



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL CASE NO. 7 OF 2019**

**PETER NUGI NGANGA.....APPLICANT**

**VERSES**

**NATIONAL INDUSTRIAL CREDIT (NIC) BANK LTD....1<sup>ST</sup> RESPONDENT**

**JOSPHAT KARIUKI MWAURA.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, UASIN GISHU.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, KAKAMEGA.....4<sup>TH</sup> RESPONDENT**

**MIRIAM OKADA.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The notice of motion dated 21<sup>st</sup> January, 2019 by the Applicant prays essentially for interim orders of injunction to restrain the 1<sup>st</sup> Respondent in its exercise of the statutory power of sale from selling land parcel numbers **MOISBRIDGE /MOISBRIDGE/BLOCK 9(NZOIA SISAL)/8** and **NZOIA/ MOISBRIDGE /BLOCK 1 /3769** registered in the name of the Applicant pending the hearing and determination of the main suit.
2. The application is supported by the sworn affidavit of the Applicant dated the even date together with the annexures attached. In the said application the applicant avers that the second Respondent has been a long-time friend and he knew his father very well. He also stated that he was a widower and a sickly old man.
3. The Applicant is equally the owner of the two properties mentioned above. According to him the same were fraudulently charged to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent and it was alleged that he guaranteed the said charge. The Applicant has attached the copies of the titles to that effect.
4. The 2<sup>nd</sup> Respondent did not pay the loan which necessitated the bank to exercise its power of sale and thus proceeded to do so. The bank through the sworn affidavit of Stephen Atenya sworn on 29<sup>th</sup> January, 2019 has exhibited the charge instruments which shows the amount granted to the 2<sup>nd</sup> Respondent as well as the guarantee documents by the Applicant.
5. The bank has equally exhibited the copies of the charged titles which are in the Applicant's names.
6. The 2<sup>nd</sup> Respondent vide his replying affidavit dated 14<sup>th</sup> February, 2019 has explained how he entered into understanding with the applicant in which part of the loan was to be given to the applicant to boost his business. He acknowledges that the loan fell into arrears and he agreed with the applicant on the way forward through an agreement with some elders. As per the agreement before the elders the Applicant agreed to pay a sum of kshs. 600,000. He said that he was willing to pay the balance of the loan as long as the applicant pays the sum stated above.
7. The 5<sup>th</sup> Respondent swore an affidavit in reply dated 14<sup>th</sup> February, 2019 which mirrors that of the 2<sup>nd</sup> Respondent. She said that she was the wife to the Applicant and contrary to the allegation that she did not grant spousal consent, the same was untrue as she went to the banks lawyers where she signed as well as the Applicant. She further attached some sets of photographs which show her with the Applicant as well as a birth certificate of their child.
8. The bank has also filed another replying affidavit by one Dennis. O. Onyinkwa Advcote which explains the steps he took when the parties appeared before him to execute the instruments. He stated that contrary to his averments the Applicant as well as the 5<sup>th</sup> Respondent did

appear before him and that he could not execute the documents in their absence. He said that he carried out due diligence and ensured that the titles were perfect and met the legal threshold.

9. The replying affidavit dated 13<sup>th</sup> March, 2019 by the Applicant pours cold water on the averments by the Respondents and states that he was married under the tenets of African Christian and Marriage Act and he would not have engaged himself in another marriage as his marriage to his late wife was monogamous. He would have been accused of bigamy at any rate.

10. He denied that the postal address used in the charged documents was his as well as the details of the registration numbers in his identity card. He said that as a matter of fact he was still in custody of the original titles of the suit land and he wondered how the Respondents managed to have the same registered. He also argued that in the absence of the land control board consents the charge was illegal. He prayed that the application be allowed as he would suffer irreparable loss should the same not be granted.

11. When the matter came up for inter parties hearing the court ordered that it be disposed of by way of written submissions which the parties have complied.

### **ANALYSIS AND DETERMINATION**

12. At this level there are three grounds that the court ought to consider as to whether to grant the prayers in the application. The same were clearly enunciated in the case of **GIELLA .VRS. CASSMAN BROWN & CO. LTD( 1973 )E.A. 38 AT PG 360**, namely:

*a. the applicant must present a prima facie case with a high likelihood of success*

*b . The applicant must show that he will suffer irreparable harm and loss that cannot be compensated by damages.*

*c. if in doubt, the court should consider the balance of convenience.*

13. Having read the pleadings on record and the lengthy rival submissions on record , which I shall not reproduce here so as to save on time, is the Applicant's application meritorious?. On the face of it, it appears that the conveyancing procedure went on very well taking into account the evidence of Mr. Dennis Onyinkwa, the counsel who executed the same. The 5<sup>th</sup> Respondent stated that she was the wife of the Applicant and they have one child between them.

14. Looking critically at the evidence on record I find that the same ought to be heard orally. The question of whether the Applicant went to the law firm of Onyinkwa and Company cannot be determined by affidavits alone. More importantly I have perused the letter from **one DR PHILEMON CHOGE** of Moi Teaching and Referral Hospital dated 16<sup>th</sup> January 2019 which gives chronology of the Applicant's age.

15. The said letter shows that the Applicant had memory challenge among others and in my view this is very critical taking into account his age. Furthermore the same ought to be challenged through oral evidence and there may be need to consider a second opinion. It is noted too that the period which is covered by the letter is within the time frame the loan was taken.

16. There is also the question of the relationship between the 5<sup>th</sup> Respondent and the Applicant. The latter stated that his marriage with his late wife was monogamous and that he could not undergo a second marriage with her. This is a weighty issue which further oral evidence must be pursued. Obviously if there was such marriage witnesses may be called during trial. If there was, then clearly the issues surrounding spousal consent would be resolved.

17. The other issues of valuation or under valuation are not very material for now but may be brought to fore at a later stage. I also note that there is the question of the Land Control Board consent which is a weighty issue legally. Although the applicant raised it there was no evidence that it was procured.

18. For now I find that based on the reasons stated above there is a prima facie case established by the Applicant. The balance of convenience tilts in his favour. The securities need to be secured. In other words this court orders that an interim injunction be issued against the 1<sup>st</sup> Respondent from selling by way of public auction or any other way the Applicant's parcels of land stated above.

19. The 2<sup>nd</sup> Respondent vide his replying affidavit sworn on 14<sup>th</sup> February, 2019 states in paragraph 29 as follows;

***“That let the plaintiff pay the kshs. 600,000 to the bank since I am ready and willing to pay the bank all the remaining balance as per our mutual trust and commitment with the plaintiff”***

20. In view of the above admission on the part of the 2<sup>nd</sup> Respondent and without prejudice to the outcome of the suit there is nothing barring the 1<sup>st</sup> Respondent from recovering the admitted amount from him less what is denied.

21. There was also an argument on the part of the respondents that the Applicant could be compensated by way of damages. Whereas that would be an available option, the circumstances herein in my considered view militates against that line of argument for the simple reason that there is a probability that the applicant did not consent to the charging of the securities or acting as a guarantor.

22. In the premises the application dated 21<sup>st</sup> January, 2019 is hereby allowed in terms of prayer 2 thereof pending the hearing and determination of the main suit. The costs shall await the outcome of the main suit.

**Dated, signed and delivered at Kitale this 28<sup>th</sup> day of May, 2019.**

**H .K CHEMITEI**

**JUDGE**

**28/5/19**

**In the presence of:-**

**Khisa holding brief for Mumia for 1<sup>st</sup> Defendant**

**No appearance for the Applicant**

**Court Assistant – Kirong**

**Ruling read in open court.**