



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 18 OF 2019

CATHERINE MAKENA.....PLAINTIFF/APPLICANT

-VS-

KIBITI KIRERA.....1ST DEFENDANT/RESPONDENT

CAPITAL SACCO LIMITED.....2ND DEFENDANT/RESPONDENT

I.G RINGERA T/A VIEWLINE AUCTIONEERS.....3RD DEFENDANT/RESPONDENT

RULING

[1] This matter emanates from the Notice of Motion dated 15th July 2019 which is brought pursuant to **Section 1A, 1B and 3A of the Civil Procedure Act, Section 93 of the Land Registration Act, Section 12 of the Matrimonial Property Act 49 of 2013, Rules 15, 16 and 17 of the Auctioneers Rules, Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of the Law.** The applicant seeks among other orders an inhibition on Land Parcel No. Timau/Settlement Scheme/ 430 as well as an injunction against the 2nd and 3rd defendants or their agents restraining them from entering or in any way interfering with the plaintiff's family's occupation or selling by public auction of the Suit Land pending the hearing and determination of the suit.

[2] The application is supported by grounds stated on the face of the Notice of Motion and the supporting affidavit of Catherine Makena sworn on 15th July 2019. It is contended that spousal consent was not obtained from the applicant who is the wife of the 1st respondent when he obtained a loan using the Suit Land which is their matrimonial home. The 2nd and 3rd respondents have threatened to sell it by way of a public auction on 1st August 2019 in spite the 2nd respondent having not obtained her consent before charging the said property.

[3] The 1st respondent through his replying affidavit sworn on 29th July 2019 supported the applicant's application. He stated that he serviced the first loan from the 2nd respondent and then obtained another loan worth Kshs. 3.5 Million which he never requested for spousal consent from the applicant. That the dispute between himself and the 2nd defendant is being handled by the Co-operative Tribunal in Tribunal Case No. 513 of 2018.

[4] However, this application was opposed by the 2nd respondent through the replying affidavit of Eliezer Kaburu, Chief Executive Officer of the 2nd respondent, sworn on 29th July 2019. He deponed that on or about 18th August 2014 the 1st respondent was given a loan by the 2nd respondent for Kshs. 2.5 Million. He provided the Suit Land as security and one Mary Terry Mwenda Mburugu executed the spousal consent. That it is reasonable to conclude that the applicant was not married to the 1st respondent in 2014 as she stated that they have been married for three years. Therefore, when charge was placed over the Suit Land her spousal consent could not have been sought. Hence, the applicant has no *locus standi*.

[5] This matter was canvassed by way of submissions. Parties submitted by reiterating what they had stated of which this court has taken due regard of.

[6] The issues of determination are:

a) Whether conditions for issuance of an injunction have been met

b) Whether to place an inhibition on the Suit Land pending the hearing and determination of the suit

Injunction

[7] Courts should examine the circumstances of the case in deciding whether or not to grant an injunction while also seeking answers the

long-established principles set out in the case of Giella v Cassman Brown [1973] EA 358 that:

(i) Has the applicant established a prima facie case with a high chance of success?

(ii) Will the applicant suffer irreparable damage unless an injunction is issued?

(iii) Where does the balance of convenience lie (if court is in doubt)?

[8] The applicant and 1st respondent got married in 2016. According to the 1st respondent statement dated 30th October 2018 is that he obtained a second loan worth Kshs. 3.5 Million in December 2016 after he had serviced the first loan which he had obtained in 2014. He fell ill for quite some time and was unable to keep up with the payments. He stated that when he was getting the second loan he did not obtain the spousal consent of the applicant. Alternatively, the 2nd defendant affirmed that the applicant has no locus standi for the loan was given in 2014 while she got married in 2016 of which the consent could not have been sought retrospectively.

[9] The 2nd respondent has submitted that the charge was registered on 26th August 2014 at which time the applicant was not married to the 1st respondent. The 1st respondent alleged that he took out a subsequent loan in 2016 of which he did not seek the spousal consent of the applicant whom he married in 2016. It is trite law that whoever alleges must prove. The 1st respondent and applicant allege that there was a second loan but they have not provided any evidence to support that claim. A court of law does not act on speculations or assumptions; it acts on evidence. In the absence of evidence, the claim must fail. That being the case, it is clear that the applicant cannot stake spousal consent against the charge herein for she was not married to the 1st Respondent at the time of the charge. In any case, on evidence availed, spousal consent of the spouse of the 1st Respondent at the time was obtained for purposes of creating the charge herein. Accordingly, the conditions for issuance of an injunction have not been met.

Inhibition

[10] Concerning the inhibition order, under **Section 68 (1) of the Land Registration Act:**

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

[11] The threshold for granting an order of inhibition was stated in the case of Japhet Kaimenyi M’ndatho v M’ndatho M’mbwiria [2012] eKLR where it stated as follows:

“In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-

a) That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.

b) That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.

c) That the applicant has arguable case.”

[12] From the foregoing, the applicant has failed to meet the conditions required as she has no arguable case for her consent would not have been sought or obtained when the loan was being given in 2014 as she was not married to the 1st respondent. Certainly, the charge or sale of the security given cannot be defeated by the claim by the applicant. The 1st respondent may have thought that he will evade his responsibility. But as this case demands, I will give orders in the interest of justice.

[13] Accordingly, I find the application is unmeritorious and purely in the interest of justice make the following orders:

a) The sale of Land Parcel No. Timau/Settlement Scheme/430 by the 2nd and 3rd respondents is suspended for only a period of 60 days.

b) The 2nd respondent to pay the auctioneer charges.

c) Costs be in the suit.

Dated, signed and delivered this 31st day of July 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Ojiambo for plaintiff

Mwirigi for 2nd defendant

Otieno C. for 1st defendant – absent

No appearance for 3rd defendant

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F. GIKONYO

JUDGE