining the decision in the lower court, I find that on a balance of probabilities the appellant has no prima facie case. Further, to examine in details whether there is a prima facie case at this point, might be prejudicial to the appeal itself.

Whether the applicant will suffer irreparable loss

The applicant has not illustrated how he will suffer irreparable loss if the application is declined.

In *Isaack O. Litali...Vs...Ambrose W, Subai & 2 others, HCCC No.2092 of 2000*, the Court held that: -

" I am of the opinion that once land has been given as security for loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful.

.... for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security...."

Once the applicant used the suit property as security it became a commodity for sale in case of default in payment of the debt. The applicant has not shown that he cannot be adequately compensated by way of damages.

Balance of convenience.

In *Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others [2012] eKLR* where it was held:

"In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

In this application the balance of convenience tilts in favour of the respondents. The application therefore lacks merit and is dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of December, 2020.

In the presence of:-

Mr. Songok for the Applicant

Mr. Bisonga for the Respondent (absent)

Gladys - Court Assistant