REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 38 OF 2018

KIBIRECH ARAP CHEMIRON.....1ST APPLICANT

NICHOLAS KIPCHIRCHIR CHEMIRON.....2ND APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. The applicants **KIBIRECH ARAP CHEMIRON** (1st applicant) and **NICHOLAS KIPCHIRCHIR CHEMIRON (2nd applicant) filed the Notice of Motion dated 23rd November 2015, seeking for orders that:**

> a) **CO-OPERATIVE BANK OF KENYA LIMITED** (the respondent) by itself, its servants and agents be restrained from attaching, selling, alienating, leasing, taking possession, appointing a receiver or in any way dealing or interfering with the applicant's properties being land parcel numbers **Nandi/Kaboi/631, Kapsabet Municipality/353** and **Kaisagat/Chepkoilel Block 2/ Kipsogon/81** pending the hearing and determination of this application.
>
> b) Status quo be maintained pending the hearing and determination of the main suit.

2. The application is based on grounds that the plaintiffs/applicants filed this suit on 1st December, 2015 as well as an application of even date, where the court issued interim orders restraining the respondents from interfering with the suit land and maintenance of status quo. That, the order regarding maintenance of status quo issued on 14th July 2016 was intended to fast track the matter rather than have it weighed down with numerous applications. That order was made by consent of both parties, and has never been set aside.

3. However, on 3rd October, 2019 the respondent in blatant disregard of the court orders in place has now instructed **Kolato Auctioneers** to sell one of the properties which is a subject matter of this suit being **Nandi/Kaboi/631,** and in that regard a Redemption notice dated 23rd July 2019 has already been issued to the applicants. The auctioneers have also issued a Notification of Sale setting 3rd October 2019 as the date of sale. It is pointed out that the respondent had filed an application seeking to discharge the consent order, but that application was later withdrawn before it was heard-which would then mean that the order for maintenance of status quo remains intact. An attempt to prevail upon the respondent to rescind the instructions to the auctioneers achieved nought, this recovery process is termed as illegal and that it will lead to injustice that would not be adequately remedied since the sale will ultimately cause feuds within the applicants' family.

4. That the properties subject to the suit are prime properties carrying both economic and sentimental value to their families hence any loss will occasion an irreparable harm.

5. The application was opposed through a replying affidavit sworn by **ELISSA OTEMBA** (the respondent's legal manager) on the grounds that the Status Quo Order issued on 14th July 2016 informing the plaintiff's application was discharged by the Environment and Land Court **(ELC)** on 23rd March, 2018 following an application filed by the defendant. A copy of the application, and the order are annexed. The respondent laments that despite filling the suit under certificate of urgency in 2015, the applicants delayed in setting down the matter for hearing forcing the defendant to move the court to discharge the orders.

6. That contrary to the applicants' assertion, the respondent's application for discharge was not withdrawn but was allowed there being no opposition by the plaintiffs.

7. In their written submissions, the applicants contend that they have demonstrated a prima facie case to warrant the orders sought as their rights have been infringed. They elaborate the failure by the respondent to observe the mandatory legal and contractual requirements before

commencing the recovery process.

8. Among the arguments advanced is that after the ELC had made orders for maintenance of status quo so as to fast track the main suit, the matter never proceeded because the Court of Appel rendered its decision in **Co-operative Bank of Kenya v Patrick Kangethe Njuguna & 5 0thers [2017] eKLR,** on 12th October 2017 whose effect was to divest the ELC from dealing with the instant matter. That is how the matter commenced before the High Court, so the applicants ate surprised that the respondent went back to the **ELC** and obtained ***exparte*** discharge orders.

9. It is pointed out that the parties herein were aware of the above-mentioned decision and more so for the reason that the Defendant/Respondent herein was a party in the Appeal before the Court of Appeal. The parties brought the matter to the attention of the court and the motion to transfer the matter to the High Court was commenced. That in a surprising move, the respondent filed an Application dated 7th November, 2017 seeking to set aside the order for status quo before the **ELC** on 15th November, 2017 fully aware of the fact that the court had no jurisdiction to entertain the said Application pursuant to the decision by the Court of Appeal.

10. That the **ELC** allowed the afore-mentioned Application on 23rd March, 2018 thereby discharging the order for status quo hence exposing the subject properties to the risk of sale. This latest order was granted exparte without according the Applicants a chance to be heard.

Furthermore, the Respondent did not take any step to notify the Applicants of the order, and they only learnt of it upon perusing the response to the instant application. The Applicants contend that all along they have been preparing for the hearing of the suit which was scheduled for 15th October, 2019.

11. The applicants justify the prayers sought in the application saying they are aimed at preventing the sale of the subject properties. That if the prayers sought are not granted, the properties on which they attach sentimental value, will be sold and thus divest the applicants off their proprietary rights. That their sale will impact on the applicant's social lives as the properties are said to be ancestral land passed on from their fore-fathers and there will be greater harm which cannot be adequately cushioned by damages if the orders are declined than if they are granted hence the balance of convenience tilts in favor of the plaintiff. In support of this limb of their submissions, the applicants rely on the case of **Simon Kipngetich Bett V Richard C. Kandie[2012]eKLR** which stated that if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit, as it is at the time of the application for injunction, then them is no irreparable harm, yet in the present scenario, if the sale takes place then the property risks further alienation into the hands of strangers

12. The applicants also point out that the two parcels are situated at a prime location, and once sold, they may not be able to get similar property of equivalent acreage within the same area. It is submitted that the balance of convenience in this scenario tilts in favour of the Applicants and their families since their lives would be adversely affected by any interference with the subject properties. Whereas the only conceivable harm to be suffered by the Respondent is merely a delay in recovery of the loan, which can be quantified easily and adequately remedied by way of interest and damages. That nothing catastrophic would occur to the respondent due to the delay in the repayment, as in any case the matter had already been set down for a hearing in a few days hence the delay will be minimal.

This court is urged to be guided by the approach adopted by Hoffman (J) in the celebrated case of **Films Rover Internationale [1986] EALL ER**, where he stated that:

> **''In granting injunctive orders, the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been wrong.''**

13. Further, that this matter falls under the doctrine of ***lis pendens*** and particularly that there is need to protect the substratum of the instant suit. The plaintiff will no longer have any remedy from the instant suit but will be required to file a separate suit leading to endless litigation.

14. The applicants poke holes at the argument by the Respondent on the initial order of status quo has been set aside is unmerited due to the fact that the jurisdiction of the Environment and Land Court to entertain the instant suit and any application in it ceased on **12/10/2017** when the Court of Appeal rendered its judgment in **Mombasa Civil Appeal No. 83 of 2016.**

15. The Respondents on their part state that an interlocutory injunction being an equitable remedy would be discharged upon being shown the persons conduct with respect to the matter, pertinent to the suit does not meet the approval of the court which granted the order which the subject matter and especially where a party upon getting the injunction order sits on the matter and uses the order to the prejudice of the opponent.

16. The respondent points out that injunction orders are intended to preserve the subject matter with a view of expeditious determination but not to oppress another party. That the applicants have delayed in setting the matter down for hearing and denied to repay the outstanding loan arrears owing to the respondent bank. Further, that by operation of the law the orders obtained by the plaintiff on the 14/7/2016 had since lapsed since its issuance resulting in the court discharging the said orders on the 23rd March, 2018. The application is faulted as being only aimed at vexing the Respondent by frustrating its recovery efforts even after the ELC had given a green light for the sale.

17. It is submitted that the applicants have failed to establish a prima facie case with probability of success, they have also failed to demonstrate that they will suffer irreparable harm that cannot be compensated in damages should the orders sought herein be denied. Further, that the applicants have not challenged the amount due but only dispute the discharge of the said Status Quo Orders of 14/7/2016. The respondent contends that its right to sell the property has thus crystallized and at worst, should the sale be found to be improper, the applicants can be compensated in damages. Lastly, that the balance of convenience tilts in favor of dismissing the application since the defendant is a registered chargee over the suit property and the facility has fallen into arrears and the plaintiff failed to remedy the default.

18. The respondent asserted that the Orders issued on 14th July, 2016 automatically lapsed after 12 months by effluxion of the law, as per the

provision of **Order 40 rule 6 which states that: -**

> ***"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."***

19. "Order 40 Rule 6 is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse.

20. The order made by the court on 14th July, 2016 remained subject to **Order 40 Rule 6** that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so.

21. The importance of Order 40 Rule 6 of the Civil Procedure Rules was echoed by the High Court (Gikonyo J) in ***David Wambua Ngii v Abed Silas Alembi & 6 others [2014] eKLR:***

> ***"It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure."***

22. This court expressed similar sentiments in ***Nguruman Limited v Jan Bonde Nielsen & 2 others 2014 eKLR :***