



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI
CIVIL SUIT NO. 132 OF 2015

NANCY WANJIRU RICHU..... FIRST PLAINTIFF
ANNE NJOKI RICHU.....SECOND PLAINTIFF
CAROLINE NGINA RICHU..... THIRD PLAINTIFF
MARY WANJIRU RICHU FOURTH PLAINTIFF

VERSUS

JOHN NJENGA NJOROGE.....FIRST DEFENDANT
SIMON RICHU MWANGI.....SECOND DEFENDANT
CO-OPERATIVE BANK OF KENYA LTD..... THIRD DEFENDANT
THE HON. ATTORNEY GENERAL FOURTH DEFENDANT

RULING

1.The Application before the Court was first brought before the Environment and Lands Court. That was not the correct Division and it was transferred to this Division on 12th March 2015 by Hon. Lady Justice Nyamweya.

2. There are numerous parties. The Plaintiff/Applicants are:-

1. Nancy Wanjiru Richu
2. Anne Njoki Richu
3. Caroline Ngina Richu
4. Mary Wanjiru Richu

And the Defendants/Respondents are:-

1. John Njenga Njoroge

2. Simon Richu Mwangi
3. Co-operative Bank of Kenya Ltd
4. Hon. Attorney General

Notwithstanding the long list of Parties, the only Parties who have participated actively have been the Fourth Plaintiff the Second Defendant and the Third Defendant. The First and Fourth Defendants have not participated at all.

3. The Application is by Notice of Motion dated 18th February 2015 and filed on 20th February 2015. The matter first came before the ELC on 23rd February 2015 and it was certified as Urgent by Mutungi J. As stated it was transferred to this Division on 10th March 2015 and was eventually listed for Mention on 9th June 2015. On that day it became clear that the First Defendant had not been served. The matter was listed for further directions on 16th June 2015 but did not come before the Court until 19th June 2015. On that date the First Defendant had still not been served. An Order for Alternative Service by Advertisement was made and the matter re-listed. On 19th June 2015 only the Advocate for the Plaintiffs attended. The First Defendant had not entered an appearance. The Second Defendant was not represented, the Third Defendant's counsel was not present but an Advocate holding Brief attended. The Fourth Defendant has not participated. In the circumstances the matter was listed for hearing on 30th July. On 30th July 2015 the Plaintiff did not wish to proceed but requested the matter to proceed on Written Submissions with highlighting on 5th October 2015. On that date the Parties were still not ready to proceed and the matter was listed again on 12th October 2015.

4. The Notice of Motion is brought under “**Order 40 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules** as read together with **Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya**.”

5. The Application seeks order that:

1) This application be and is hereby certified urgent and the same be heard ex-parte in the first instance.

2) This Honourable Court be pleased to issue an order restraining the Third defendant either by itself, servants or its agents from selling or any way disposing of the suit property being land reference Number Komothai/Kiratina/1577 until the final determination of this suit or further orders of this court.

3) Costs of this application be provided for in any event.

6. The Grounds relied upon in the Application are that:

a. The 2nd Defendant, who is the husband of the Plaintiff is the registered proprietor of all that parcel of land known as L.R. NO. Komothai/Kiratina/1577 otherwise known as the suit property.

b. The 1st Defendant fraudulently obtained a loan from the Second Defendant which the Plaintiff either by fraud or mistake guaranteed a charge on the suit property.

c. The 2nd Defendant negligently allowed the First Defendant to obtain a loan from it after obtaining a purported consent from the Githunguri Land Control Board through a special. (sic)

d. The 1st Defendant has defaulted in the repayment of the loan and the 2nd Defendant has issued notice of its intention to exercise its statutory power of sale among other remedies.

e. Unless this application is heard expeditiously the 2nd Defendant (sic) is likely to carry out its threat in which event the Plaintiffs are likely to suffer irreparable.(sic)

7. The Supporting Affidavit is sworn by the Fourth Plaintiff on behalf of herself and the other three Plaintiffs. She confirm that the Second Defendant is the Registered owner of Land Reference Number Komothai/Kiratina/1577 (hereinafter referred to as the “*suit property*”). She says at Paragraphs 4 that she was asked attend the offices of a lawyer in January 2014 at Old Mutual Building in Nairobi where the Secretary gave her a document to sign. The contents were not explained to her, she says. She says she is “little educated” and did not know the nature of the documents she signed.

8. At paragraph 6 of the Supporting Affidavit she says that one of her children came across the Letter from the Third Defendant and she has exhibited that Letter as **Exhibit-MWR3**. She says that was in August 2014. However, the Letter at **Exhibit-MWR-3** is dated 15th December 2014 and stamped on 17th December 2014 so is unlikely to have been in existence in August 2014. It records that there are arrears and default in payment and states that the liabilities are secured on the Suit Property. The Letter then states that under Section **90(3) of the Land Act 2012** it shall; “*exercise any of the following remedies file a suit for money due and owing*”

- Appoint a receiver of the income of the charged property.
- Lease the changed land or if the charge is of a lease, sublease the land
- Sell the charged property”

The closing paragraph of that letter states; “*FURTHER NOTE that pursuant to the provisions of Section 90(2) (e) and 103 of the Land Act, 2012 you are at liberty to apply to the Court for any relief that the Court may deem fit to grant against the Banks remedies*”.

9. At paragraph 10 the deponent states that she was shocked to find out that she had given her spousal consent to the charge of the suit property. She refers to **Exhibit MWR-4**. That Exhibit appears to be the Offer Letter from the Bank to the First Defendant Borrower. At page 6 is a Section entitled “*ACCEPTANCE*”. That Section has been signed by the Borrower- John Njenga and Simon Richu Mwangi (the Second Defendant). The Advocate who witnessed the signatories is identified by his seal as F.W. Ngunjiri of P.O. Box 1127-20117 NAIVASHA. The same Advocate witnessed the signature of the First and Second Defendants, certified that on 5th January 2014 the Fourth Plaintiff appeared before him and acknowledged the above signature as hers and that he/she had freely and voluntarily executed this instrument and its contents. An identical Acceptance and Spousal Consent Form appears at the last page of **MWR-4**.

10. The letter dated 20th August 2014 does appear at Exhibit **MWR-7**. That letter is a demand for payment of outstanding liabilities of the First Defendant Borrower. The Deponent also states that she was not invited to attend any Land Control Board meeting. She says she later discovered no such meeting took place.

11. Paragraph 17 of the Supporting Affidavit states

“17. I now understand that the Third Defendant with a statutory notice to sell the suit property which sale is due after 15th March 2015”.

There is no reference to the date of any specific document or letter and there is no exhibit setting out the information of that, nor indeed any date for a sale..

12. Neither the First nor Fourth Defendants have participated. The Third Defendant has filed a Replying Affidavit on 19th March 2015. The Deponent of the Replying Affidavit is a Joseph Irungu who describes himself as the Third Defendant’s Recoveries Officer duly authorized by the Third Defendant’s Board of Directors to swear the affidavit. The Affidavit contains a mixture of fact, law and opinion. The Deponent seeks to argue the entire suit rather than the Application. The parts that are of relevance to the

Application include:-

i. Paragraph 6 which states:

“The 4 Plaintiff read and understood the terms of the Letter of offer and subsequently executed the same in the presence of an advocate stating that she has issued her spousal consent for a charge to be registered over her property as security.”

ii. Paragraph 8 which merely repeats the contents of a document already produced and states:

“It is key to note that the Fourth Plaintiff read and understood the spousal consent in the charge and executed the consent whose terms were:

a. I have full knowledge of this Charge

b. I understand the nature and effect of this Charge

c. Neither the chargeor (being the Fourth Plaintiff’s husband/Second Defendant) nor the Bank (the Third Defendant) have used any compulsion or threat or exercised undue influence on me to induce me to execute this agreement,

d. I acknowledge that I have been advised to take and have taken independent legal advice regarding the nature, remedies and effect of this charge and understand the nature of this charge and understand the nature of this commercial transaction.

iii. The Fourth Plaintiff therefore had the opportunity to read the charge document, understand the consequence of the Borrower defaulting payment of the loan facility and was further aware that in the event of default the Bank would exercise its statutory power of sale. The Fourth Plaintiff further had the opportunity to seek independent legal counsel on the effect of the charge, which she did and can therefore not renege on the terms of the charge, which bind her. How the Deponent knows that the Fourth Plaintiff did seek and obtain legal advice is not explained.

iv. the Fourth Plaintiff understood the terms of the charge and was aware that the charged property reserved to it the Bank’s right to sell the suit property upon default by the Borrower.

v. In any event, the spousal consent granted by the Fourth Plaintiff is of no consequence to the validity of the charge and the remedies of the Bank. The Certificate of Marriage annexed to the Plaintiff’s document and marked **MRW-1a**, indicates that the Fourth Plaintiff and the Second Defendant celebrated their marriage on 29th March 2014, which is 2 months from the date the Charge was executed and registered being Third January 2014.

vi.Paragraph 15 attempts to quote a legal authority as a fact. In any event, even if the suit property is a family home and matrimonial property, once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.

vii.The Bank, in compliance with the law consequently forwarded to the Guarantor/Chargor by registered mail a Statutory Notice dated 15th December 2014 which notice contained the intention of the bank to exercise its statutory power of sale over the suit property after the expiry of the statutory notice. The Plaintiffs have not disputed receipt of service of the statutory notice and has admitted to being served with the Notice in paragraph 6 of the supporting affidavit.

viii. In view of the above, the application now before court is without merit for the following reasons and he lists:

a. The liability of the Second Defendant as a guarantor is co-extensive with the liability of the

borrower and subsequently arises upon default of the borrower and thus the guarantor is immediately liable to the full extent of his obligations.

b. The contract of the guarantees in the strict sense is ancillary to the contract of the principal debtor and thus the guarantor is a collateral debtor.

c. Further the law governing guarantees and indemnities provides that the Bank is always to claim from the guarantor and not the borrower and so it was incumbent upon the guarantor to prevail upon the borrower to ensure that loan repayments are made promptly. The Law referred to there is not set out expressly, The suggestion is that the Borrower had no liability to repay the loan.

d. The Borrower has defaulted in repayment and the Second Defendant as a Guarantor has equally neglected in the performance of his obligations to ensure the debt the guaranteed is repaid in full.

e. That the arrangements between the First and Second Defendant which have not been evidenced, are not legal grounds on which the Bank should be barred from exercising its statutory power of sale.

f. The *“Fourth Plaintiff by the pleadings before this Court and conduct has not demonstrated by way of bank statements that she is willing to redeem the security.”*. It seems the Deponent has failed to understand the purport of the Application before the Court.

g. That once land has been given as security for a loan, it becomes a commercial commodity that can be adequately compensated. Annexed hereto as **J1-7** is a valuation report.

h. The Second Defendant admits that there is a debt outstanding and has requested the Bank to ignore summons served in the matter Annexed hereto as **J1-8** is a valuation report.

i. The Bank’s right to power of sale has accrued as per **Section 96** of the **Lands Act**.

j. In the premises, an injunction cannot issue where there is a debt due and a statutory notices have been issued. Again, the legal basis for that proposition is not set out.

ix. The Deponent argues that, in view of the foregoing, it is abundantly clear that the Plaintiffs have failed to establish a prima facie case with a probability of success to warrant the granting of an injunction and in the circumstances, the application should be dismissed with costs. As can be seen the Deponent feels able to give evidence on oath as to the state of mind of the Fourth Plaintiff at a given point in time, as well as the state of the law.

13. The Defendants have filed a Replying Affidavits. The Second Defendant on 9th July, 2015 and the Third Defendant on 19th March 2015. The Third Defendant opposes the Application.

14. In his Replying Affidavit the Second Defendant confirms that he is the Registered owner of the suit Property Land Parcel Komothai/1577, he said that he knew the First Defendant because the First Defendant was the Loan Officer at Githunguri Dairy Sacco. He was also a Finances Education Officer for the Sacco who used the Fourth Plaintiff and Second Defendant’s home for training. He records that he was willing to provide a guarantee and security for the First Defendants borrowing from the Third Defendant an certain conditions including that the purpose of the loan was verifiable and the arrangement was to be temporary and it would be replaced with the Land Titles for Limuru/Ngecha/1107. If fact that would not happen because as the Second Defendant subsequently discovered the First Defendant did not own that property and learned from Kiambu Lands Registry that the Title Deed that he was shown was fake and the true registered owner was one Josphat Njoroge Thara.

15. In relation to the change documents they were prepared by M/S Ngunjiri Advocates on the

Instructions of the Third Defendants. The Second Defendant admits that he signed the documents without reading them, to same extent placing his trust in the First and Third Defendants. In relation to the Fourth Plaintiff/Applicant he asserts that she never signed the change document and in particular never signed the spousal consent. He says he believes the signature is a forgery and that the forgery was made by the First Defendant. Again, the grounds for that assertion are not clearly set out.

16. In relation to the Land Board Consent he avers that he was excluded from the proceedings. At paragraph 14 he says; “**THAT** the First Respondent and I went for a special Land Board Consent at Gitunguri whereby I was left outside while the district Officer’s secretary and the First Respondent went into the district officer’s office and the next minute he was out with a fully signed land board consent. On inquiring I was informed that the guarantor was not required in the transaction and the borrower was the necessary party I believed this as true since I had no cause to suspect the same to be untrue.”.

17. The Second Defendant says that the First Defendant disappeared and in November 2014 he discovered he had deserted his work place too. He is alleged to have stolen from the Sacco Members. He then got the Letter informing him of the default.

18. In his Further Affidavit filed on 30th July 2015 the Second Defendant/Respondent confirms that the First Defendant was served by Advertisement.

19. Although Application brought principally by the Fourth Plaintiff contains many inadequacies, it does disclose the Applicant’s concerns and its grounds together with the Orders sought. The Application was brought under a Certificate of Urgency. It prays for an Order preventing the Bank from selling the suit property pending hearing of the Suit. Surprisingly it does not seek an interim order pending hearing of the Application could it be that the Plaintiff’s did not consider the sale to be imminent. The matter was before this Court on 10th March 2015 that is 5 days before “the intended sale” on 15th March 2015. At that stage even Counsel for the Plaintiff did not themselves demonstrate that they considered to matter to be urgent. It seems the intended sale did not go ahead on 15th March 2015. In fact the Plaintiffs themselves do consider the matter to be urgent and important. The delay impacts upon them.

20. The first question is, does the Court’s Jurisdiction engage? **CPR Order 40 Rules 1 & 2** provide that:

1. *Where in any suit it is proved by affidavit or otherwise-*

a. *That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

b. *That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,*

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

2. (1) *In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whatever compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after Judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.*

(2) *The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court deems*

fit.

21. In this case there is danger that the suit property will be disposed of , in the event that the Third Defendant proceeds with a sale pursuant to its notices. Order 40 Rule 1 provides that the Court may grant a temporary injunction or other order to prevent waste, damage, alienation, sale removal or disposition of the property until disposal of the suit.

22. In this case there is a dispute. The dispute concerns the validity of the Charge and/or Guarantee that provides for security upon a family home therefore there is a possibility that the property would be sold and/or disposed of. In the Plaintiff's case, allegations of fraud, forgery and undue influence and non est factum have been raised. The Bank's letter of August 2014 gives notice of 3 different possible outcomes that fall within their stated criteria. Therefore it is indisputable that the Court has jurisdiction.

23. In the event that it was doubtful whether or not **Order 40** applied, the Court has a wide inherent jurisdiction. The Third Defendant does not dispute the Court's jurisdiction because the 'legal argument' part of the Replying Affidavit argues the case on just that basis.

24. The next question to be answered is, how should the Court exercise its discretion. The very well know Authority of **Giella vs. Cassman Brown 1973 CA EAR 358** and the cases that build thereon provide the framework.

25. The Fourth Plaintiff's case is that she and the Second Defendant were induced to provide a Guarantee to the borrowing of the First Defendant. She says the First Defendant has turned out to be a fraudster and he has disappeared as well as having his employment terminated. In relation to the Charge Document and/or the Acceptance of the Offer letter, she says she was misled as to the effect of the signature and the document explained to her before she signed. She also makes certain allegations in relation to the Land Board approval but that is largely hearsay. I will deal with that issue below.

26. Further, the Fourth Defendant has not entered appearance. In relation to allegations the Replying Affidavit of the Second Defendant was filed on 9th July 2015. It confirms what is said by the Fourth Plaintiff. He adds that the First Defendant was a person with whom there had been a relationship of trust and confidence. He confirms that the arrangement that was agreed was for a temporary arrangement where the Security would be replaced with an alternative property in Limuru and he saw what the First Defendant put forward as the Title Deed for L.R. Limuru/Ngecha/1107 which was registered in his name and his father's name.

27. The Second Defendant has set out that the Fourth Plaintiff's purported signature is a forgery. He says that his wife was asked to sign the spousal consent and she refused. That is a serious issue to be considered and decided at trial after hearing the evidence. The Advocate who certified the signatures has not filed an affidavit, so that allegation has not been challenged by direct evidence.

28. The Replying Affidavit filed on behalf of the Third Defendant Bank, as stated above is sworn by a Recoveries Officer. He confirmed the Defendant's opposition to the Application and confirmed that the Bank felt the charge was properly entered into and that the Bank was entitled to sell the property if the debt was not repaid. At paragraph 6 he says the Fourth Plaintiff (a) read and (b) understood the terms of the Charge. He does not say how he knew that to be the case. Was he present? Probably not. The Defendants have not produced an affidavit from the lawyer who did attend, either to explain the Charge to the Fourth Plaintiff and/or witnessed her signature. The Charge secures the indebtedness of the First Defendant Borrower, therefore the Bank's entitlement comes through him and the mechanism he initiated. The Parties have filed Written Submissions and I have considered them.

29. The first limb of **Giella** is to ask the question, has the Plaintiff demonstrated a prima facie case. A prima facie case has been described as better than arguable case. On the evidence the Plaintiff has demonstrated that she has three grounds on which to challenge the charge, firstly that it was induced by undue influence, secondly that it was induced by fraud and thirdly, that the spousal consent alleged was not in fact informed consent freely given.

30. On the evidence before the Court the Fourth Plaintiff has demonstrated a prima facie case with a probability of success. *a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.* **Per Bosire JA in the Mrao v First American Bank and 2 Others Civ App 39 or 2002**. At this stage that decision is made only on the evidence filed. The issues will be finally resolved at trial after hearing oral evidence.

31. The Second Limb of **Giella** requires the Court to ask, does the Applicant stand to suffer irreparable harm, if relief is denied? The Applicants have averred that the property in question is a family home occupied by, at the very least, an elderly couple of limited means. This is not a commercial development. The Third Defendant Bank argues that once the Charge was in place the home converted into a commodity. That begs the question whether such advice was provided to the guarantor and his wife before they signed the Charge. The Third Defendant appears to rely on the case of **Samba Kitui vs. Standard Chartered Bank and 2 others Eld HCCC No. 50 of 2012** while the Court said as security for a loan or any other Commercial facility....the damages are foreseeable. The security is henceforth a commodity for sale or possible sale...how can he having defaulted to pay loan arrears,...claim that he is likely to suffer loss and injury incapable of compensation by an “award of damages”. That decision was a High Court Decision and therefore a persuasive precedent. It is also distinguishable from the current case in fundamental respect being that in this case the charger is not the borrower who defaulted but a guarantor who may or may not have had any power to prevent default of repayments. In addition the court takes cognisance of the fact that every piece of land is unique. Further there is the emotional and sentimental attachment which emanates from a family home spanning several generations. I therefore find that in the event that the suit property is sold when it should not have been, the Applicants cannot be adequately compensated for with liquidated damages. If indeed, the Guarantee was obtained through fraud, then as a creation of equity, it is liable to be struck down.

32. In light of the above, it is not necessary to consider the balance of convenience, however, if it were, the convenience would not lie in favour of the party that claims its entitlement through an alleged fraud. That is a serious allegation for trial, however, it has not been contravened save by assertion or hearsay therefore on the evidence currently before the court, the balance of convenience would lie in favour of preserving a family home.

33. Further applying the test from **Amir Suleiman vs. Amboseli Lodges**. On the “*Fourth Limb*”, that is whether there are any other reasons for allowing the injunction, the matters set out above provide those reasons.

34. In this case there are allegations that the guarantor was induced to provide a guarantee and thereafter a charge on his property. That inducement was either because of trust and friendship or as alleged false statements using fraudulent documents.

35. A guarantee is a creature of equity. If in fact the guarantee was obtained by undue influence and/or fraud, that would vitiate the guarantee as well as the resulting charge. These are matters for trial. However, high the hurdles the Plaintiffs need to overcome, the Bank too will at trial need to demonstrate that it had not colluded in the undue influence and/or fraud and/or properly obtained that charge and that there was full informed consent.

36. In the circumstances the interests of Justice favour maintaining the status quo. I therefore grant the injunction applied for in the following terms:

- i. The Third Defendant Bank is forbidden, whether through its servants, agents, nominees and/or assigns from offering for sale and/or attempting to sell and/or selling the suit property known as LR Komothai/Kiratina/1577.
- ii. In the event a sale has been agreed, the Third Defendant whether through its servants assigns nominees, agents or howsoever is forbidden from registering any transfer.

iii. Any proceeds of an attempted sale shall be paid into court.

37. The Second Defendant has in the Written Submissions filed on his behalf requested an early trial and resolution as a priority. It can only be in the interests of the Parties to have this matter resolved sooner rather than later. I therefore give the following directions:-

i. The Parties and each of them shall file their respective pleadings within 28 days.

ii. The Parties to file all witness statements and lists and Bundles of Documents within 56 days.

iii. Parties to file are combined and/or their respective case management checklists and requests within 7 days of filing their Lists of Issues.

iv. Thereafter Parties to take a date for case management.

38. The Third Defendant to pay the Plaintiffs' costs of the Application.

Order accordingly,

SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF March, 2015.

FARAH S. M. AMIN

JUDGE

In the Presence of:

Clerk: Isiah Otieno

Mr Otieno HB Mr Opiyo for First to Fourth Applicants

Mr Otieno HB for Mr Musoka for the Third Respondent