



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 225 OF 2015

EVANS NYAUNCHO OSINDE.....1ST PLAINTIFF

MERCY MUKWANYAGA NYAUNCHO.....2ND PLAINTIFF

VERSUS

BANK OF AFRICA (KENYA) LIMITED.....DEFENDANT

RULING

1.The plaintiffs by a Notice of Motion application dated 29th June 2015 seeks an order of temporary injunction against the defendant prohibiting the defendant by itself and/or its servants and/or agents from disposing, alienating or in any manner dealing with land parcel **Ekerubo Settlement Scheme/182** and **184** pending the hearing and determination of the suit.

2. The plaintiffs premise their application on the grounds set out on the body of the application and on the supporting affidavits sworn by the 1st and 2nd plaintiffs dated 29th June, 2015. The defendant in opposition to the plaintiffs' application filed a replying affidavit sworn by one Monica Kamau, a Recoveries Assistant on 3rd July 2015. The parties further canvassed the application by way of written submissions.

3. The plaintiffs are husband and wife and the 1st plaintiff is the registered owner of land parcels **Ekerubo Settlement Scheme/ 182** and **Ekerubo Settlement Scheme/184** (hereinafter referred to as "the suit property"). The 1st plaintiff as per the plaint dated 29th June 2015 avers that he in the year 2011 at the request of one Jared Mokuia Nyariki a customer of the defendant agreed to guarantee him some banking facilities with the defendant bank and in that respect executed legal charges over the suit properties in favour of the defendant. The 1st plaintiff however avers that he executed the legal charges over the suit properties following what he states was misrepresentation by the defendant and acts of negligence on the part of the defendant in failing to properly and/or adequately assess the suitability and ability of their said customer to service the loan advance. The 1st plaintiff asserts that the defendant failed to take additional security from their customer as they had represented they would and further failed to act prudently thus exposing the 1st plaintiff's charged securities to risk. The 2nd plaintiff avers that she contributed towards the purchase and development of the suit properties and that is where she resides with her children. The 2nd plaintiff thus claims she has an equal share in the suit property and that the 1st plaintiff holds the property in trust for her and her children. The 2nd plaintiff further asserts that the defendant cannot be entitled to realize the securities over the suit land as that would prejudice her proprietary interest and rights over the properties.

4. The plaintiffs by the plaint seek orders of injunction restraining the defendant from disposing, alienating or in any manner dealing with the suit properties. The 2nd plaintiff prays for a declaration that she is a joint owner of the suit properties and further the plaintiffs seek cancellation of the legal charges registered against the suit properties and the guarantee executed in favour of the defendant by the 1st plaintiff.

5. The 1st plaintiff in his affidavit in support of the application avers that the defendant's customer Jared Mokuia Nyariki was, in addition to the securities that the 1st plaintiff was to offer by way of guarantee to the borrowing by the customer from the defendant, supposed to give additional securities comprising his developed land a Nyasiongo and Letein Townships and two of his lorries being KAZ 476V and KAW158G. The borrower did not offer the additional securities and the 1st plaintiff states the defendant was negligent in failing to take the additional securities from the borrower with the result that the 1st plaintiff's properties offered as security were exposed to loss in the event the borrower failed to service the loan.

6. The 2nd plaintiff in her affidavit sworn in support of the application, states that she married the 1st plaintiff in 1986 and that they have 7 children out of the marriage and have resided at Ekerubo Settlement Scheme since then. The 2nd plaintiff avers that she made financial contributions towards the purchase and development of the suit properties though the properties were registered solely in her husband's name for convenience. The 2nd plaintiff states that she recently learnt her husband had charged the suit properties to secure funds lent to Jared Mokuia Nyariki and that the defendant is threatening to auction the charged properties as per the notification of sale dated 19th June 2015 received by the 1st plaintiff on 22nd June 2015 annexed and marked "MMN-1". The 2nd plaintiff avers that sale of the charged property by auction would cause irreparable loss/damage to her and her family would be rendered destitute.

7. The defendant in response by way of the replying affidavit sworn by Monica Kamau avers that they granted one Jared Mokuia Nyariki ("the borrower") Banking facilities in the aggregate sum of kshs. 13,500,000/= on the terms and conditions set out in the offer letter dated 24th February 2011 subsequently conditionally restructured vide letters dated 22nd March 2011 and 8th May 2012 (Letters annexed and marked **MK1**, **MK2** and **MK3** respectively. The banking facilities were interalia to be secured by charges over title numbers **Ekerubo Settlement Scheme/182** and **Ekerubo Settlement Scheme/184** registered in the name of the 1st plaintiff. Evans Nyauncho Oside. The 1st plaintiff duly executed a charge over land parcels **Ekerubo Settlement Scheme/182** and **184**. The copy of the charge dated 11th May 2011 is annexed and marked "MK4". The 1st plaintiff further executed a guarantee and indemnity in favour of defendant for the loan amount dated 13th May 2011 a copy whereof is annexed and marked "MK5". The defendant avers that the 1st plaintiff was fully aware of the duties and obligations of being a chargor and guarantor and further contends that the plaintiffs have no basis whatsoever to obstruct the defendant from realizing its securities after its right to do so has arisen. The defendant asserts that the securities were taken before the new land laws were enacted and there was no requirement for spousal consent at the time and hence the 2nd plaintiff's claims and prayers are not sustainable.

8. The defendant avers that the borrower, Jared Mokuia Nyariki defaulted in making the monthly instalments when they fell due and due demand and notification was made to the borrower and the guarantor on 13th November 2012 which elicited no positive response. The defendant states that a formal demand for payment was made to the borrower and the guarantor vide letter dated 27th November 2012 which again did not elicit any positive response that the borrower and the guarantor were issued with the requisite statutory notice dated 24th March 2014 annexed and marked "MK8(a) and (b)". After the borrower and the guarantor failed to pay the debt in terms of the statutory notice the defendant on 10th February 2015 issued the 1st plaintiff and the borrower with a notice to sell the charged property in terms of the registered charge. The copy of the notice to sell dated 10th February 2015 is annexed and marked together with the certificates of postage as "MK9 (a) and (b)". The defendant further avers the guarantor was served a redemption notice on the 27th April 2015 as required under the law and contends that the

applicants have no justifiable cause to warrant the grant of an injunction restraining the defendant from exercising its statutory power of sale as conferred under the charge. It is contended by the defendant that the defendant's application lacks any merit and that the same ought to be dismissed.

9. The parties canvassed the application dated 29th June 2015 by way of written submissions. The plaintiff/applicants filed their submissions dated 27th July 2015 on 4th August 2015 while the defendant/respondent filed its submissions dated 15th November 2015 on 16th November 2015. The plaintiffs filed further submissions dated 30th November 2015 on 2nd December 2015 in reply to the respondent's submissions. Having reviewed the pleadings, the application and the affidavits in support and in opposition and the parties submissions the issue for determination is whether the applicants have satisfied the conditions for grant of a temporary injunction to warrant the court to exercise its discretion to grant such an injunction.

10. The principles upon which an interlocutory injunction may be granted are now fairly settled and the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** remains the leading authority. The case laid the conditions that an applicant for a temporary injunction must satisfy as follows:-

- i. **That the applicant must demonstrate a prima facie case with probability of success;**
- ii. **That the applicant must show that he/she might suffer irreparable injury unless the injunction is granted; and**
- iii. **Incase there is doubt the application may be determined on consideration of the balance of convenience having regard to the circumstances.**

11. In the present matter it is not denied that the 1st plaintiff executed legal charge over title numbers **Ekerubo Settlement Scheme/182 and 184** to secure the principal sum of kshs. 6 Million advanced by the defendant to the borrower together with interest, costs and other charges as stipulated in the charge. The 1st plaintiff also separately executed a guarantee and indemnity to secure the payment by the borrower of the principal sum of kshs. 13,500,000/= together with interest and other expenses and charges as stipulated in the guarantee and indemnity dated 13th may 2011. The 1st plaintiff however avers he was duped into executing the legal charge and the guarantee as the defendant misrepresented to him that the borrower was to give additional securities to secure the facilities which the borrower failed to do and the defendant failed to ensure the additional securities were taken/given. The 1st plaintiff states the defendant in that regard acted negligently which resulted in the 1st plaintiff's charged properties being exposed to undue risk in the event the borrower was unable to pay the loan.

12. The defendant refutes the 1st plaintiff's averments and states that the defendant as is evident from the annexed letter of offer and the letter dated 8th May 2012 held other securities notably a legal charge over **LR No. Kericho/Kipchimchim/5208** for kshs. 4,500,000.00 and chattels mortgage over motor vehicles KAZ 476Y and KAW 158H for kshs. 2,500,000/=. The defendant asserts the 1st plaintiff clearly knew the obligations placed on him as chargor and guarantor when he executed the instruments. By executing the charge over the suit properties the 1st plaintiff was committing himself to ensure the loan was paid by the borrower and/or by himself incase the borrower failed to pay. The charge instrument was clear on what would constitute acts of default under the charge under clause 9 and in the event of default the bank (defendant) would be entitled to enforce the charge in the manner as outlined under clause 11 of the charge which includes the right to exercise its power of sale as stipulated under clause 11.4 of the charge provided the right to exercise the power of sale has accrued and the requisite notices have been given. By executing the guarantee and indemnity the 1st plaintiff was unequivocally binding himself to pay and/or to ensure the debt by the principal debtor was fully paid. As per the guarantee the limitation of liability of the guarantor is the principal sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000/=) to which interest, fees, commissions, costs, charges and expenses were to be added.

13. The defendant has demonstrated that there was default in payment of the loan by the principal debtor

and the guarantor and that the requisite demand for payment of the sum outstanding in arrears was made. Further the defendant issued to the principal debtor and the chargor the requisite statutory notice and gave notice of intention to sell the charged property in accordance with the charge and the appropriate provisions of the law. The notice and the intention to sell are not disputed by the 1st plaintiff.

14. The charge over the suit properties was registered on 16th May 2011 which was before the new land Acts namely, the **Land Registration Act No. 3 of 2012** and the **Land Act No. 6 of 2012** came into force. The **Land Registration Act No. 3 of 2012** which came into force on 2nd May 2012 repealed the Registered Land Act, Cap 300 Laws of Kenya under which the suit properties were registered. By virtue of section 106 of the **Land Registration Act, 2012** the charges that had been registered before the Act came into force were to be construed and enforced in accordance with the law that was applicable to the parcel of land before the registration of the new Act.

Section 106 of the Land Registration Act provides:-

1. On the effective date, the repealed Acts shall cease to apply to a parcel of land which this Act applies.

2. Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts.

3. For the avoidance of doubt-

a. Any rights, liabilities and remedies shall be exercised and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act; and

b. The memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the act under which the memorandum was first registered

4. Notwithstanding this section, any notice in writing required to be served under the repealed Acts upon any of the parties under any mortgage, charge, memorandum of equitable mortgage or memorandum of charge by deposit of title may be served in accordance with this Act, and such service shall be deemed to be effective for all purposes.

15. Quite clearly Section 106 of the Land Registration Act 2012 (as above) validated all charges and mortgages that had been taken before the coming into force of the new Act. It is a transition provision that saves all the prior charges and stipulates that such charges and/or mortgages would be construed having regard to the law under which they were registered. Under the **Registered Land Act**, Cap 300 laws of Kenya under which the subject charge over the suit property was registered there was no requirement for spousal consent which the new Land Act No. 6 of 2012 under the provisions of Section 79 (3) requires to be given in regard to charges relating to matrimonial homes. The 2nd plaintiff states she contributed to the purchase and development of the suit properties and thus she has an overriding interest over the suit property which the repealed Act recognized under Section 30 and is presently expressly recognized under Section 28 of the **Land Registration Act 2012**. Besides the 2nd plaintiff contends she did not give her consent to the charge stating that she only came to know about the charge when a notification of sale by public auction was issued. She submits the suit property constitutes matrimonial property to which she made her contribution and thus her interest in the property should be recognized and safeguarded.

16. The suit properties as acknowledged and admitted by all the parties was as at May 2011 when the charge was taken registered in the name of the 1st plaintiff under the **Registered Land Act**, Cap 300

Laws of Kenya. As the registered owner of the suit properties, the 1st plaintiff had absolute rights to deal with the property. In terms of Sections 27 and 28 of the **Registered Land Act** he was the absolute owner and his rights were indefeasible save as provided under the Act. Section 27 (a) of the **Registered Land Act** provides:-

27. Subject to this Act –

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Section 28 provides:-

28. The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject to a trustee.

17. In the present matter the Bank dealt with the 1st plaintiff as the registered absolute proprietor of the suit properties as they were entitled to do and there was no encumbrance that was noted in the register that would have placed them on inquiry. There is no doubt the 1st plaintiff executed the charge. The letter of offer itemized the securities that were to be taken which included the suit properties. The 1st plaintiff duly executed the letter of offer in acceptance of the terms thereof. He definitely knew the purport of the charge that he subsequently executed and this knowledge is fortified by the fact that he even went on to execute a guarantee and indemnity. I do not accept the view that the 1st plaintiff was misled when he signed both the charge and guarantee. There is no proof or evidence of any misrepresentation and my view is that the plaintiffs are clutching on supposed misrepresentation in a bid to deflect the defendant from its efforts of enforcing its security which it validly obtained to secure the lending to the borrower.

18. The operative law at the time the 1st plaintiff offered the suit property as security was the **Registered Land Act**, Cap 300 Laws of Kenya and there was no requirement for spousal consent even where it was the matrimonial home that was being charged. The **Land Registration Act, 2012** and the **Land Act 2012** in my view did not have retrospective operation such that they invalidated any charges that had been validly and properly taken before the said Acts became operative. Under the transitional clauses the prior charges were validated and all that was required under the law was that appropriate notices relating to enforcement be given in accordance with the new Acts in terms of Sections 90 and 96 of the **Land Act No. 6 of 2012**.

19. The plaintiffs have argued forcefully that the 2nd plaintiff had an overriding interest over the suit property. She being the wife of the 1st plaintiff and having made contribution towards the purchase of the suit properties and her not having consented to the charge over the property it is submitted she has a prima facie case to warrant the grant of a temporary injunction to enable the suit to be heard and determined on merits. The issue to determine in regard to the question whether or not the bank ought to have considered whether or not there could be persons, such as the 2nd plaintiff who had any overriding

interests over the suit property before taking the charge in my view remains relevant even though the 1st plaintiff held absolute title over the properties which conferred absolute rights of ownership to him. The law as it then existed provided that once the charge was registered the registered owner would hold the land subject to such charge. Kamoni, J (as he then was) in the case of **Republic –vs- Chairman Land Disputes Tribunal Kirinyaga District & Another ex parte Kariuki [2005] 2KLR pg 10** while considering what amounts to overriding interests under the previous Section 30 of the **Registered Land Act**, cap 300 Laws of Kenya observed as follows:-

“Overriding interests are interests inferior not only to ownership or proprietorship but also to interests like leases and charges and are interests that can also be terminated by either party or both following the correct law and legal procedure.”

20. In the present case following the registration of the charge against the suit property the rights conferred on the chargee by the charge crystallized and could not seemingly be defeated by the unregistered interests that the 2nd plaintiff claims. Once the charge was registered the chargor could only be discharged from the obligations imposed by the charge upon full payment of the debt secured under the charge whereupon the chargee would execute a discharge of the charge. The 1st plaintiff apart from the charge also executed a guarantee committing himself to pay the entire debt amount should the principal debtor default in payment. From the material furnished by the parties it is apparent the process of perfecting the securities took some time and the 1st plaintiff even admits attending a meeting at the defendant’s offices with the principal debtor where the terms of the lending were discussed. I find no proof of any fraud or misrepresentation on the part of the defendant in order to procure the 1st plaintiff to execute the charge and the guarantee. All indications point to the 1st plaintiff voluntarily executing the instruments which at any rate were executed by him before an advocate who it is expected explained to him the content and nature of the instruments.

21. The rights, liabilities and remedies provided for under the charge are enforceable in accordance with the law that was applicable to the parcel of land immediately before the registration of the land under the **Land Registration Act, 2012** as provided under Section 106 of the said Act. Section 162 (1) of the **Land Act No. 6 of 2012** provides that the rights, actions and dispositions acquired under the repealed Acts would continue to be governed under those laws. Section 162 (1) of the Land Act provides:-

162(1) Unless the contrary is specifically provided this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

22. The enactment of the new land laws did not therefore affect the rights and interests that had accrued under the repealed Acts and equally the enforcement of any rights, liabilities and remedies remained as provided under the repealed Acts where the instruments conferring the rights, interest, liabilities and remedies were under those Acts. The defendant’s rights and interest accrued under the charge registered prior to the repeal of the Registered Land Act, Cap 300 Laws of Kenya and in terms of the transitional provision under Section 162 (1) of the **Land Act, 2012**, the applicable law in construing the charge in regard to the accrual of any rights, interest and liabilities and the enforcement thereof remains the **Registered Land Act**, cap 300 Laws of Kenya (repealed).

23. Having reviewed all the material placed before the court and the submissions made by the parties, I am not persuaded the plaintiffs have demonstrated they have a prima facie case with a probability of success. However, I am alive to the fact that our law since the inauguration of our 2010 Kenya Constitution has been under a constant state of development. The assertion by the 2nd plaintiff that she contributed to the purchase and development of the charged properties and that she has an overriding interest over the suit properties which the court should recognize and further that she is in active occupation and has lived in the suit properties since she was married to the 1st plaintiff in 1981 creates doubt in my mind whether she will not indeed suffer irreparable harm if I was to decline to grant the order of injunction. The 2nd plaintiff being a teacher by profession may well have contributed to the purchase

of the properties and their development and in a sense she may be right that she is entitled to a share of the suit property. There is no indication that the defendant bank visited the suit property before they took the charge. If they did they would have verified whether the 2nd plaintiff and her said 7 children of the marriage were in physical occupation of the properties the subject of the charge. The plaintiff referred the court to the case of **Williams & Glyn's Bank Ltd -vs- Boland [1980] 2 ALL ER 48, HL** where the House of Lords dealing with a somewhat similar case held that a wife's equitable interest in a matrimonial home which was in her husband's sole name was an overriding interest under the **English Law of Property Act, 1925**, as long as she was in occupation. In the case **Lord Denning MR** rendered himself as follows:-

“Once it is found that a wife is in actual occupation, then it is clear that in the case of registered land a purchaser or lender would be well advised to make inquiry of the wife. If she then discloses her rights, he takes subject to them. If she does not disclose them, he takes free of them. I see no reason why this should cause any difficulty to conveyancers. Nor should it impair the proper conduct of business. Anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wife may have a share in it. He ought to make sure that the wife agrees of it, or to go to the house and make inquiries of her. It seems to me utterly wrong that a lender should turn a blind eye to the wife's interest or the possibility of it and afterwards seek to turn her and the family out – on the plea that he did not know she was in actual possession. If a bank is to do its duty, in the society in which we live, it should recognize the integrity of the matrimonial home. It should not destroy it by disregarding the wife's interest in it, simply to ensure it is paid the husband's debt in full, with the high interest rate now prevailing. We shall not give monied might priority over social justice.”

24. It does appear the same concerns that the society in England experienced in the 1970's are the same concerns we as Kenyans sought to address in 2012 when spousal consent over charges taken on matrimonial property was made a requirement. This development did not blossom over-night but had a history. In the instant case the parties are caught at a cross road where the law transcends from the old order to the new order. The new land laws were a direct consequence of 2010 Kenya Constitution which demanded a new legal order in as far as the administration of justice was concerned. The constitution particularly called for land reform with a view of addressing the historical land injustices that had bedeviled the land sector. The court cannot be impervious to what happens in society and in the present case cannot ignore the possibility that indeed the 2nd plaintiff who is the 1st plaintiff's wife could in fact have a superior interest in the matrimonial home than the 1st plaintiff. The balance of convenience tilts in favour of the plaintiffs.

25. Hence even though I have held that the plaintiffs have not in my view demonstrated a prima facie case with a probability of success I cannot say the plaintiffs' case is frivolous or vexatious. Their case is indeed arguable and having regard to all the attendant circumstances, I feel constrained to grant the order of injunction so that the suit property is preserved until the suit is heard and determined on its merits. I will grant the order of injunction on the terms of the Notice of Motion dated 29th June, 2015 as prayed under prayer (3), that the parties shall complete their pretrial directions within 60 days from the date of this ruling and thereafter the suit will be fixed for hearing on a priority basis. The costs of the application shall be in the cause.

26. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 11th day of March, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the 1st and 2nd plaintiffs

..... for the defendant

J. M. MUTUNGI

JUDGE