



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 382 OF 2017

MINA ACHENDID.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion dated **18 September 2017** was filed herein on **19 September 2017** by the Plaintiff/Applicant, **Mina Achendid**, pursuant to the provisions of **Sections 1A, 1B, 3A, and 63(c) and (e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and **Section 93(3) and (4)** of the **Land Registration Act, No. 3 of 2012**, as well as **Order 40 Rules 1, 2 and 4** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] Spent

[c] Pending the hearing and determination of this suit, an injunction be issued restraining the Defendant/Respondent and/or its agents from selling, transferring, disposing of, interfering with and/or in any other manner whatsoever altering or dealing with the suit properties known as Apartment Numbers 409, 509, 608, 709, 800, 809, 900, 908, 909, 1000, 1001, 1008, 1009, 1100, 1101, 1108, 1109, 1200, 1208 and 1209 erected on a portion of Land Reference Number 209/19835, Nairobi (the Suit Properties).

[d] The costs of this application be provided for.

[2] The application was premised on the grounds that the purported Charge over the Suit Properties is void in terms of **Section 93(3) and (4)** of the **Land Registration Act, No. 3 of 2012**, and consequently, the intended sale of the suit properties is unlawful; and that the applicant will suffer irreparable loss and damage if the suit properties are sold as advertised. The application is supported by the affidavit of the Applicant annexed thereto, sworn on **18 September 2017** together with all the annexures thereto.

[3] The Applicant averred that she is the spouse to **Mr. Hassan Ahmed Abdulhafedh Zubeidi**, having contracted a civil marriage with him on **20 June 2006** in the Kingdom of Morocco in accordance with the Laws of Morocco; and that at all material times relevant hereto, her husband was and is the registered proprietor of all the 20 apartments comprising the Suit Properties herein. She averred that, on **13**

September 2017, she visited the Suit Properties to check on ongoing renovation works and, on arrival, she met various people claiming to have been sent by the Respondent to view the Suit Properties as prospective purchasers; and got to learn from them that the Properties had been charged and were being sold by the Respondent in purported recovery of loan facilities advanced to her husband.

[4] The Applicant further deposed that she immediately made inquiries from her husband, who confirmed to her that he had indeed charged the Suit Properties to the Respondent to secure certain loan facilities that had been advanced to him by the Defendant. She added that at no time did she, as a spouse to the Chargor, consent to the Charge. She accordingly instructed her Advocates to write to the Respondent seeking the immediate cancellation of the purported Charge and delivery up of the original title documents of the Suit Properties. She annexed to her Supporting Affidavit copies of the Certificate of Marriage and a Translation thereof, the Title Document for the Suit Properties, the Charge and the Demand Letter dated **13 September 2017** as exhibits in support of her application.

[5] It was further the averment of the Applicant that she received no response to the Demand Notice from the Respondent; and that instead, the Respondent's agents, **M/s Purple Royal Auctioneers**, advertised the Suit Properties for sale by public auction on Thursday **21 September 2017**, thereby prompting her to seek the intervention of the Court. She expressed her apprehension that the Suit Properties may be sold and transferred in purported exercise of the Respondent's statutory power of sale yet the Charge was void and invalid; in which event she would suffer irreparable loss and damage. She accordingly expressed her willingness to give an Undertaking as to Damages as a basis for her prayer for interim relief; which aspect was heard and disposed of on **20 September 2017**.

[6] The Respondent opposed the application vide the Grounds of Opposition dated **19 September 2017** as well as the Replying Affidavit sworn by **Paul K. Chelang'a**, which was filed herein on **27 September 2017**. The contention of the Respondent was that, by way of various registered instruments/securities, the Applicant's alleged spouse, one **Hassan Ahmed Abdul Hafedh** (the Chargor) was extended credit facilities by the Respondent; which transactions were as follows:

[a] That by way of a Letter of Offer dated **3 October 2013**, the Defendant extended credit facilities to the Chargor in the form of a **Diminishing Musharakah Property Finance** in the sum of **Kshs. 100,000,000/=** for purposes of purchasing the Suit Properties.

[b] That it was a term of the said facility that repayment of the amounts advanced by the Respondent would be effected within 120 months at an annual financing rate of 15.45%; and that the facility would be secured by:

[i] First Ranking Charge of **Kshs. 100,000,000/=** on the Twenty (20) residential apartments;

[ii] Corporate Guarantee and Indemnity for **Kshs. 100,000,000/=** by **Remu Salt Packers Productions Limited**;

[iii] Deed of Assignment of Rental Income executed by the said Chargor with respect to the Twenty (20) residential apartments.

[7] It was further the averment of the Respondent that, having received the monies under the Charge Instrument, the Chargor defaulted in servicing the facility, such that by **18 January 2017**, the account was in arrears to the tune of **Kshs. 4,204,020/=**; and that in accordance with the terms of the Letter of Offer and the Charge, a Statutory Notice was accordingly issued by the Respondent under **Section 90(1) and (2) of the Land Act, 2012**, requiring the Chargor to rectify the default within three months. According to the Respondent, the Chargor ignored the said notice, as well as subsequent notices dated **27 April 2017** and **19 July 2017**; and therefore it was averred that the Respondent is entitled in the circumstances to realize the securities by way of sale.

[8] In response to the Applicant's contention that the Suit Properties were charged without spousal consent, the Respondent averred that the subject matter properties were not secured as matrimonial

properties as alleged, but instead acquired through a facility granted by the Defendant; and that as at the time of registration of the securities were commercial assets on offer for sale as opposed to matrimonial assets and as such the requirement for a spousal consent was neither necessary nor statutorily mandated. It was also the contention of the Respondent that the suit is fraudulently designed granted that the Chargor is admittedly in default; has not been enjoined to this suit as a party; and has employed the same Advocate as the Applicant in connection with this subject matter. For this reason, the Respondent postulated that the issue of lack of spousal consent was an afterthought and a deliberate attempt to procure orders with a view of defrauding the Respondent; and that the entire suit and the application is frivolous, a mere sham and an unfortunate attempt by an indebted person to fraudulently collude with and use his spouse as an excuse not to settle his obligations.

[9] The application was canvassed by way of written submissions, pursuant to the directions given herein on **20 September 2017**. The written submissions were filed and highlighted on **4 October 2017**. The Applicant's submissions were premised on **Section 93(3) and (4) of the Land Registration Act** and her argument that the Charge was void and invalid from that standpoint; and therefore that she has demonstrated a *prima facie* case with a probability of success. She cited the case of **Giella vs. Cassman Brown & Company Limited [1973] EA 358** and **Mrao Ltd vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 125** to buttress her contention that she has a genuine and arguable case. She also cited the case of **Susan Anna Karanja vs. Lenana Towers Limited [2014] eKLR** for the submission that the failure by the Respondent to ensure that spousal consent had been given and/or obtained prior to registration of the Charge renders the Charge void and invalid.

[10] In support of her contention that she stands to suffer irreparable harm if the sale of the Suit Properties were to go on as proposed by the Respondent, the Applicant relied on the following authorities for the principle that damages cannot be a substitute is a situation where there is a clear breach of the law:

[a] **Kanorero River Farm Ltd and 3 Others vs. National Bank of Kenya Ltd [2002] 2 KLR 207;**

[b] **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Ltd & 3 Others, Nairobi HCCC No. 265 of 2007 (UR);**

[c] **Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation Ltd [2008] eKLR;** and

[d] **Olympic Sports House Limited vs. School Equipment Centre Limited.**

[11] It was further submitted by Counsel for the Applicant that the balance of convenience in this case hugely tilts in her favour, given that the legality of the Charge and the intended sale has been impugned; and that, since at this interlocutory stage, the Court cannot resolve the matters raised, it would only be in the interest of the parties that the *status quo* be preserved pending the hearing and determination of this suit on the merits. Reliance was also placed on the cases of **Charter House Investments Ltd vs. Simon K. Sang & Others Civil Appeal No. 315 of 2014** and **Jackson K. Chebet vs. Selly J. Busienei & Another [2016] eKLR** to underscore the need for the Court to balance the convenience of the parties and possible injury to them and to third parties; which, it was submitted, is in favour of granting the orders sought by the Applicant in the interim.

[12] The submissions of the Respondent, on the other hand, were that, as at the year **2013** when the Suit Properties were charged, the requirement for spousal consent was restricted to matrimonial properties as defined under the **Matrimonial Properties Act**; and/or properties acquired by one spouse for co-ownership and use with the other; and therefore that the Suit Properties do not fall under the statutory definition of "**matrimonial properties**" for which consent would be a prerequisite for purposes of **Section 93(3) and (4) of the Land Registration Act**. The Respondent relied on the decision of the Court of Appeal in **Stella Mokeira Matara vs. Thaddeus Mose Mangenya & Family Bank Limited [2016] eKLR** as well as the case of **Maithya vs. Housing Finance Company of Kenya & Another [2003] 1 EA 133** to bolster its argument that no spousal consent was required in this instance.

[13] The Respondent further submitted that, in the current scenario, where it is seeking to realize its securities, it cannot be argued that the Applicant stands to suffer irreparable harm; and that in any event it is in a position to make compensation for any losses that the Applicant may suffer. In its argument, the Applicant having charged the Suit Properties, they were thus presented as goods of a commercial nature with monetary value and therefore easily compensable in damages. The Court was further urged to consider the conduct of the Applicant and find that she is guilty of material non-disclosure; and is therefore not entitled to the discretion of the Court. In this regard, the Respondent took issue with the Applicant's failure to enjoin her husband, the Chargor, to these proceedings. The Respondent further questioned the Applicant's motive in denying that the Suit Properties were purchased by from loan proceeds; and yet at page 9 of the annexures to her Further Affidavit marked **Annexure "MA-b"** there is an acknowledgement that the suit properties were purchased by way of a loan, which her husband indicated he was still repaying.

[14] On the balance of convenience, the submission of the Respondent was that a finding in favour of the Applicant would expose it not only to the loss of its securities, but also to the loss of a colossal sum of money advanced to a Chargor, who had proven his inability to repay the loan; and that such a finding would, in effect, be in aid of a loan defaulter, who through connivance and fraudulent acts, now seeks to escape his legal obligations. It was thus the Respondent's submission that the Applicant has failed to raise sufficient grounds to warrant the issuance of the orders sought; and that her application dated **18 September 2017** ought to be dismissed with costs.

[15] There appears, therefore, to be no dispute that the Respondent was approached by the Chargor herein for a loan and that by way of a Letter of Offer dated **3 October 2013**, the Respondent extended credit facilities to the Chargor in the sum of **Kshs. 100,000,000/=** for purposes of purchasing the Suit Properties. It is manifest from the evidence placed before the Court that it was a term of the said facility that repayment of would be effected within 120 months at an annual financing rate of 15.45%; and that the facility would be secured by:

[i] First Ranking Charge of **Kshs. 100,000,000/=** on the Twenty (20) residential apartments;

[ii] Corporate Guarantee and Indemnity for **Kshs.100,000,000/=** by **Remu Salt Packers Productions Limited;**

[iii] Deed of Assignment of Rental Income executed by the said Chargor with respect to the Twenty (20) residential apartments.

[16] The Letter of Offer was annexed to the Replying Affidavit as **Annexure "PC-1"** and it confirms the terms aforementioned. It further confirms that those terms were accepted by the Chargor. The Charge Instrument was duly prepared and signed by the parties and a copy thereof has been exhibited as **Annexure MA-3** to the Supporting Affidavit and **Annexure "PC-2"** to the Replying Affidavit. Also exhibited by the Respondent were the Corporate Guarantee and Indemnity for **Kshs. 100,000,000/=** by **Remu Salt Packers Productions Limited (Annexure "PC-3")** as well as the **Deed of Assignment of Rental Income (Annexure "PC-4")** executed by the said Chargor with respect to the Twenty (20) residential apartments that formed the subject of the Charge.

[17] Since the Chargor is not a party to these proceedings, the averments of the Respondent, to the effect that the funds were disbursed and that the Chargor thereafter defaulted in making the repayments as agreed, have not been controverted. Indeed the Respondent's **Annexures "PC-5" to "PC-10"** all go to confirm default by the Chargor, following which the requisite statutory notices were issued with a view to realization by the Respondent of the securities; and in particular the Charge. There is further no dispute that the Applicant is the spouse of the Chargor. She exhibited a copy of their Marriage Certificate as well as an English Translation thereof as **Annexure MA-1** to the Supporting Affidavit. Accordingly, what is in contention is whether spousal consent was a prerequisite for the Charge herein; and whether that consent was obtained. Of course, that is not an issue that can be determined on the basis of affidavit evidence. It is the subject of the main suit as can be ascertained from paragraphs 3 to 7 of the Amended Plaintiff. Accordingly, the Court is obliged to exercise caution at this stage so as not to make definitive findings in

respect thereof. (see Vivo **Energy Kenya Limited vs. Maloba Petrol Station & 3 Others [2015] eKLR**)

[18] Needless to say that it is it is permissible, under **Sections 1A, 1B, 3A and 63(c)and (e)** of the **Civil Procedure Act**, and **Order 40 Rules 1, 2 and 4** of the **Civil Procedure Rules** for the intervention of the Court to be sought and obtained, by way of temporary injunction, to restrain the sale pending the hearing and determination of the dispute, provided that there is a demonstration that the Applicant's case falls within the strictures of the principles laid down in the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), namely:

[a] that she has a *prima facie* case with probability of success

[b] that she stands to suffer irreparable damage which cannot be compensated by an award of damages; and

[c] That the balance of convenience is in her favour.

[19] As to what amount to a *prima facie* case, the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** expressed the view that:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."

[20] In response to the Applicant's contention that the Suit Properties were charged without spousal consent, the Respondent averred that the subject matter properties were not secured as matrimonial properties as alleged, but instead acquired through a facility granted by the Defendant; and that as at the time of registration of the securities were commercial assets on offer for sale as opposed to matrimonial assets and as such the requirement for a spousal consent was neither necessary nor statutorily mandated. It was also the contention of the Respondent that the suit is fraudulently designed, granted that the Chargor is admittedly in default; has not been enjoined to this suit as a party; and has employed the same Advocate as the Applicant in connection with this subject matter. For this reason, the Respondent postulated that the issue of lack of spousal consent was an afterthought and a deliberate attempt to procure orders with a view of defrauding the Respondent; and that the entire suit and the application is frivolous, a mere sham and an unfortunate attempt by and indebted person to fraudulently collude with and use his spouse as an excuse not to settle his obligations.

[21] The Title Documents marked **Annexure MA-2** to the Supporting Affidavit show that the Title to the Suit Properties was registered under the **Registration of Titles Act, Chapter 281** of the **Laws of Kenya**, now repealed; and that the Charge was drawn and executed pursuant to **Section 108** of the **Land Registration Act, 2012**. Thus, **Section 93(3)** of the Act requires that:

"Where a spouse who holds land or dwelling house in his or her name individually undertakes a disposition of that land or dwelling house--

(a) the lender shall, if that disposition is a Charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, consented to that Charge..."

[22] Accordingly, there being no dispute that a disposition was indeed made by the Applicant's spouse without her consent as a spouse, it is evident that a *prima facie* case has been made out by the Applicant to warrant a rebuttal by the Respondent. It remains to be seen at the trial whether the subject category of property was exempt from the requirements of **Section 93** of the **Land Registration Act**. Thus, I would agree with the decision of **Onguto, J.** in **Susan Anna Karanja vs. Lenana Towers Ltd [2014] eKLR**, wherein it was held that:

"The Plaintiff has the right to know when her spouse is disposing of real property and to consent to such disposition. She has shown that no such consent was apparently obtained from her and it is upon the respondent to explain to the Court whether an attempt was made to obtain such consent and whether indeed one was obtained. In my view, the applicant has established a prima facie case with a probability of success...I hold the view that in view of the express provisions of section 93(3) and (4) of the Land Registration Act, if there ultimately be a finding by the trial Court that no consent was obtained then the transaction has to be declared void."

[23] I note that quite a robust rebuttal was made herein by way of the Respondent's Replying Affidavit and submissions that **Section 93** of the Land Registration Act, as read with **Section 28(a)** thereof, and **Section 79(3)** of the **Land Act**, is in connection with "**matrimonial dwelling houses**" which the Suit Properties are not; and therefore the Respondent was under no obligation in **2013** to seek or obtain spousal consent, or to make an inquiry in that regard. However, as pointed out hereinabove, these are issues in contest that would best be resolved at the trial and not on the basis of affidavit evidence. Indeed, in a somewhat similar situation in **Shah vs. Padamshi [1982] eKLR**, the Court of Appeal held that it is inadvisable for the Court to prefer one affidavit over another:

A party who contends that he did not receive a particular letter by post can do no more than to deny the receipt of it, and bare though the denial appears by itself, it is capable of raising a triable issue. As the situation stood, with respect, the judge failed to note that a triable issue existed. He was also in no position to hold that the appellant "in fact" received the notice. If he meant to say the appellant must have received the notice, he should have said so, and said what he meant with the reasons for his opinion. Except in the clearest of cases, which this one was not it is inadvisable for the court to prefer one affidavit to another... A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial.

[24] In the premises, I am satisfied that the Plaintiff has indeed demonstrated that she has a right under **Section 93** of the Land Registration Act **which has apparently been infringed by the Defendants" ...as to call for an explanation or rebuttal from the latter..."** within the definition of a prima facie case provided in **the Mrao Ltd Case** above.

[25] As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. In **Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207** for instance, **Ringera, J.** (as he then was) held as follows at page 216:

"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

[26] Similarly **Warsame, J.** in the case of **Joseph Siro Mosioma V Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR** held as follows:-

"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

[27] *The same position was taken by Warsame, J. (as he then was) in Sharok Kher Mohamed Ali &*

Another vs. Southern Credit Banking Corporation [2008] eKLR thus:

"I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)"

[28] As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in **Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004** is instructive that:

"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties."

[29] Moreover, it is imperative that the Court opts for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' ..."

[30] In the instant matter, the path leading to the lower risk of injustice would be to stop the impugned auction pending the hearing and determination of the Applicant's case. Accordingly, I find merit in the Plaintiff's application and would grant orders in his favour in the following terms:

[a] That pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendant/Respondent and/or its agents from selling, transferring, disposing of, interfering with and/or in any other manner whatsoever altering or dealing with the suit properties known as Apartment Numbers 409, 509, 608, 709, 800, 809, 900, 908,909, 1000, 1001, 1008, 1009, 1100, 1101, 1108, 1109, 1200, 1208 and 1209 erected on a portion of Land Reference Number 209/19835, Nairobi (the Suit Properties).

[b] That the costs of the application be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2017

OLGA SEWE

JUDGE