



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICH0

ENVIRONMENT AND LAND CASE NO. 87 OF 2016

AGNES CHEROTICH NGENY

(Suing on behalf of the estate of

Sophia

Chelimo Keryo (Deceased).....PLAINTIFF

VERSUS

**ANNE CHEROTICH CHEPKWONY ALIAS KIMETO.....1ST
DEFENDANT**

**FRANKLIN BETT.....2ND
DEFENDANT**

**RAYMOND CHERUIYOT.....3RD
DEFENDANT**

**ZAKAYO BIEGON4TH
DEFENDANT**

**NATIONAL BANK OF KENYA.....5TH
DEFENDANT**

RULING

By a Notice of Motion dated 8th November 2016 brought under sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 1,2 and 3 of the Civil Procedure Rules the plaintiff seeks an order for injunction to restrain the 2nd, 3rd, 4th and 5th respondents from selling, trespassing into, entering, erecting buildings or otherwise interfering with land parcel no. KERICH0/KAPSOIT/1603 until this suit is heard and determined. The application is based on the grounds stated on the Notice of Motion and the plaintiff’s supporting affidavit.

The plaintiff has instituted this suit against the defendants in her capacity as the daughter in law and administrator of the estate of Sophia Chelimo Keryo (Deceased). The plaintiff avers that sometime in 1993, the deceased guaranteed her granddaughter (the 1st respondent) a loan of Kshs. 1,000,000 from the 5th respondent (National Bank of Kenya) by providing her title deed in respect of land parcel number KERICH0/KAPSOIT/1603 as security. By the time of her death in 2003, the loan had not been repaid. The plaintiff tried to establish the status of the loan from the 5th defendant and when she did not get a

response she approached the 2nd defendant who was a member of Parliament to assist her to negotiate with the bank for repayment of the outstanding arrears.

The plaintiff further avers that in 2009 she learnt that the 2nd defendant had taken advantage of the plaintiff and her family's desperation and vulnerability and bought the suit land from the bank after which he sub-divided it and sold it to the 3rd and 4th defendants.

In its rejoinder, the 5th defendant states that it sold the suit land in exercise of its statutory power of sale following the 1st defendant's failure to repay the loan. On his part the 2nd defendant maintains that he bought the suit land from the bank in a public auction after which he sub-divided and sold it to the 3rd and 4th defendants.

What emerges from the above facts is that the 1st defendant was indebted to the 5th defendant and according to the affidavit of the 5th defendant's Recoveries Manager, is still indebted to the tune of over 1,780,496. This figure is however disputed by the 1st defendant as she alleges to have made substantial payments. Under the circumstances, the plaintiff has not established a prima facie case with a probability of success. If indeed the 5th defendant sold the suit property in exercise of its statutory power of sale as alleged, then it was well within its rights to do so. However, if there were any irregularities with regard to the sale as alleged in the plaint, these would only be proved at a hearing after listening to the evidence of both parties.

I am not persuaded that the plaintiff has made out a case for the grant of an injunction in accordance with the principles laid down in the celebrated case of **Giella V Cassman Brown 1973 E.A 358**. What is also not clear is why the 1st defendant has played such a passive role in redeeming the suit land and why the plaintiff took such a long time to institute this suit in order to safeguard the estate of the deceased. In any event the property has already been sold by the bank and it would not make any sense to issue an injunction against the 5th defendant as the court would be issuing orders in vain. I therefore agree with counsel for the respondents that the plaintiff is guilty of laches.

I have carefully considered the application together with the all the affidavits, annexures, pleadings and submissions of both parties and come to the inescapable conclusion that the plaintiff's application lacks merit and is hereby dismissed with costs to the 2nd, 3rd, 4th and 5th respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 29TH DAY OF SEPTEMBER, 2017

J.M ONYANGO

JUDGE

IN THE PRESENCE OF:

Miss Kitur for Koko for the 1st Defendant

Mwita for the 2nd, 3rd and 4th Defendants

No appearance for the Applicant

Court Assistant; Rotich