



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 357 OF 2017

T W M.....PLAINTIFF/APPLICANT

VERSUS

P K M.....1stDEFENDANT/RESPONDENT

CONSOLIDATED BANK OF KENYA...2ndDEFENDANT/RESPONDENT

J.M MURAGURI T/A

CLEVERLINE AUCTIONEERS.....3rdDEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 13th April 2017 and filed on the same day is brought under Section 1A, 1B and 3A of the Civil Procedure Act Section 93 and 28 of the Land Registration Act 2012, Section 103 104 and 105 of the land Act 2012, Section 12(1) of the Matrimonial Property Act No. 49 of 2013, Articles 45(1) and 68 (c) of the Constitution, Rules 15,16 and 17 of the Auctioneers Rules, Order 40 Rule 1,2 and 3, of the Civil Procedure Rules and any other provisions of the Law applicable where the Applicant seeks that:

a. Spent.....

b. Spent.....

c. That pending the hearing and determination of this suit a temporary injunction do issue restraining the 2nd and 3rd defendants by themselves their agents, servants, and /or employees from selling, dealing, interfering, alienating or disposing off L.R No. NYANDARUA/ ORRAIMUTIA /[particulars withheld]

d. That costs of this application be provided for;

2. The Application was premised on the grounds that:

a) The Plaintiff applicant is the wife of the 1st Defendant and they acquired L.R No. NYANDARUA/ ORRAIMUTIA /[particulars withheld] in the course of their marriage through joint contribution.

b) That L.R No. NYANDARUA/ ORRAIMUTIA /[particulars withheld] is matrimonial property and the plaintiff resides therein with her three children and rely on farming thereon for her livelihood.

c) That the 1st Defendant secured a loan using the said matrimonial property as security from the 2nd Defendant and the property is scheduled to be sold on the 20th April 2017 by way of public auction for default of payment of the loan.

d) That the plaintiff became ware of the said loan on the 10th April 2017 after she came across a notice by the 3rd Defendant affixed on her gate advertising the property for sale.

e) That the plaintiff did not give her consent as a spouse for the acquisition of the said loan which consent is mandatory to protect her overriding interest in the property as a spouse.

f) That the 2nd and the 3rd defendants did not issue the requisite mandatory Notice to the plaintiff as a spouse before exercising the statutory power of sale.

g) That due process of the law was not followed while charging the matrimonial property and advertising the same for sale by way of Public auction by the 2nd and 3rd Defendants.

h) That the Plaintiff and her three children have nowhere else to call home and unless the orders sought are granted they stand to be rendered homeless and destitute.

i) That the plaintiff has satisfied the conditions set out in the case of Giella vs Cassman Brown and pray for the orders sought to be granted.

3. The Application was supported by an affidavit sworn on the 13th April 2017 by M/s Tabitha Wachugu Mwai the Plaintiff/Applicant and wife to the 1st Defendant/Respondent herein.

4. Briefly the applicant averred that she had been married to the 1st defendant in the year 2002 under the Kikuyu customary laws and had (3) three children from the union.

5. That they lived on her father in law's farm in Nyairoko scheme until the year 2010 when they moved out after having saved enough money, bought their own land (the subject suit herein) and constructed a permanent house thereon.

6. The applicant further averred that since the 1st defendant was the head of the family, the suit land was registered in his name.

7. She was later shocked to see an advertisement a notice from the 3rd Respondent affixed on their gate advertising their home land for sale. She conducted a search and discovered that the 1st Respondent had taken a loan of Ksh 1,500,000/= from the 2nd Defendant using their home as security.

8. The Applicant avers that the suit property is their matrimonial home and that the 1st Respondent did not seek consent from her before charging their home hence rendering the whole transaction invalid.

9. She also averred that she had neither received any notice from the 2nd and 3rd Defendant touching on the charge and sale of the property, nor had she benefitted from the loan and that she will suffer irreparable loss and damage as she and her children would be rendered homeless if the sale of the suit land is not stopped.

10. When this matter came before me ex-parte on the 19th April 2017, I allowed prayers 1, 2 and 4 of the application and granted interim orders of injunction thereby scheduling the application for inter-parte hearing for the 3rd May 2017.

11. On the 2nd May 2017 the 2nd Defendant filed their response dated the 28th April 2017 wherein M/s Caren Wanakacha, the Recoveries officer deponed that at the instance of the 1st Defendant, the 2nd Defendant obtained a loan facility of Ksh 1,500,000/= from the bank wherein he had placed as security L.R No. NYANDARUA/ ORRAIMUTIA /[particulars withheld] and a charge was prepared in that respect and the Land control board was served with the consent which had also been signed by the applicant herein.

12. Subsequently the 1st Respondent defaulted in repayment of the loan and steps were made to regularize the account but when the default persisted the 2nd Defendant sent the 1st Respondent/ Defendant two statutory notices dated the 26th August 2016 and 13th December 2016 respectively through registered post. When the 1st Defendant failed to comply with the terms of the notices, the 2nd Defendant served upon him the Notice of intention to sale.

13. That the 2nd Defendant averred that it was justified in exercising its statutory power of sale. The Applicant in her application ex-parte had concealed material to the effect that she had signed the spousal consent hence obtaining interim orders.

14. The 2nd Respondent further averred that the 1st Defendant is still in default and that the loan continues to attract interest and penalties as per their agreement The 2nd Respondent sought for the dismissal of the application.

15. In a rejoinder, the applicant vide her further Affidavit dated the 17th May 2017 and filed on the same day reiterated that she was not aware that her spouse had put their matrimonial house as security secondly, she did not sign the spousal consent, and third that she was not served with any of the notices which were sent to Postal Box number 45 Nairobi instead of Postal Box number 45 Milangine.

16. The 1st and 3rd Defendants did not file any responses to the applications.

17. When this matter came up for inter-partes hearing, directions were given that parties file their written submissions to which they did and sought that the court delivers its ruling thereafter.

18. I have since evaluated the evidence on record, as well as read the filed submissions and wish to summarize them as herein under.

Applicant's submissions.

19. The applicant's written submission was supported by the grounds set out on the face of the application and affidavits filed thereon to the effect that under section 93 and 28 of the Land Registration Act 2012 the charge over the land parcel No. L.R No. NYANDARUA/

ORRAIMUTIA /[particulars withheld] was void and the property could not be disposed of by way of Public auction as advertised by the 3rd Defendant /Respondent.

20. The applicant relied on Section 93(3) of the Land Registration Act 2012 (which is non-existent) to submit that where a spouse who holds land in his name individually undertakes a disposition of a charge over that land, the lender shall be under a duty to inquire of the borrower on whether the spouse has consented to the charge.

21. According to the submission, there was no consent from the Applicant who has vehemently denied ever signing the spousal consent and goes on to point at the irregularities of the alleged spousal consent to wit,

- i. that the signature on the consent form was not hers,
- ii. that her name did not appear against the signature,
- iii. that a copy of her identity card was not attached to the consent,
- iv. that the address on the notice was Postal Box number 45 Nairobi instead of Postal Box number 45 Milangine.

22. The applicant relied on section 93(4) (of which act?) to demonstrate that where a spouse undertakes a disposition and deliberately misleads the lender on the issue of spousal consent, that disposition shall be void at the option of the spouse who has not consented to the disposition.

23. It was reiterated that suit parcel was matrimonial property and that the 1st Respondent did not seek consent from the applicant before charging their home hence rendering the whole transaction invalid.

24. The Applicant further relied on section 79(3) (of which Act?) to submit that the charge of a matrimonial home shall only be valid if the documents are executed by the charger and any spouse living in that matrimonial home.

25. The written submissions also brought out the issue of there being lack of service of the statutory notice to the effect that the 2nd defendant did not issue the requisite mandatory Notice provided for under section 15, 16 and 17 of the Auctioneers Rules to the plaintiff as a spouse before exercising their statutory power of sale. They instead sent them to the wrong address. The balance of convenience thus tilted in the plaintiff's favor as envisaged in the case of *Giella vs Cassman Brown*.

26. To buttress her application, the plaintiff relied on the cases of:

- i. SophyNjiiri vs. National Bank of Kenya Ltd and another [2015]eKLR**
- ii. Susan Anna Karanja vs. Lenana Towers Limited [2014] eKLR**
- iii. Moses Kibiego Ytor vs. Eco Bank Kenya Limited [2014]eKLR**

2nd Respondent's submissions

27. In response to the application, the 2nd Respondent's written submissions basically were a replica of their replying affidavit in opposition to the applicant's application where it was stated that the applicant had not met the requirements laid down in the case of *Giella vs Cassman Brown* to be granted the injunction they were seeking.

28. The 2nd Respondent reiterated that the applicant had granted spousal consent as per their attached annexure 6(b). Further that there was no evidence adduced by the applicant to show that the consent was procured through any means that could vitiate a contract such as misrepresentation, undue influence etc. That the applicant ought to have reported to the police or even included a writing experts report, if indeed her contention was that she had not signed the consent document.

29. The 2nd Defendant's written submission was also to the effect that there was no dispute that they had advanced a loan facility to the 1st Defendant/Respondent who had defaulted and is still in default with the payment.

30. The 2nd Defendant/Respondent relied on Section 90 of the Land Act which provides for remedies of a charge where the chargor is in default. The said Section 90(2) is to the effect that Notice should be issued to the recipients informing them of the consequence if the default is not rectified within the time specified in the Notice and further that after the Notice, the chargee was free to proceed to exercise any of the remedies as provided for in the statute. They contended that they had complied with the provisions of law and had a right to exercise their statutory power of sale.

31. Reliance was also put on section 96(1) of the Land Act which made a provision for a chargee to exercise its power of sale where the chargor had defaulted and remained in default at the expiry of the time provided for in the notification.

32. The 2nd Defendant's further contention was that there had been no denial from the 1st Defendant/Respondent that he had not been served with any Notice. His silence spelt the opposite of what the applicant had wanted the court to believe. Their stand was that he was served in

accordance with the law.

33. It was further submitted that the Applicant had not proved that she would suffer any loss if the prayers in her application were not granted because as it was trite law that once a property was charged to a bank to secure a loan facility, that property became a commodity for sale in default of the loan obligations.

34. On the issue of damages, the 2nd Defendant/Respondent relied on the case of **Peter Kamau Munene vs. Kenya Commercial Bank Ltd [2015]eKLR** where the court held that the suit property could be assessed and quantified and in case the plaintiff succeeded in the case on a future date, he could be compensated by award of damages.

35. Reliance was also placed on the case of **Elijah Kipng'eno Arap Bii vs. Kenya Commercial Bank Ltd [2001] eKLR** where the court held that the applicant's probable injury was capable of being adequately compensated in damages.

36. The 2nd Defendant curiously noted that the 1st respondent had not filed any papers and wondered whether he was acting in cohorts with the plaintiff/Applicant to prevent the bank from exercising their statutory power of sale by public auction.

37. They sought for the case to be dismissed.

38. Having read submission by counsel for the parties as well as having perused the affidavits and annexures herein attached, as well as the applicable law, I find that the matters for determination are as follows:

The matters for determination;

- i. Whether the Defendant served the Plaintiffs with a Statutory Notice pursuant to section 90(2) of the Land Act.
- ii. Whether the plaintiff gave spousal consent for the matrimonial property to be offered as security to the chargee.
- iii. Whether the conditions for issuance of an injunction have been met herein.

39. I find that the 1st Defendant/Respondent applied for and was advanced a loan facility of Ksh 1,500,000/= vide a letter of offer dated the 9th June 2015. The said facility was secured by the 1st Defendant/Respondent's security namely No. L.R No. NYANDARUA/ORRAIMUTIA/[particulars withheld] and the title deed clearly shows that the land was charged to the 2nd Defendant/Respondent vide a copy of the charge dated the 3rd September 2015.

40. That on the 24th August 2015, the 1st Defendant/Respondent swore an affidavit to the effect the charged land was a matrimonial property wherein the Plaintiff/Applicant gave spousal consent to the charge. Thereafter the Land control board was served with the application for consent which was duly executed on the 22nd September 2015.

41. The 1st Defendant/ Respondent having defaulted in the servicing of his loan, the 2nd Defendant/Respondent issued a 3 month the statutory notice in compliance to section 90(1) and (2) of the Land Act, dated the 26th August 2016, upon him.

42. The statutory notice through registered post, was addressed to the 1st Defendant/ Respondent by the Defendant's legal officer listing the status of his account with the 2nd Defendant Bank.

43. The letter demanded that a total sum of Ksh. 1, 301,387/-which was the outstanding amount as at 26th August 2016 and gave a three months' notice as provided for under the provisions of section 90(2) of the Land Act to wit:

The notice required by Subsection (1) shall adequately inform the recipient of the following matters –

a) the nature and extent of the default by the chargor;

b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies

44. It is worth noting that a statutory notice issued under section 90(2) of the Land Act, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3) of the Act. The notice is issued where the chargor is in default of any

obligation under the charge or has failed to pay interest or any other periodic payment and such default continues for one month.

45. As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the charger is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the notice is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.

46. I find that the above notice satisfied the requirements as provide for under section 90(2) of the Land Act.

47. On the 13th December 2016, the 2nd Defendant/Respondent issued a second Notice to sell pursuant to section 96(2) of the Land Act through registered post, to the 1st Defendant/ Respondent demanding for ksh 1,281,713/= which was the outstanding amount as at 13th December 2016. The letter gave a forty (40) days' notice as provided for under the provisions of section 96(1) of the Land Act.

48. **Notice to sell charged property under Section 96(2) of the Land Act provides as follows:-**

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

49. The Statutory notice in in the present case in my humble view was in accordance with section 96(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale were lawful.

50. The Plaintiff/applicant therefore fails on this aspect.

51. The second issue for determination is whether service of the statutory Notice was properly effected upon the 1st Defendant/Respondent. I have looked at both the statutory Notice and the Notice to sell respectively, and find that both Notices were sent through registered post to Box office address 45 Nairobi.

52. I have looked at the Letter of offer, the application for consent of the Land Control Board, the 1st Defendant/ Respondents' affidavit well as the spousal consent and suffice to say that all these documents were addressed the 1st Defendant/respondent vide Box umber 45 Nairobi, an address given by the 1st Defendant/Respondents' and which appears in all the facility documents. It is also not in dispute that the 1st Defendant/ Respondents' received the said Notices since he did not put in his papers to rebut receipt of the notices.

53. Although the Applicant's submission was to the effect that statutory notice was neither served upon the 1st Defendant/ Respondent nor the plaintiff/Applicant since the address was Box office 45 Nairobi and not 45 Melangine. The certificate of posting attached showed Box office 45 Nairobi. This line of defence by the Plaintiff must also fail.

54. **On the issue of the Matrimonial home the court expressed itself as follows in the case of Julius Mainye Anyega vs. Eco Bank Limited [2014] eKLR**

The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagees from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility.

55. **The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home.**

56. I find that unlike the plaintiff's written submission that she did not give consent to the matrimonial property being charged to the 2nd defendant, there is a spousal consent to that effect with the plaintiff's identity number and signature affixed thereon, no criminal proceedings have been instituted or a report made to the police alleging that the document was a forgery. *There is no cogent evidence before this court to show that the Plaintiff herein did not give spousal consent to the 1st Respondent to charge their matrimonial home to the 2nd defendant.* Since the remedy being sought by the Plaintiff is an equitable one, the Court should decline to exercise its discretion because the Applicant has been shown to be guilty of conduct which does not meet the approval of the Court of equity.

57. Turning on the third issue of determination on whether the conditions for issuance of an injunction have been met herein. The principles

are well set out by the court of Appeal in *Giella Vs Cassman Brown* where the court has to consider the following questions before granting injunctive relief.

i. *Is there a prima facie case...*

ii. *Does the applicant stand to suffer irreparable harm...*

iii. *On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....*

58. *Going by the statements of accounts before me, there is clear evidence that the 1st Defendant took a loan of Ksh 1,500,000/= which was payable over a period of 36 months at a rate of Ksh 56,513/= per month inclusive of interest.*

59. *The Statement for the account No. [particulars withheld] is to the effect that the loan was debited into the 2nd Defendant's account on the 14th September 2015. From October-December 2015, the creditor made payments into the 2nd Defendant's account. From January-June 2016, he again made effort to credit minimal sums into the 2nd Defendant's account. However from July 2016-september 2016, no credits were made into the account, in October 2016, two deposits were made as per the statement. November-December 2016, nothing was deposited yet again. The last deposit was made in January 2017 up to when this matter was filed in court.*

60. *I am not satisfied that the Applicant is deserving of the orders of injunction it seeks in this matter. It has been shown that not only is the 1st Defendant/Respondent indebted to the 2nd Defendant/Respondent but that no payments have been forthcoming for a long period of time.*

61. *After careful consideration of the pleadings, the affidavit evidence, submissions of the parties and the applicable law, the question to ask is whether the material presented to the Court, can enable the court properly directing itself thereto, to conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the Defendant.*

62. *The court having found that the principal debtor was served with the requisite statutory notice to remedy his default within 90 days, and was informed of the acts needed to remedy the default and his right to apply for relief, the notice had fully complied with section 90(1) of the Land Act.*

63. *The same was properly issued and liability on the guarantor attached. When the Chargor failed to comply with the notice under section 90(1) to remedy the default, he was issued with another Notice under section 96(2) of the Land Act of the chargee's statutory power to sell the charged property. The Applicant has therefore not established a *prima facie* case with a probability of success.*

64. *I find that the property was legally charged to the bank so as to secure its interest on the sum advanced in favor of the borrower. The 1st defendant surrendered the Title documents for the aforesaid property to the Defendant bank pursuant to the charge instrument and in so doing; he fully understood and agreed to the full import of the terms set out in the charge instrument registered in favour of the bank.*

65. *In the case of **Mrao supra** Kwach, JA (as he then was), had this to say:*

'I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.'

66. *On the issues of irreparable loss, this case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.*

67. *In determining where the balance on convenience lies, considering the facts of this case in totality, I find that the balance of convenience is not in favour of the applicant. Since the Respondents statutory power of sale has arisen, I find that the balance of convenience lies in enforcing the contractual obligations of the parties.*

68. *Consequently, I find that the application under determination has no merits and that the Plaintiff/Applicants have not satisfied the tests for granting the injunction sought as laid down in the *Giella v Cassman Brown* case. Accordingly, I dismiss the application dated 13th April 2017 and vacate the interim orders.*

69. *Costs to the Respondent.*

Dated and delivered at Nyahururu this 16th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE