



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 54 OF 2018

PRAYOSHA VENTURES LIMITED.....1ST APPLICANT

SAMMY KIPKETER CHERUIYOT.....2ND APPLICANT

STEPHEN KIPKIYEN TARUS.....3RD APPLICANT

VERSUS

NIC BANK LIMITED.....1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS.....2ND RESPONDENT

AND

BEATRICE JERUTO KIPKETER.....INTERESTED PARTY

RULING

1. The interested party moved the court by way of an application dated 4.12.2017 in an earlier suit no. E & L case no. 384 of 2017 which was consolidated with suit no.376/2017. The applicant sought for the following orders;

I. Pending the interpartes hearing and determination of this suit thereby an order of injunction against the defendants jointly and severally restraining the defendants by themselves, their servants and/or agents from offering for sale, selling by public auction or private treaty, or advertising for sale, alienating, disposing off charging or excising power of sale and/or completing/concluding any sale, transferring and/or otherwise adversely dealing with title no. Eldoret Municipal/ Block 4/335 in any way or manner whatsoever.

II. Costs of this application be provided for in any event.

2. In the supporting affidavit by Beatrice Jeruto Kipketer she deposed that the said parcel of land was slated for sale on the 7.12.2017 by the 2nd defendant (GARAM INVESTMENTS AUCTIONEERS). The land had been bought by 3rd applicant (STEPHEN KIPKIYENY TARUS)-who is her husband and herself jointly. She had never given her consent for the said property to be charged by NIC Bank as principal of the 2nd defendant. The land had been registered in the 3rd defendant's name and a certificate of lease issued in 2003. The proposed sale was illegal, null and void and she had a prima facie case against the defendants. Her family would suffer irreparable damage.

3. The 2nd plaintiff **Sammy Kipketer Cheruiyot** swore an affidavit deposing that he did not know a spousal consent was required and though he had bought the land jointly with his wife and it was registered in his name. The signature on the charge document was not his wife's.

4. The application by notice of motion dated 23.11.2017 filed by the plaintiffs'/applicants sought for the following orders;

1) That service of this application be dispensed with in the first instance

2) That an interim injunction do issue against the defendants by themselves, their servants and/or agents from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known as Uasin Gishu/Kimumu settlement scheme/4813 and Eldoret Municipality Block and LR No. 2259/463 pending the hearing and determination of this application.

3) That interim injunction do issue against the defendants by themselves , their servants and/or agents from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90(3) of the Land Act, 2012 leasing, letting, charging or otherwise interfering with all that land parcels known as Uasin Gishu /Kimumu Settlement Scheme /4813 and Eldoret Municipality Block and LR NO. 2259/463 pending the hearing and determination of this suit.

4) That an order be made under the doctrine of *lis pendens* and section 106 of the Land Registration Act (previously enshrined under section 52 of the Indian Transfer Property Act 1959(repealed) that pending the final determination of this suit in accordance with the law, all further registration or change in the registration and ownership, leasing, subleasing, allotment, user, occupation or possession of any kind of right, title or interest in the charged property in any land registry, Government department and all other registering authorities be and is hereby prohibited in ALL that parcels of land known as Uasin Gishu/Kimumu Settlement Scheme/4813 and Eldoret Municipality Block 4/335 and LR No. 2259/463.

5) That an interlocutory mandatory injunction do issue compelling the 1st respondent to render a true, proper and accurate account to the plaintiff(s) and this honorable Court the actual status of the charge account(s).

6) That the costs of this application be provided for.

5. **TEJASKUMAR RATILAL PATEL** he director of the 1st plaintiff (**PRAYOSHA VENTURES LTD**) deposed that there was a charge registered in their favor to secure some facilities. He states that the 2nd and 3rd plaintiffs (**SAMMY KIPKETER CHERUIYOT and STEPHEN KIPKIYENY**) had offered their properties as security but they were never served with any statutory notices as provided under **section 96(2) of the Land Act, 2012** and only became aware after seeing an advertisement in the Daily Nation of 20.11.2017. He further deposed that he had established a prima-facie case and urged the court to maintain the *status quo*.

6. The 1st and 2nd respondents deposed in their replying affidavit that on 23.3.2015 the 1st plaintiff accepted a facility from **NIC Bank** (1st Respondent) as follows:

a) **Revolving hire purchase facility –Ksh 100,000,000**

b) **Overdraft facility----Ksh 80,000,000/=**

c) **Revolving import letters of credit facility.....USD 1,000,000**

d) **Post import finance and stock financing(inner to the revolving letters of credit above.....USD 1,000,000**

e) **Term loan.....Ksh 50,250,000/=**

f) **Non-revolving import letter of credit facility.....USD 1,250,000**

g) **Short term loan/hire- purchase facility(inner to the non-revolving letters of credit above USD 1,250,000**

h) **Bonds and guarantees.....Ksh 20,000,000**

i) **Spot and forward exchange transaction limit.....USD 50,000**

7. Apart from securities charged by the plaintiffs personal guarantees were executed. The plaintiffs failed to repay the loans and as at 7.3.2017 the loan stood out at **Ksh 319,649,027**. It was an express provision of the charge instrument that in default the properties would be sold to recover any amounts due to the bank. The bank issued a statutory notice to the chargor to make payments within three months which they still failed to honor and on 16.6.2017 another **Notice of sale as per section 96(2)(3) of the Land Act** was issued. After lapse of the 40 days notice the auctioneers' were notified. The process was dully followed and thus the plaintiffs' allegations should fail.

8. In their further supporting affidavit sworn by **KIPLAGAT W. KALYA (ADVOCATE)**, he deposed that the 1st defendant exercised due diligence in investigation of title and **BEATRICE KIPKETER** appeared before him on 22.7.2015 to execute the spousal consent thus she was aware of the charge over the property.

9. In a further affidavit by the director of the 1st plaintiff he laments that the takeover by the 1st defendant took 10 months instead of the three months they had agreed on. Since the facilities were non- performing the 1st defendant ought to have stopped charging interest on the same.

10. It was the applicant's submission that they were never served with the statutory notices for the 45 day notice. **Section 96(2) provides as:**

“ Before exercising the power to sell the charged land, the charge shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty five days have elapsed from the date of the service of the notice to sell.”

They maintain that redemption notice of 45 days was only served upon the 1st and 2nd applicants.

11. It is also argued that there was no spousal consent and if at all it was there, then it was obtained by fraud as the national identification card number did not belong to the wife and the signature was not hers. The court is urged to be guided by the decision in **Mugo Muiru Investment Limited v. EWB and SB [2017] eKLR** which held that the wife had an equitable interest in the property and the husband held the title in trust for both, thus equitable interest combined with the actual possession and control of the matrimonial home gave rise in common law of an overriding interest superior to that of an adverse possessor.

12. Further that the 1st defendant/respondent owed a duty of care to the 1st plaintiff to offer sound financial advice and full material disclosure on the facilities advanced.

13. It was also argued further they had demonstrated their right on the properties had been infringed on and had satisfied the principles set in **Giella v. Cassman Brown & Co. Ltd & Anor [1973] E.A 358**, and that on a balance of convenience as between the parties the same tilts on the plaintiffs. It is their contention that they would suffer irreparable loss since the 1st plaintiff/ applicant has lost a lot of business and the 2nd and 3rd plaintiffs ought not to lose their matrimonial properties due to a bad facility offered by the 1st defendant.

Interested party's submissions

14. Counsel for the interested party submitted that the 1st defendant does not hold a valid charge over the suit property Eldoret Municipal/Block 4/335 due to lack of her consent. She seeks to rely on **Article 68(3) (iii) of the Constitution of Kenya**, which she says protects the matrimonial home and **section 28 of the Land Registration Act 2012** which has made spousal consent over the matrimonial property an overriding interest. Further that **section 12(1) of the Matrimonial Act no.49 of 2013** provides that no estate or interest in any matrimonial property shall be alienated in any form by way of sale, gift, lease, mortgage or otherwise during the subsistence of a monogamous marriage without the consent of the both parties. The interested party contends that she has established that the property in question was a matrimonial property refers to the holding in **Eunice Njeri Kariuki v. James Mwangi Mwirika & Anor, Murang'a ELC Case no. 294 of 2017**.

15. She insists that there was no spousal consent, and the spousal consent and the execution form relied by the defendants are not genuine saying her national identification number is **23219386** yet the one in the form is **22367684**. It is argued that if the defendants had exercised due diligence then the property could not have been charged.

16. The court was urged to rely on **Giella v. Cassman Brown** to establish whether to grant or deny the orders being sought. The party had established a prima facie case since they have shown no consent was issued by her. In **David Ngungi Ngaari v. KCB [2015] eKLR** the court elaborated the spousal consent and notice it noted that where there is consent statutory power of sale can go on but in the contrary it cannot. The court was referred to Civil Appeal no. 148 of 1995, **Nyangilo & Anor v. Fanuel B. Ochieng & Ors**.

17. The interested party is likely to suffer irreparable loss that cannot be compensated in damages. The childrens' school fees and upkeep of the family was derived from the rental income. Finally the balance of convenience tilts on the interested party since there was no valid spousal consent and a valid charge, hence there is need to preserve the property. The 1st defendant shall not suffer any loss, in the event it is found there was consent then they can be at liberty to dispose of the property.

18. It was the submission the of 1st and 2nd respondents that the plaintiffs'/applicants' were served with the statutory notices on the **7.3.2017 as provided under section 96(2) of the Land Act and the Auctioneers Act**. The valuation of the properties was conducted by **Landmark Realtors** to establish the true market price before advertisement of the same.

19. That infact, the interested party consented to the parcel of land being charged and she had appeared before an advocate who identified her. The interested party's allegation that the children and her shall suffer is unfounded since she has consented to the property being charged citing the case of **WYCLIFFE MUTALI OKWARO V. KWFT & ANOR ELC NO. 98 OF 2017** where the court held that where matrimonial property is charged or tendered as security for a loan, it becomes a commercial commodity that risks of being sold by the chargee.

20. It is also argued that the applicants have failed to show they will suffer irreparable damage that cannot be compensated by an award of damages. In **Bii v. K.C.B [2001] KLR 458** the court on an injunctive application held that once property is offered as security it by that fact becomes a commodity for sale. That infact there is no commodity for sale whose loss cannot be compensated in damages.

21. The court is urged to decide on a balance of convenience if it's in doubt with the first two. The sum owed by the 1st defendant/ respondent who is in the money lending business will stand to suffer most drawing from **ELC No. 22 of 017 Lawrence N. Wahome v. Kenya Industrial Estates & Anor** the principal debtor was found to owe the bank and he was not repaying thus the right to realize the charge instrument was found to have accrued. Finally thy urged the applications be dismissed since they had not met the threshold to grant injunctive orders.

22. The issues that arise for determination is whether the applications have merit and if the interested party's consent was obtained.

23. The interested party and the plaintiffs' had moved the court for injunctive orders against the defendants/ respondents. The issue in contention is parcels **No. Uasin-Gishu/Kimumu Settlement Scheme/4813** (registered in the name of 1st plaintiff), **Eldoret Municipality Block 4/335**(registered in the name of 2nd Plaintiff) and **LR No. 2259/463(I.R NO. 86846)** (registered in the 3rd plaintiff's name) which is situated in Nairobi City.

Whether Eldoret Municipality Block 4.335 was a matrimonial property and if so was spousal consent obtained.

24. It is not in dispute that these properties were charged in order to obtain the facilities as per the request of the applicants. The respondents annexed the charge document dated 22.7.2015 between **SAMMY KIPKETER CHERUIYOT as the chargor, PRAYOSHA VENTURES as the borrower and NIC BANK as the chargee. The charge was over property number Eldoret Municipality Block 4/335. The charge was for a principal amount of Ksh 80,000,000/-**. What is in contention is that the interested party was not aware as she had never at one point granted her consent for **Eldoret Municipality Block 4.335**. It is also not in dispute that this property is registered under the name of the 2nd plaintiff/ applicant. The interested party argues that the property was jointly bought by the 2nd plaintiff and herself but was registered under the 2nd applicant's name. In such circumstances how does the property become matrimonial property? Section 93 of the Registered Land Act states as follows;

“Subject to any law to the contrary, if a spouse obtains interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Act.”

The Matrimonial Property Act No. 49 of 2013 defines matrimonial property as follows;

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

The interested party averred that she contributed towards buying the land and in the construction of the building situate on the piece of land. The 2nd applicant was an athlete who stayed in the camp and she had to oversee the development.

25. The interested party in her application annexed her national identification number as **23219386** bearing the names **Beatrice Jeruto Kipketer**. On the other hand the respondents in the annexed charge of 22.7.2015 indicates a spousal consent and execution at page 18 of the said document. It is dated 22.7.2015 and the spouses name that appears on it reads: **Beatrice J. Kipketer of I.D no. 22367684**. The same is signed and an advocate verified the same. This is denied by the interested party who deposed that she has never attested to the charge of her property and she never appeared before any advocate. This position is supported by the 2nd applicant who says that he knows his wife's signature and identity number which was not the one used in the charge instrument. He further said that he was never informed that a spousal consent was required in order for him to charge the property. Though the advocate Kiplagat W. Kalya swore and affidavit deposing that the interested party appeared before him and he identified her through the identification number. These are issues which the interested party has strongly opposed.

26. As indicated above, there are two identification numbers for the same person though the interested party still maintains even the names are not hers. However the initial J. under common knowledge would imply that it stood for Jeruto her middle name. Thus the argument that it isn't her fails. The only contention is the identity number.

27. In the charge property the 2nd applicant does not dispute that he did appear before the advocate to attest, he only says that his wife did not appear before the advocate. Then giving an implication that the 2nd applicant could have found someone else to stand in as the wife, no wonder the identity card number is different, and this can only be verified by the office of registrar of persons. In my view, that duty falls on the applicant and the interested party

28. This court borrows the sentiments of the court in **Jimmy Wafula Simiyu v. Fidelity Bank Ltd** [2014] eKLR where it was held that , “ *the fact that the mortgaged property is a matrimonial property will only become relevant if the applicant is alleging lack of consent of the spouse in the creation of the mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the mortgaged property is a matrimonial home.*”

29. In addition to the above the other properties that were charged, however the applicants aver that due process was not followed. This court is in agreement with the argument advanced by the respondents that once a property has been offered as security it becomes a commodity for sale. Section 96(2) of the Land Act provides that the chargor shall be served by the charge a notice to sell in the prescribed form, and no sale shall take effect not until lapse of 45 days. In the absence of this then the statutory power of sale cannot be exercised even if the statutory notice, the notification of sale and the redemption notice have been issued.

30. The respondents annexed three copies of statutory notice under **section 90(1),(2),(3) (e) of the Land Act**. The same was issued to **Sammy Kipketer Cheruiyot, Stephen Kipkiyeny Tarus and Prayosha Ventures Limited**. The same notices were served by registered post and they are dated 7.3.2017. The notice to the 2nd applicant is not copied to the interested party but is copied to the other persons who had given spousal consent. The addresses are the same that appear in the charged property. The applicants however dispute ever receiving the same notices. There are receipts attached to the statutory notices as evidence of dispatch of the said notices by the respondents through their advocate. The postage of the notices was done on 16.3.2017. The notices are done on 7.3.2017 but the dispatch is after a week or so. The notice to the applicants informing them of the right of sale by the respondents by the auctioneers was done in 30th September 2017. That is over five months from the service of the statutory notice.

31. The notices were issued pursuant to section 90 of the Land Act and therefore the statutory notice was properly issued as was held in **David Ngugi Ngaari v. K.C.B Ltd** (supra). The applicants in their application have not demonstrated a prima facie case.

32. The next issue is whether irreparable damage may be occasioned to the applicants that cannot be compensated by way of damages. The respondents carried out valuation an issue disputed by the applicants. That the market price is much higher than the price the respondents are

selling off the properties. The 1st respondent is in business of money lending, and the monies being owed is quite huge, they urged that the only way to recover is by way of sale of the charged properties. The debt stands at Ksh 470,105,380.86/=. The company, 1st applicant and the borrowers (2nd and 3rd applicants) had guaranteed that they would repay the monies owed. The 2nd and 3rd applicants voluntarily offer to secure their properties as collateral for the advance of the money. They became aware of the risk they were subjecting themselves to.

33. The object of the interim injunction is to prevent a litigant who must necessarily suffer the law's delay from losing from that delay the fruit of his litigation as was described by Lord Wilberforce in the House of Lords case of **Hoffman Laroche & Co. Industry v. Secretary of State for Trade and Industry**[1975] AC 295 at 355(H.L). In this instant case the interested party states that she stands to suffer since her livelihood depends on the income from the property. She has not given evidence on the extent of damage apart from stating only.

34. Indeed this court is in agreement that the applicants have not demonstrated any effort they have made in repayment of the money advanced to them. I can do no better than to echo the findings in **Wycliffe Mutali v. Kenya Women Micro-finance Bank (supra)** where the court strongly affirmed the position that a property once it has been charged even if it is a matrimonial property risks being sold if a party is in default of any payment. The argument advanced by the respondents that the interested party dully executed the spousal form and thus she cannot run away from her own consent holds water. Prima facie, the interested party has not presented any evidence that she is the purported spouse, but even if that was to be defeated,` the balance of probability that she in fact did give consent tilts heavily in favour of the respondents. The application lacks merit and is dismissed with costs to the respondents

DELIVERED, SIGNED AND DATED THIS 15TH DAY OF MARCH 2019 AT ELDORET

H. A. OMONDI

JUDGE