



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 2 OF 2016

MARY NYAMBURA KINYANJUI NJEHIA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED..... DEFENDANT

RULING

Before the court is an application by **Mary Nyambura Kinyanjui Njehia** brought under Certificate of Urgency and dated 15th January 2016.

It is brought under the provisions of **Order 40** of the **Civil Procedure Rules** and **Sections 3A, 1A, 1B of the Civil Procedure Act**. It seeks the following Orders:

1. Spent
2. Spent
3. That pending the hearing and determination of this suit this Honourable court be pleased to restrain the Respondent by its agent, servants, employees and/or any other person exercising authority from it from advertising for sale, selling, disposing off, transferring, alienating and/or in any other manner interfering with the applicant's quiet use, possession and/or occupation for land **Parcels No Bahati/Bahati Block 1/871 and Bahati Block/1/872**.

The Applicant swore an affidavit on the 15th January 2016 in support of her application and upon grounds stated on the face of the application, among them that, she is a beneficial owner of the two properties being matrimonial properties, that the said properties were charged to the Respondent, **National Bank of Kenya** without her knowledge to secure financial facility by her husband on behalf of **Tulip Collections Limited**.

The applicant states that she only came to learn of the charge when the chargee issued a notification of sale of the properties after the chargor defaulted in payments through Sadabbri Auctioneers and that the sale is scheduled for the 21st January 2016. It is her further ground that the charge upon which the sale arises from is invalid for non compliance with the law and that she stands to suffer irreparably if the properties are sold as they form her home.

In her supporting affidavit, the applicant confirms that she is the wife of Davis Nyanjui Njehiah who is a Proprietor and Director of Tulips Collections Limited where she has matrimonial and legal shares and interests, and that she is aware of facts and circumstances leading to these proceedings, that she does not remember executing spousal consent to have the properties charged and actually denies executing such

consents.

Further, it is her deposition that there is no current valuation report to ascertain current market values of the properties now advertised for sale which is a legal requirement.

She avers that the properties house a college, and a school and the intended sale would greatly prejudice the rights to education and welfare of humanity and would leave her family without a home. She also terms the respondents actions as premature and urges this court to exercise its discretion and forestall the intended sale scheduled for 21st January 2016.

In his submissions, Advocate for the applicant, Mr. Mukira reiterated the averments in the applicants supporting affidavit and only added that the applicant was informed of the intended sale on the 14th January 2015 by her husband Davis Njehia Nyanjui. He submitted that at the point of perfection of the charge documents the applicant's consent was not sought in respect of the two properties and therefore the charge is invalid by virtue of non compliance with the law.

On the Replying affidavit sworn today by the Respondents Nakuru Branch Manager one Mary Talam, he submitted that spousal consent was obtained in one property **Bahati/Bahati Block 1/871** and not in **Block 1/872** her matrimonial home and that the applicant was not accorded an opportunity nor explained the effects in law in regard to the spousal consent.

In reference to a ruling made by this court in **Nakuru HCCC No. 22 of 2015** on the subject matter and same properties on the 17th September, 2015, it was his submission that the issues raised in the application under review are not *Res Judicata*, and urged the court to allow the application.

The application is opposed and a Replying affidavit sworn today the 20th January 2016 by the Respondent's Nakuru Branch Manager.

Mr. Kiburi advocate for the Respondent urged the court that the applicant being a Co-director of Tulip Collections Limited with her husband Davis Nyanjui Njehia cannot plead ignorance, that she voluntarily executed spousal consent and even offered and executed a personal guarantee to guarantee payment of the loan facility granted to the company. It was submitted that the applicant in her affidavit she swore on the 14th October 2013 before an advocate, that the subject properties were not matrimonial properties and therefore she ought to be cited for perjury. Mr. Kiburi referred the court to an earlier case being **Nakuru HCCC No 22 of 2015** where all the issues in this application were raised and adjudicated upon, and a ruling delivered on the 17th September 2015. He urged that the said ruling determined all the issues herein, and that this application is brought in bad faith and is yet another attempt to forestall sale of the charged properties and that it does not meet the legal requirements as enunciated in **Giella -vs- Cassman Brown** Case. He urges the court to dismiss the application.

The court has considered issues raised in the application and the responses tendered by the Respondent, together with the ruling delivered by this court in **HCCC No. 22 of 2015 on the 17th September 2015**, being a matter substantially and directly similar to the current application. There is no doubt that the properties in issue in this suit and application were also subject in the earlier case **NKU HCCC 22 of 2015, between Davis Nyanjui Njehia t/a Davis Academy & Tulips Collections Ltd as applicants and National Bank of Kenya Limited as Respondent**. As stated earlier the issues raised are the same ones raised in the said suit, that is

1. **Validity of the charges over the suit properties**
2. **Matrimonial Properties**
3. **Statutory Notices under the Land Act, 2012 and Auctioneers Rules**
4. **Recent valuations of the charged properties.**

Suffice to state that this court will not go into details once again in interrogating and answering the above issues, and I believe they are ably analysed and determinations given. The court urges the parties to obtain and apply the ruling on the above issues as stated by the court on the 17th September 2015 in the said Ruling.

Briefly I shall revisit the courts determination as hereunder:

1. **Validity of charges:** In the applicants affidavit and spousal consent dated the 30th May 2014 the applicant stated, in the presence of her advocates, that she understood the purport of the chargees rights and she unconditionally and irrevocably granted her authority and consent to have the properties charged to the Respondent. She further executed a personal guarantee and indemnity. See **Paragraph 12** of the ruling delivered on the **17th September 2015**.
2. On the spousal consent dated 14th October 2013, the court made a finding that the applicant voluntarily executed the spousal consent and in the affidavit sworn on same date avered that title **Bahati/Bahati Block 1/872** forms part of her matrimonial property, and gave it out with full knowledge that the property was matrimonial property. See Paragraph 13 of the ruling.
3. On recent valuation, the court made a finding that the valuation undertaken on the properties on the 13th May 2014 was current for purposes of the then intended sale. I shall hold once more that the said valuation is still current and represents a fair valuation of the properties. The applicant did not submit on this issue.

An issue was raised by the applicant herein that in **HCCC No. 22 of 2015**, the applicant was not a party and therefore the doctrine of *Res Judicata* cannot be applicable.

Section 7 of the Civil Procedure Act states:

“That no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

I have stated above that the suit properties hereof are among the suit properties in the earlier suit and the application therein sought exactly same reliefs upon same grounds.

In **HCCC No. 22 of 2015**, the plaintiffs and applicants were **Davis Nyanjui Njehia t/a Davis Academy**, admittedly the husband of the applicant in this suit. The second plaintiff Tulip Collections Limited is a Limited Liability Company where in her own admission in her affidavits sworn on 14th October 2013 on the 15th January 2016 that she is a co-director with her husband Davis Nyanjui Njehia.

In all documents executed towards perfection of the charges, upon the suit properties, the applicant Mary Nyambura Kinyanjui Njehia voluntarily executed the same as a director of the company, and in particular the charges created upon the suit properties on the 14th October 2013.

The above clearly confirms that the applicant in this suit was and is an active party and participant in the proceedings in **Nakuru HCCC No. 22 of 2015**.

In its totality, this application being over the same issues, properties, same reliefs and same parties that have already been adjudicated upon in the application dated 26th March 2015 in **HCCC No. 22 of 2015**, by a competent court and a final decision made on the similar application is caught up by the doctrine of *Res Judicata* – under **Section 7 of the Civil Procedure Act**.

To that extent, this court is barred from trying the application as all issues directly substantially in issue in the application have been substantially dealt with and a final decision reached vide the Ruling on 17th September 2015 in **Nakuru HCCC No 22 of 2015**.

Consequently, the court finds the application dated 15th January 2016 without merit, an abuse of the court process and is *Res Judicata*. The orders of injunction are denied. It is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 20th day of January 2016

JANET MULWA

JUDGE