



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 469 OF 2016

MINNIE WAHU GITAU.....PLAINTIFF/APPLICANT

VERSUS

HFC LIMITED.....1ST DEFENDANT/RESPONDENT

CHRISTOPHER G. KANYIRI.....2ND DEFENDANT/RESPONDENT

REUBEN T. GATHEMI.....3RD DEFENDANT/RESPONDENT

EVAJANICE W. GITHUKU.....4TH DEFENDANT/RESPONDENT

AND

LIVINGSTONE KAMANDE GITAU.....INTERESTED PARTY

RULING

1. The Plaintiff (herein “the Applicant”) filed the Notice of Motion Application herein dated 16th November 2016, seeking for orders that, pending the hearing and determination of the suit, the Defendants (herein “the Respondents”) by themselves, their agents, servants and/or employees be restrained by an order of injunction from selling, alienating, subdividing, disposing of, creating a further charge, transferring or auctioneering the Applicant’s property known as Land Reference Number Ngong/Ngong/3853 (herein “suit property”) or in any other manner interfering with the Applicants quiet possession or ownership thereof. That the Court do issue any other order as may deem expedient in the interest of justice and the costs of the Application be provided for.

2. The Application is brought under the provisions of Sections 1A, 1B, 3 & 3A of the Civil Procedure Act (Cap 21), Laws of Kenya, Sections 79(3), 103(1)(c), 104(1)(b)(iii)(bb) and 106(1)(b) of the Land Act 2012, Section 28(a) of the Land Registration Act 2012, Section 4 & 12 of the Matrimonial Property Act, Order 51 Rule1, 40 Rules 1, 2 & 4 of the Civil Procedure Rules, and all other enabling provisions of the law. It is supported by the grounds on the face of it and an Affidavit sworn by Applicant.

3. The Applicants avers that, she is the legal and joint owner of the suit property registered in her names and that of the Interested Party who is her husband. That she was surprised on the 10th November 2016, when she was served with a notice of Notification issued by the Auctioneer, an agent of the 1st Defendant (herein “1st Respondent”) relating of sale of the said suit property. She learnt that, the 1st

Respondent was allegedly selling the suit property due to an outstanding loan debt of Kshs.12,379,716.48, as at 31st October 2016, in favour of the 2nd, 3rd and 4th Respondents.

4. The Applicant avers that she is a total stranger to all the allegations of an existing loan facility as she has never charged the suit property in favour of the 1st Respondent, nor executed any documents as a joint owner thereof to create a charge in favour of the 1st Respondent. She denies ever having attended the 1st Respondent offices for any negotiation and/or execution of the Guarantee and Indemnity documents in favour of the 1st Respondent; nor even having given all the necessary consents required from a spouse and/or the Land Control Board. That the loan granted to the 2nd to 4th Respondents must have been done “fraudulently, unlawfully, and in total connivance to defraud her. As a result she had made a report to the police vide OB No. 38/10/11/2016.

5. However, the 1st Respondent opposed the Application by filing a Replying Affidavit dated 25th November 2016, sworn by Mr. Martin Machira, the Legal Manager of the 1st Respondent. He deposed that, vide a consent letter dated 22nd September 2014, the Applicant and the Interested Party consented to the use of the suit property as a security for a loan facility advanced to the 2nd to 4th Respondents. That, the search conducted at the Lands Registry confirmed that, both are the joint registered owners of the suit property. That on 12th November 2014, the joint owners of the suit properties appeared before Mr. Gilbert Nyamweya, an Advocate where the terms and conditions of the charge documents were explained to them freely and voluntarily and they executed the charge document, and the Guarantee and Indemnity on 12th November 2014, effectually charging the suit property. That, the Applicant is not being candid to Court and is guilty of material non-disclosure of the real facts in issue and therefore not deserving of the orders sought. That the Application should be dismissed with costs.

6. The 3rd Respondent swore an affidavit dated 6th February 2017, on his own and on behalf of the 2nd Respondent. He averred that, the 2nd to 4th Defendants, who are members of “*strippers Group*”, applied for a loan facility from the 1st Respondent. Subsequently, the 4th Respondent introduced the Interested Party to the group, and he gave the group a verbal assurance that he would provide a title for his property in Ngong as security, and eventually did so. The group believed that all the processes for approval and consents necessary to charge the suit property had been undertaken. He denied that, he and the 2nd Respondents were privy to the act(s) of forgery, deceit, misrepresentation and/or fraud in any manner whatsoever.

7. On 7th March 2017, Mr. Makembo appearing for the 4th Respondent informed the Court that, the 4th Respondent is not opposed to the Application. At that point, Mr. Gatheru on behalf of the 2nd and 3rd Respondent also informed the Court that they too are not opposing the Application.

8. The Applicant and 1st Respondent filed their respective submissions on the Application. I have considered these submissions alongside the other documents filed in support and in opposition to the Applicant. In my considered opinion, two distinct issues herein arise for determination:

i. Whether, there is a valid charge, and/or Guarantee and Indemnity executed by the Applicant in favour of the 1st Respondent.

ii. Whether, there is default on the Loan facility granted to the 2nd to 4th Respondents, and if so, whether the 1st Respondent’s statutory power of sale has arisen.

iii. If it has, whether the 1st Respondent is exercising the same within the laid down statutory and procedural provision.

9. To address these issues, I find that basically the Applicant denies ever executing the documents which gave the 1st Respondent rights over the suit property. In my opinion, the issue simply relates to the

disputed signature on the charge and Guarantee and indemnity documents as whether it lawfully belongs to the Applicant. The Applicant has referred the matter to the Police for investigation. The document examiner's report in this regard should be able to clear that issue. It is only when the validity of the said documents is dealt with that, all the other issues raised herein, relating to, but not limited to the following will be dealt with. That is:

i. The loan arrears

ii. The exercise of the statutory power of sale by the 1st Respondent.

iii. The issuance of the requisite and necessary statutory notices.

10. The upshot of this is that, I order that:

i. The prayer (2) of the Notice of Motion dated 16th November 2016 is allowed as prayed.

ii. The Parties herein will on priority basis, and within one month prepare this matter for the hearing of the main suit. Case Management Conference to be held within one month of this order, so that, the suit is dealt with expeditiously.

iii. The report from the DCIO to be availed in Court within 14 days of this order. The Deputy Registrar to take up the issue with the assistance of the Applicant and any other Party as to who is investigating the same.

iv. The issue of costs will await and/or abide the outcome of the main suit.

11. Those then are the orders of the Court.

Dated, signed and delivered on this 29th day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In open court in the presence of;

Mr. Muchira for Mr. Wachira for the Plaintiff/Applicant

Mr. Tarus for Mr. Mugambi for the 1st Defendant/Respondent

Mr. Gathemia for the 2nd Defendant/Respondent

Mr. Gathemia for the 3rd Defendant/Respondent

Mr. Kibicho for the 4th Defendant/Respondent

No Appearance for the Interested Party

Teresia - Court Assistant