



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL CASE NO 13 OF 2019

ELIZABETH NAIRUKO MURUNTOI NKURUMWA.....PLAINTIFF/APPLICANT

VERSUS

RICHARD MANCHA SURURU.....1ST DEFENDANT/RESPONDENT

EQUITY BANK LTD.....2ND DEFENDANT/RESPONDENT

KEYSIAN AUCTIONERS.....3RD DEFENDANT/RESPONDENT

RULING

The case for the applicant

1. Pursuant to the provisions of Order 40 Rules 1, 2, 3 and 9 and Order 51 rule 1 of the Civil Procedure Rules, 2010, sections 3A and 63 (e) of the Civil Act, (Cap 21) Laws of Kenya and all other enabling provisions of the law, the applicant applied under certificate of urgency for the following orders.

1. *spent*

2. pending the hearing and determination of this application *inter partes*, the court be pleased to issue an injunction restraining the defendants whether by themselves, their agents and/or servants from offering for sale, advertising, selling or transferring all that parcel of land reference NO. LR NO Cis-Mara/Entain/579

3. pending the hearing and determination of this suit, the court be pleased to issue an injunction restraining the defendants whether by themselves, their agents and/or servants from offering for sale, advertising, selling or transferring all the parcel of land reference no Cis-Mara/Entian/ 579

4. an order to make provision for costs of the case

2. The application is supported by five grounds that are set out on the face of the notice of motion. The plaintiff is the wife of the Murunto Kirampa (the chargor) who at all material times was the registered owner of land reference No. Cis-Mara/Entain/579, hereinafter referred to as the suit property. Muruntoi Kirampa charged the suit property to the 2nd defendant, hereinafter referred to as the bank as security for a loan that was to be advanced to the 1st defendant, with Muruntoi Kirampa acting as a guarantor. The 2nd and 3rd defendants have advertised the suit property for sale by public auction on the 19th December 2017 despite the fact that the applicant did not consent to the creation of the charge over the suit property, which is a matrimonial home. Neither the applicant nor her husband were notified by the 2nd defendant that the 1st defendant had been in default and none of them were served with a redemption notice. The creation of the charge over the suit property and the subsequent intention to sell is null and void for not complying with the mandatory provisions of 28 of the Land Registration Act, 2012, which makes it mandatory for spousal consent to be obtained before a charge can be created in respect of the suit property.

3. Furthermore, the applicant has deposed to a 12 paragraphs supporting affidavit in support of the application. The major averments are as follows. The applicant is married under Maasai customary law since 10th March 1995 to Muruntoi Kirampa, who is the owner of the suit property. In 2014 a charge was created over the suit property in favour of the bank as security for a loan advanced to the 1st defendant, wherein the husband of the applicant was the guarantor. The applicant was not informed about the charge and her spousal consent was not obtained. She was surprised to learn that the suit property had been advertised for sale by public auction on 19th December 2017, through a notice of sale that was served upon her husband, that is when she learned that a charge had been created over the suit property.

4. In addition to the foregoing, the applicant has averred that following advice from her advocate, which she believed, the Land Registration Act 2012 and the Land Act No 6 of 2012 mandatorily required that a charge could only be created against such property with spousal

consent. That the intended sale is illegal. And finally that even if the statutory power of sale accrued to the bank, it would have been mandatory for both the chargor and the 1st defendant to be served with the mandatory three months' notice as required by law; before exercising the power of sale, which was never done.

5. The applicant deposed to a 24 paragraphs supplementary affidavit in response to the replying affidavit of the respondent. She has deposed to the following major matters. The loan in favour of the bank was shillings seven hundred and fifty thousand ((shs 750,000/=). She has further deposed that that she was not a party to Narok ELC NO. 187 of 2017 (formerly Nakuru ELC NO. 382 OF 2016, Muruntoi Kirampa vs Equity Bank, Richard Mancha Sururu and Keysian Auctioneers). That the aforementioned suit is in relation to a loan of Kenya shillings four hundred thousand (shs 400,000/=).

The submissions of the applicant.

6. Mr. G.O. Otieno, counsel for the applicant, has submitted that the principle of *res judicata* does not apply in the instant application, by virtue of section 7 of Civil Procedure Act. According to counsel, for *res judicata* to apply the same parties must have been involved during litigation and the suit must be under the same title and/or subject matter. Counsel has submitted that the plaintiff is a new litigant, who came to realize that her spousal rights over the matrimonial property under section 28 of the Land Registration Act 2012, were violated. Counsel submitted that this court has jurisdiction to entertain and determine this application. See ***Owners of the Motor Vessel "Lillian S"v. Caltex Oil (Kenya) Ltd [1989] KLR 1.***

7. Furthermore, counsel cited section 12 (5) of the Matrimonial Property Act, which reads: "*The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.*"

8. Finally, counsel cited *Giella v Cassman Brown (1973) EA 358*, among other authorities, which sets out the principles upon which a court may grant a temporary injunction. Those principles are well known and I do not need to set them out in the instant application.

9. He has therefore urged the court to grant the prayers sought.

The case for the 2nd defendant/respondent.

10. The 2nd respondent through its credit manager (Joseph Muhia) has deposed to a 21 paragraphs affidavit in opposition to the application. He has averred to the following major matters. He also has averred that he is versed with the facts of this case and that he is duly enabled to swear this replying affidavit. He has averred that he is aware and based on the advice of counsel for the 2nd respondent, which he believes that this application is an abuse of the court process as the plaintiff is substantially through the chargor her husband one Muruntoi Kirampa litigating and a party to Narok ELC NO 187 of 2017 (formerly Nakuru ELC NO 382 of 2016, Muruntoi Kirampa vs Equity Bank, Richard Mancha Sururu and Keysian Auctioneers, which case touches the same suit property in this case and is pending for hearing and determination.

11. Based on advice of its counsel, the deponent believes that on 20th September 2016, when Narok ELC NO 187 OF 2017 (formerly Nakuru ELC NO 382 of 2016 Muruntoi Kirampa vs Equity Bank, Richard Mancha Sururu and Keysian Auctioneers came up *ex parte* before Munyao, J. he issued interim orders of stay on condition that the applicant deposits a sum of shs 250,000/=. That court (Munyao, J) on 14th November 2016 vacated its orders of stay and ordered the 2nd defendant to be at liberty to advertise and sell the suit property. Furthermore, based on advice of its counsel the deponent believes that Mohamed Kullow, J. on 25th July 2017 dismissed the injunctive application in Narok ELC NO. 187 of 2017 (formerly Nakuru ELC NO 382 of 2016 Muruntoi Kirampa vs. Equity Bank, Richard Mancha Sururu and Keysian Auctioneers. He therefore believes that the application is *res judicata* since it was between the same parties and the subject matter was the same. He also believes that the application has been made without factual basis and is an improper use of limited judicial resources. Again based on the advice of its counsel, the deponent believes that the 2nd defendant's statutory power of sale had accrued and was justified under clause 9 of the charge instrument. This did not clog the equity of redemption as claimed under paragraph 10 of the supporting affidavit. Finally, the deponent has averred that the applicant has come to court with unclean hands, is guilty of non-disclosure and distortion of material facts and therefore does not deserve to be granted the injunctive orders.

THE SUBMISSIONS OF THE 2ND RESPONDENT

12. Counsel for the 2nd respondent has submitted that the applicant's case is very weak and her application does not meet the threshold that is set out in *Giella v Cassman Brown, supra*, and therefore her application should be dismissed. Counsel cited other authorities, which I have perused, which reiterate the principles set out in *Giella v Cassman Brown, supra*. Counsel has therefore urged the court to dismiss the application.

ISSUES FOR DETERMINATION

13. I have considered the affidavit evidence of the parties, the submissions of their counsel in the light of the applicable law. As a result, I find the following to be the issues for determination.

1. Whether or not this application is *res judicata* by virtue of the orders of the court (Munyao, J) in Nakuru and the Narok court (Mohamed Kullow, J).
2. Whether or not the applicant has made out a case for the grant of an order of an interim injunction.
3. Who bears the costs of this application?

ISSUE 1

14. This application was transferred to the High Court from the ELC Court in Narok by Mohamed Kullow, J on 23rd July 2019 on the ground that the ELC Court lacked jurisdiction to entertain and determine it. The determinations and orders made by Munyao, J on 14th November 2016 by which he vacated his orders of stay and ordered the 2nd defendant to be at liberty to advertise and sell the suit property, were orders made without jurisdiction and they are therefore null and void. It therefore follows that the principle of *res judicata* is inapplicable in the instant application. And the same is true of the determinations and orders made by Mohamed Kullow, J, since the orders made by both courts were made by them as ELC Courts.

15. The principle of *res judicata* is therefore inapplicable in this instant application.

ISSUE 2

16. I find that the predominant claim in respect of the charge being challenged is on account that the charge was created without the spousal consent of the applicant. There is credible evidence that the applicant is the wife of Murunto Kirampa (the chargor), who at all material times was the registered owner of land reference No. Cis-Mara/Entain/579, which is the suit property. Sections 28 of the Land Registration Act, 2012 reads: ***“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register-(a) spousal rights over matrimonial property.”*** There is evidence that the suit property is matrimonial property.

17. Furthermore, there is evidence that spousal consent had not been obtained before the creation of the charge.

18. The submissions of the respondent that the application is an abuse of the court process, that the applicant has come to court with unclean hands and is guilty of non-disclosure of material facts are matters that cannot be finally decided in the instant interlocutory stage.

19. In the premises, I find that the application succeeds and I hereby grant the orders sought in terms of prayers No 2 and 3 of the notice of motion.

20. Issue 3

21. Costs of this application will be costs in cause.

Ruling signed, dated and delivered in open court in Narok this day of 19th day of December 2019 in the absence of both counsel and in the presence of the court assistant Mr. Kasaso.

J. M. Bwonwong’a

Judge

19/12/2019