



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 81 OF 2016

LUCY GATHONI MUYA PLAINTIFF

VERSUS

PROGRESSIVE CREDIT LIMITED 1ST DEFENDANT

DAVID KAROBIA KIIRU 2ND DEFENDANT

RULING

1. The application before me dated 1st September 2016, seeks orders *inter alia* that:-

(i) Pending the interpartes hearing and determination of this application the defendant whether acting in person through their agents, servants, employees or any other party under the instructions of or at the behest of the defendants be restrained from selling, disposing off, transferring, alienating or in any other manner so to do interfering with land parcel number NJORO/NJORO BLOCK 2/1507 (NJOKERIO)

(ii) Pending the hearing and determination of this suit, the defendants whether acting in person through their agents, servant, employees or any other party acting under the instructions of or at the behest of the defendants be restrained from selling, disposing off, transferring, alienating or in any other way so to do interfering with land parcel number NJORO/NJORO BLOCK 2/1507 (NJOKERIO)

2. The applicant is the wife of the 2nd defendant. She has sued the 1st and 2nd defendants on account of a loan taken by the 2nd defendant from the 1st defendant which loan was secured by Title No. Njoro/Njoro Block 2/1507 (**Njokerio**) which she contends was matrimonial property in which she has spousal interest. She contends in the grounds of the application and deposes in her supporting affidavit sworn on 1st September 2016, that at the time the loan was granted to the 2nd defendant, and the instrument of charge executed, she had an overriding interest in the land as a person in actual occupation of the property and that the interest subsisted irrespective of whether it was noted on the register or not. She further deposed that the defendants did not disclose to her the loan contract and only learned about it when **Freeman Auctioneering Services** went to her matrimonial home on 29th July 2016 and served her with a notification of sale. That she then raised the issue with her husband (2nd defendant) who confessed that he had charged the title to their matrimonial home.

3. The plaintiff further deposed that the instrument of charge was null and void as she did not grant her spousal consent as envisaged by **Section 79(3) of the Land Act 2012**. Further that the instrument of charge was null and void as the 1st defendant purported to do lending business pursuant to **Section 2 of the Banking Act (Cap 488 Laws of Kenya)** without holding a licence from the Central Bank of Kenya. Finally, the plaintiff deposed that her rights as a person in actual occupation or spouse occupying the matrimonial home take precedence over any rights that may have been acquired by the defendant upon the registration of the charge.

4. The application is opposed by the 1st defendant. In his sworn affidavit dated 18th April 2017, Mbaabu Muchiri who is the director of the 1st defendant deposed that the application was brought in bad faith with the aim of forestalling the realization of the security. That the 2nd defendant swore an affidavit stating that he was a bachelor and had never been involved in any marriage, under any law. The 2nd defendant further deposed that the 2nd defendant had neither responded to the application nor opposed the suit which suggests an intention by the plaintiff and 2nd defendant to frustrate the 1st defendant; that it was not true that there was a matrimonial home on the suit land.

5. Both parties filed submissions which I have considered along with the authorities. The issues that stand out for my determination are; whether the applicant is deserving of an injunction, and; whether the applicant has an overriding interest that would defeat the charge in question. In dealing with these issues, I am guided by the principles set out in the case of **Giella Vs. Cassman Brown[1973] E.A 358**. The applicant must show a *prima facie* case with probability of success; that irreparable injury not compensable by damages would result; and thirdly if the court is in doubt it will decide the application on the balance of convenience.

6. It is not disputed that the 2nd defendant took a loan with the 1st defendant. The applicant/plaintiff herself admits as much. Her contention however is that the charged property is matrimonial property for which the 1st defendant should have sought her consent before charging. She submits the 1st Defendant failed to do due diligence to establish that the charge property was free of overriding interests including the fact of her physical occupation whether her interest was noted on the register or not.

7. She cites **Eunice Wairimu Kibe -Vs- Edward Kibe Maina & 2 Others, Nakuru HCCC No. 88 of 2010 (unreported)** in which **Emukule J.**(as he then was) enjoined the sale of suit property on the ground that the Plaintiff who was wife to the 1st Defendant had an overriding interest which superceded that of the lender. She also cites the English cases of **Barclays Bank Plc -Vs- O'brien & Another 1993 ALL ER Vol. 4P.47, National Provincial Bank -Vs- Hasting Car Mart [1964] 1 ALL ER 688** all which support the proposition that a spouse has a superior overriding interest in the matrimonial home even if such an interest is not registered.

8. The 1st Defendant's position is that it conducted due diligence before executing the charge. That they acted on the basis of an affidavit sworn by the 2nd Defendant to the effect that he was a bachelor. There was no disclosure that the property in question was matrimonial property. The 1st Defendant further submits that the suit and the application by the Plaintiff/Applicant was a ploy to void the charge. They submit that the 2nd Defendant has neither defended the suit nor opposed the application. They rely on the case of **Peter Chomba -Vs- Kenya Commercial Bank [2016] eKLR** for the proposition that *"the law cannot be invoked to assist an indolent, defaulting or guilty party and that he who goes to equity must do so with clean hands."* They further relied on **Elizabeth N. Wambua -Vs- Philip Wambua Masila & 3 Others 2013 eKLR** for the proposition that *"a matrimonial property offered as a security for a loan facility from a commercial financial institution will be treated for all intent as a commercial property."*

9. **Section 79 (3)** of the **Land Act** states that:-

"A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

10. In the present case the Applicant contends that she is wife to the 2nd Defendant. She has not however annexed any documents by way of either a marriage certificate or an affidavit to support the fact of marriage. She has not offered any evidence to enable the court know whether the marriage was subsisting at the time the husband who is the 2nd Defendant executed the loan agreement and swore an affidavit stating that he was a bachelor and therefore required no spousal consent as provided by **Section 93** of the **Land Act**. Other than her assertion that she was in occupation of the suit property, she has not provided any supporting documents to show the developments on the suit land including the matrimonial home.

11. The 1st Defendant, on the other hand has demonstrated that the 2nd Defendant declared a bachelor status through an affidavit. It would have helped the applicant's case if the 2nd Defendant disclosed that his marital status had subsequently changed and that indeed the suit property was matrimonial property. There is no evidence placed before me to suggest that the couple were not in an harmonious relationship which could hinder the 2nd Defendant from disclosing the fact of marriage and that the suit property was matrimonial property which upon default qualified to be spared the auctioneer's hammer. The total silence of the 2nd defendant may very well suggest a ploy to avoid repaying the loan upon default.

12. Following the above, I am not persuaded that the Plaintiff/Applicant has established a *prima facie* case. I have found no evidence to be persuaded that the suit property constitutes the matrimonial home of the Applicant. That being the case and the suit land having been offered as security for the loan in question, I find no evidence that irreparable loss not compensable by damages shall result if the injunction is not granted.

13. In the premises I find the application not merited. It is dismissed. The first defendant must however re-issue afresh all the requisite statutory notices in compliance with the law.

Costs shall abide the outcome of the suit.

Orders accordingly.

Ruling signed.....

R. LAGAT-KORIR

JUDGE

Ruling dated, delivered and signed at Nakuru this 26th Day of September, 2018.

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JANET MULWA

JUDGE

In the presence of:

..... Court clerk

..... For the applicant

..... For the Respondent