



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION
ELC CIVIL SUIT NO 1319 OF 2014

ESTHER NANJALA WEKESA.....PLAINTIFF

VERSUS

ARTURS MILDOV.....1ST DEFENDANT

CFC STANBIC BANK LIMITED.....2ND DEFENDANT

RULING

The application for this courts determination is the Notice of Motion dated **10th October 2014** brought under **order 20 Rules 1,2 ad 3 of the Civil Procedure Rules and section 3A and 63 of the Civil Procedure Act** seeking for orders that the honourable court be pleased to issue an interlocutory injunction directed against the 2nd defendant restraining the 2nd defendant from selling, charging, disposing of, taking over possession or in any way dealing with the property known as Apartment **No B9** erected on **LR No 209/2068** pending the hearing and determination of this suit. That the 1st and 2nd defendants provide a statement of account in respect of the charge over apartment **B9** erected on **LR No 209/2068** pending the hearing and determination of this suit.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the applicant who stated that she bought apartment **B9** from the 1st defendant on **11th November 2011**. That the property was charged to the **CFC Bank Ltd** who were made aware of the sale and even consented to the sale. That she has made a repayment of the loan to a tune of **Ksh.10,022,000/=** and has been demanding for a statement of accounts. However she was shocked to be served with a statutory notice over the property on **3rd September 2014** and therefore wants this court to issue the prayers sought.

This application is opposed. The 2nd defendant through its legal officer **Boniface Machuki** deponed a Replying Affidavit stating that the 2nd defendant was not privy to or even aware of any agreement between the plaintiff and the 1st defendant for sale for the property known as Apartment **B9** and the 2nd defendant did not have any obligations towards the plaintiff. That the 2d defendant was required under the charge instrument dated **17th December 2008** and registered on **30th December 2008** to give consent in writing where the 1st defendant wanted to sell the property. The plaintiff failed to produce a document as a written consent from the 2nd defendant obviously the 2nd defendant had not consented to the sale of the property to the plaintiff thus the sale is void ab initio. He further averred that the 2nd defendant did not owe the plaintiff to supply bank statements to the plaintiff since she was not a customer /account holder

with the 2nd defendant .Furthermore the 2nd defendant was not obliged to furnish the plaintiff with statements by virtue of the sale of the property that it had neither consented or was privy to. That the 2nd defendant's role as the bank for the 1st defendant and also as the charge was to receive monies from the 1st defendant .That the 2nd defendant issued notices that were proper in form and in substance prior to its exercise of its power of sale of the property and it should not be denied its rights to exercise its power of sale since that right has rightly accrued and also because it had complied with the relevant provisions of the law. He further stated that the plaintiff was required to be diligent enough and obtain a written consent from the 2nd defendant but she failed to do so. He prays that the application be dismissed with costs.

The 1st defendant has not filed any pleading to contest the plaintiff's application. Parties canvassed this application by way of written submissions which I have considered. The principles of interlocutory injunction are now well settled. The same were laid down in the case of **GIELLA v. CASSMAN BROWN & CO. LTD[1973] EA 358 at page 360** where Spry J. held that,

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff established a *prima facie* case with a probability of success? To answer that, I will address the grounds upon which the Plaintiff is relying as discussed above, and the response thereto from the Defendants. The plaintiff has exhibited a sale agreement between herself and the 1st defendant for the purchase of apartment B9 for purchase price of **Ksh 16,500,000/=**.She alleges to have been paying the monies towards the loan to an account of the 1st defendant because it is clear that the firm of **Ochieng' Onyango, Kibet & Ohaga** have been representing the 1st defendant and it seems the 2nd defendant was not aware of the transaction between the plaintiff and the 1st defendant. I have perused the annexures annexed to the replying affidavit of **Boniface Machuki** and note all communications were made to the 1st defendant and not the plaintiff. The defaulter therefore was the 1st defendant. I find that there was no privity of contract between the plaintiff and the 2nd defendant .The 2nd defendant had a contract between itself and the 1st defendant and it was proper for the 2nd defendant to issue the statutory power of sale to the 1st defendant having failed to honor his obligation. My finding is that the plaintiff has not established a prima facie case. Since she has failed in the first limb of **Giella –V s- Cassman Brown** I need not proceed to the other principles and therefore dismiss the application with costs to the 2nd defendant.

It is so ordered.

Dated, Signed and Delivered this **21st** day of **May, 2015**

L.GACHERU

JUDGE

In the Presence of:-

..... for the Plaintiff/Applicant

.....for the Defendant/Respondent

Court Clerk: Hilda

L.GACHERU

JUDGE