



REPUBLIC OF KENYA



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Mungai v Ngunya & 3 others (Environment & Land Miscellaneous Case E219 of 2021) [2023] KEELC 20842 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20842 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E219 OF 2021
OA ANGOTE, J
OCTOBER 19, 2023

BETWEEN

ANITA WAMBUI MUNGAI PLAINTIFF

AND

SAMUEL MAINA NGUNYA 1ST DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

NCBA BANK KENYA PLC 3RD DEFENDANT

LAND REGISTRAR 4TH DEFENDANT

RULING

1. Before the court for determination is the plaintiff's notice of motion dated November 18, 2021 seeking for the following orders:
 - a. Pending the inter partes hearing and determination of suit, there be an order of temporary 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 exercising power of sale and/or completing or conducting any sale, transferring and/or otherwise adversely dealing with LR. No. Nairobi/Block 93/527 (hereinafter the suit property) in any manner whatsoever.
 - b. The court be pleased to grant a mandatory injunction to preserve the status quo that existed before the fraudulent and unlawful acts of the defendants pending the hearing and determination of the suit herein.
 - c. The costs of this application be provided for.



- d. The court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.
2. The application is based on several grounds and supported by an affidavit sworn by the plaintiff. The plaintiff stated that she got married to the 1st defendant on December 10, 2005 and that around October 31, 2013, they purchased the suit property with a three-bedroom house thereon, which is their matrimonial home until their divorce was finalized.
 3. It was deponed by the plaintiff that as the divorce proceedings were going on, she conducted a search at the lands registry on January 8, 2021 and discovered that the 1st defendant had taken a facility with the 3rd defendant who had registered a charge dated June 22, 2017 on the suit property and a further charge dated February 10, 2020.
 4. The plaintiff further stated that the charge and further charge was obtained without her consent; that the spousal consent appearing in the documents was a forgery of her signature and that she reported the matter to the Industrial Area Police Station.
 5. On October 9, 2021, it was deponed, the 2nd defendant showed up at the suit property and issued her with a 45 days redemption notice and a notification of sale of immovable property that indicated that the suit property was due for auction on December 14, 2021 and that when she visited the 3rd defendant's offices she was informed that there was nothing they could do to help her as the 1st defendant had failed to repay the facilities advanced to him hence the need for the redemption notice and the notification of sale.
 6. The plaintiff maintained that she never gave any spousal consent for the registration of the charge and further charge; that she procured the services of the firm of Ongweny Omwenga - Arasa & Company Advocates to register a caution over the suit property and that the same was registered on March 30, 2017.
 7. She consequently deponed that it would have been impossible for the 1st defendant to be a chargor and the 3rd defendant chargee of the suit property barely two months after the caution was registered and that the 1st defendant colluded with the 4th defendant to unlawfully remove the caution thus allowing the illegal and fraudulent registration of the charge and further charge.
 8. In conclusion, the plaintiff asked the court to issue an injunction restraining the auction or sale of the suit property as that would not only be furthering the illegal acts of the defendants, but it would also cause irreparable harm to her and her family as they would lose their home.
 9. The 2nd and 3rd defendants filed their Replying Affidavit on April 22, 2022 sworn by the Senior Legal Counsel for the 3rd defendant, who deponed that in June 2017, the 1st defendant made an application for a Kshs 6,000,000 loan facility to be secured by a charge over the suit property.
 10. It was deponed that the 3rd defendant agreed to advance the loan facility and a charge dated June 20, 2017 was registered over the suit property on June 22, 2017 and that sometime in 2017, the 1st defendant made an application for a further charge over the suit property which was registered on February 10, 2020 securing a maximum prescribed debt of Kshs. 9,300,000.
 11. The deponent averred that the 1st defendant defaulted in repaying the loan and was in arrears of Kshs. 808,849.97 as at February 10, 2021; that he was issued with a 30 day demand notice and that having failed to pay the demanded amount, the 1st defendant was issued with a statutory notice dated April 26, 2021 and a Notice issued under section 96 of the Land Act on August 2, 2021.



12. It was deponed that the 3rd defendant also had the suit property valued; that the Valuation Report placed the market value of the suit property at Kshs. 17,000,000 and the forced sale value at Kshs. 13,000,000 and that the 3rd defendant instructed the 2nd defendant to serve the plaintiff and the 1st defendant with a Notification of Sale and Redemption Notice as per the *Auctioneers Act*.
13. The deponent averred that the 3rd defendant followed all due process to create the charge and that the plaintiff's remedy lies with seeking damages from the 1st defendant and that the plaintiff and the 1st defendant are working together to frustrate the 3rd defendant's statutory power of sale because the plaintiff only disowned the spousal consent after the default by the 1st defendant.
14. It was deponed that the affidavit of spousal consent was executed in the presence of an advocate who confirmed seeing the plaintiff execute the same and that there was no caution when the charges were being registered and there is none at the moment.
15. Additionally, it was deponed, the suit property was registered in the name of the 1st defendant and the same was encumbered when the facilities were advanced to him; that the plaintiff had not proven any wrongdoing on the part of the defendants, or that the suit property was her matrimonial home and that there was no evidence to show that the 1st defendant had been charged for forgery.
16. In conclusion, the deponent stated that the 3rd defendant has met all the conditions precedent and antecedent for the statutory sale of the suit property and that the plaintiff has no legal basis to oppose it.
17. The 1st defendant deponed that he is the registered owner of the suit property and the owner of the house thereon and that he was repaying the loan without any contribution from the plaintiff who also refused to participate in its restructuring despite having given consent for the taking of the loan.
18. The 1st defendant deponed that he lost his job during the Covid-19 pandemic and applied for a plan to restructure the loan and that he was not granted a moratorium and defaulted on the loan after the plaintiff refused to go to the 3rd defendant's offices to consent to the application for a moratorium.
19. With reference to the issue of fraud and illegality, the 1st defendant stated that the same had not been proven by evidence and that the allegations that spousal consent was not given did not meet the standard of proof of fraud and illegality. With regard to their children being left destitute if the suit property was sold, the 1st defendant averred that that would not be the case because the children live with him and not the plaintiff.
20. In conclusion, the 1st defendant stated that the plaintiff has not met the conditions required for the grant of an injunction and that her application should consequently be dismissed. The 4th defendant did not file a replying affidavit. The parties filed submissions which I have considered.

Analysis and Determination

21. Based on the foregoing, the following one issue arises for determination: Whether an injunction should be issued.
22. The conditions for the grant of a temporary injunction were set out as follows in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 as follows:

“First, an plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the plaintiff might otherwise suffer irreparable injury, which would not adequately be compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

23. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 the Court of Appeal defined a prima facie case as follows:

“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the plaintiff’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

24. In the present case, the plaintiff has argued that she has a right to the suit property based on three grounds: Firstly, that it is her matrimonial home, secondly, that the spousal consent used in charging the suit property was a forgery, and thirdly, that the suit property could not have been rightfully charged because she had registered a caution against it.

25. On the other hand, the 1st defendant stated that he is the sole owner of the suit property having purchased it and repaid the loans all by himself and that the plaintiff had not proved that the suit property which was registered in his name was her matrimonial home. The defendants stated that all due process, including obtaining spousal consent, was followed in registering the charges.

26. Section 107(1) of the *Evidence Act* provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

27. The burden of proving that indeed she has apparent rights which should be protected at interlocutory stage discussed above lies with the plaintiff. The documents produced shows that there are two cautions, one relating to the suit property and another relating to Longonot/Kijabe Block 6/574 (Kiambu Nyakinyua).

28. While the latter was signed and registered on 21st February 2017, the one relating to the suit property is blank on the part where the date of registration and the signature of the registering authority are supposed to be. That being the case, it cannot be said that the caution was registered.

29. Both the plaintiff and defendants have in their bundles of documents copies of the charge including the spousal consent. The plaintiff has alleged that the same was fraudulently acquired because her signature was forged.

30. The Court of Appeal in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR stated as follows:

“As regards the standard of proof, this Court in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the defendant who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the defendant was making a serious charge of forgery or fraud, the standard of proof



required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)

The onus was therefore on the appellant who sought to rely on fraud on the part of the defendant and alleged forgery on his documents to prove to the court that she did not sign any of the documents relied upon by the defendant in support of his case....As the appellant was the one claiming that the documents were forgeries, the burden was on her to prove that the documents were not authentic government documents as claimed by the defendant. section 107 of the Evidence Act, provides as follows:-

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

31. In the current case, I am not satisfied that the plaintiff has discharged the burden of proving that her signature was forged. In addition to making the allegation of fraud, she has only submitted an O.B Report dated March 5, 2021. The report is only proof of the fact that she reported the alleged forgery/ fraud to the police. The same is not proof that her signature was forged.
32. The plaintiff also alleged that the suit property is her matrimonial home. This position is partly supported by the documents on record. As part of the charge documents is an affidavit sworn by the 1st defendant acknowledging that he was married to the plaintiff and that the suit property formed part of their matrimonial property.
33. There is therefore no dispute as to whether the suit property was matrimonial property at the time the charges were registered. However, having prima facie established in the foregoing section that the spousal consent was fully given and in the absence of proof to the contrary, it is my finding that it is immaterial that the suit property is matrimonial property.
34. According to the evidence on record, when the auctioneers notice was given, the plaintiff was residing on the suit property. However, the status of its ownership is not clear especially considering that the divorce between the plaintiff and the 1st defendant has been finalized. In view of that, I find that while the interest of the plaintiff as a spouse was proven, her interest as a former spouse (which is material to this application) has neither been proven nor disproven.
35. Having failed to prove, *prima facie*, that a caution was registered; that the spousal consent was forged; and that she has the interest of a former spouse in the suit property, I find that the plaintiff has not established a prima facie case with a probability of success and is therefore not entitled to the injunctive relief.
36. Indeed, having not shown that she lives in the suit property, the issue of suffering irreparable harm does not arise. In the circumstance, the application dated November 18, 2021 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

O. A. Angote

Judge



In the presence of;

Mr. Kibera for 2nd, and 3rd defendants

Mr. Andati for 1st defendants

No appearance for plaintiff

Court Assistant - Tracy

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