



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO 465 OF 2013

SOPHYNJIIRI.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

PETER GICHUKI T/A

SPORTLIGHT INTERCEPTS AUCTIONEERS.....2ND DEFENDANT

RULING

Injunction

[1] The Court has been called upon to determine the application dated 29th October 2013 which seeks *inter alia* for;

1. A temporary injunction restraining the Defendants jointly and severally whether by themselves, their agents, employees or otherwise howsoever, from selling or advertising for sale by way or private treaty or by public auction the property comprised in LR 7660/40 Tigoni Kiambu District or interfering in any way whatsoever with the Plaintiff/Applicant's quiet enjoyment thereof.
2. An mandatory injunction directing the 1st Defendant/Respondent to provide to the Plaintiff/Applicant the following;
 - (a) A statement of account in respect of the account (s) purportedly secured by the charges registered against the title to the suit property.
 - (b) Any and all notices notifying the alleged charge of the suit property on James Njiiri Mwangi of fluctuations in the subject accounts and the applicable rates of interest and changes thereto if at all.
 - (c) Any consents obtained in respect of the alleged securities (legal and equitable) from the spouse or from the relevant Land Control Board, noting that the subject property is agricultural.
 - (d) Any proof that it has sought leave from the High Court of its intended action

to sell the suit property by way of public auction premised on an equitable or informal charge.

(e) Any and all notices issued to the aforesaid James Njiiri Mwangi pursuant to the very elaborate provisions of the Land Act 2012.

3. An order directed at the 2nd Defendant/Respondent to provide proof of service of the requisite notices prior to the intended sale by public auction including inter –alia the purported advertisement of 11th October 2013.

4. An order to re-open all the charges registered against the suit property.

5. An injunction restraining the 1st Defendant through its employees and/or agents or in any manner whatsoever from purporting to exercise any remedy pursuant to the charges registered against the title to the suit property.

6. Any other order that this Honourable Court may be pleased to make as it deems it fit and just.

7. An order for costs of this application to be borne by the Defendants.

[2] The application is expressed to be brought under Order 40 Rules 1(a), 2, 4 and 10, Order 51 Rule 1 of the Civil Procedure Rules, the Land Act and all other enabling provisions of the law. It was premised on the grounds that the 1st Respondent had purported to sell by public auction the suit property yet it had failed to comply with the stringent provisions of the Land Act. the best argument on support of this ground is that, the charges registered against the title of the land were for a sum of Kshs 1,100,000/- therefore the claim for Kshs 19,000,000/- by the 1st Respondent must be inequitable and unconscionable. In any event the Applicant was ready and willing to deposit the sum of Kshs 1,100,000/- with the Court as a show of good faith. Further, it was averred that the Applicant would stand to suffer irreparable loss which may not be compensated in damages as the suit property has been her matrimonial home for over 31 years and would be rendered homeless and landless if the said orders sought were not issued by the Court.

[3] The application was supported by the Applicant own affidavit sworn on 29th October 2013. Therein, she averred that the suit property was registered in the name of James Mwangi Njiiri, her husband, and on which they had built their matrimonial home. She had registered a caveat on the suit property on 7th January 2000 in affirmation of spousal interest. It was further deposed to that she was aware that there were three (3) charges registered against the said suit property, which charges were registered on 2nd February 1983, 20th May 1983 and 17th November 1983, none of which had been obtained with consent from the Land Control Board. According to the Applicant, in the absence of consent from the Land Control Board, the intended sale of the suit property was null and void due to the failure by the 1st Respondent to comply with the provisions of the Land Act. that is not all; she stated that the 1st Defendant did not issue the requisite notices before the intended sale of the suit property. Again, she reinforced her argument that a sum Kshs 19,000,000/- being claimed by the bank is unreasonable, unfair and unconscionable, yet the 1st Respondent has failed and/or neglected to provide accounts to ascertain how the figure claimed was arrived at. She deposed further in her affidavit that, despite valiant efforts by the Applicant's son, who had been authorized to deal with the suit property as a donee of the chargor's power of attorney, the 1st Respondent was bent at only commencing foreclosure proceedings.

[4] In the submissions filed on her behalf dated 15th October 2014 and 3rd February 2015, she emphasized the necessity of requisite consent from the Land Control Board on such controlled transactions under Sections 6(1)(a) and 8 of the Land Control Act. And since none had been obtained, the transactions with the 1st Respondent were null and void. On accounts she relied on

the case of **Civil Case No 385 of 2011 Captain J N Wafubwa v Housing Finance of Kenya Ltd**. She also relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** to support her submission that she had established a *prima facie* case. She also addressed the question of *locus standi*, and asserted that she brought this suit in her capacity as the spouse of the registered proprietor seeking to protect her matrimonial home as defined under Section 2 of the Matrimonial Property Act.

[5] Further submissions were made with regards to consent under Section 79(3) of the Land Act and Section 6(1) of the Land Control Act, and cited the cases of **Joseph Nyaga Njagi & 2 Others v Michale Muchira Nduma & Another (2014) eKLR**, **Elijah Kipkorir Barmalel & Another v John Kiplagat & 3 Others (2010) eKLR**, **Samuel Miki Waweru v Jane Njeri Richu (2007) eKLR** and **Kariuki v Kariuki (1983) KLR 225**. She buttressed that no equitable charge could be created over the suit premises without the requisite consents. The submissions also turned to the *in duplum* rule provided under Section 44A of the Banking Act, and stated that the law provides the limit of the amount that may be claimed or recovered from a non-performing loan from a debtor. The Applicant cited the cases of **Duncan Nderitu Wamae v Housing Finance Company of Kenya Ltd (2008) eKLR** and **Peter Kungu Kagia & Another v Housing Finance Company of Kenya Ltd (2008) eKLR** on Section 44A of the Banking Act. The Applicant ultimately submitted that damages was not an adequate remedy in the circumstances as the property that the 1st Respondent intended to dispose of was matrimonial property and the sale was in breach of the law. See **Patrick Mukiri Kabundu v Equity Bank Ltd & Another (2014) eKLR** and **Joseph Siro Mosiomo v Housing Finance of Kenya Ltd (2008) eKLR**.

[6] Counsel for the Applicant made oral submissions and reinforced the above submissions except he added some other legal issues. He submitted that section 103 of the Land Act is clear on statutory as well as constitutional right to property and that the section intended requirement for consent by spouse of the chargor and occupant of the suit property to apply retrospectively. And so he urged that the Applicant should have the benefit of those provisions of the law. Counsel also argued that he had applied for joinder of James Njiiri as a party in this suit. He did not, however, give much elaboration. He also emphasized that a certificate of nil balance had been issued which means there was no debt owing to the 1st Defendant. He urged the court to grant the injunction.

Respondent opposed application

[7] The 1st Respondent opposed the application and filed a replying affidavit sworn on 20th March 2014. It averred that the application is misconceived and did not establish a *prima facie* case as alleged. Further, it was deposed to that the chargor was and still is indebted to the 1st Respondent, and that his actions to appoint one Antony Maina Njiiri as the donee of the power of attorney issued on 11th April 2007, and the actions and conduct by the said donee aimed at liquidating the outstanding debt, was a clear indication that the chargor was aware of the indebtedness to the 1st Respondent. It was further averred that the Applicant had no registered interest in the suit property and that the capacity in which she claims to sue does not give her *locus standi* to institute this suit or make any claim for accounts from, and that the 1st Respondent has no legal obligation to share such information with her. To the Respondent, this suit and application is yet another attempt to obstruct the 1st Respondent from realizing its security under the charge. She has not established or shown any irreparable loss or damage that she may suffer should the 1st Respondent exercise its statutory right of sale. Damages will be adequate remedy to her.

[8] The 1st Respondent in its submissions dated 17th November 2014 stated that the Applicant has not met the threshold of law set out in the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358** and **Mrao Ltd v First American Bank of Kenya Ltd** (supra). She did not establish a *prima facie* case. Further, it was submitted that the Applicant had no *locus standi* to institute the instant application and the underlying suit, as, by dint of Section 23(1) of the Land Registration Act (repealed), Section 26 of the Land Registration Act, and the decision in **Wreck Motor**

Enterprises v Commissioner for Lands & 3 Others (1997) eKLR, she does not have any proprietary interest in the suit property. Therefore, the application and suit were null and void. The Respondent argued also that the requirement for spousal consent is provided in the Land Act, and was not a requirement of law at the time the charges were executed. Thus, the requirement is not applicable to the transactions which took place before the law was enacted. In any event, the law does not apply retrospectively unless and/or otherwise explicitly provided. Reliance was placed in the Court of Appeal case of **Panafric Builders & Contractors Ltd v Singh (1984) KLR 121** and Supreme Court case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR**.

[9] Counsel for the Respondent also made oral submissions and stressed the forgoing submissions. He, however, argued that certificate of nil balance is being used inappropriately because there was no transfer of accounts at all; there was merely a change from one system to another. He also stated that the principal sum was not Kshs. 1.1 million as claimed but was Kshs. 5.235 million. He emphasized that the Applicant does not have any right and so none has been violated. He urged the court to decline the application.

DETERMINATION

Locus Standi

[10] *Locus standi* of the Applicant has been raised as an issue and been addressed by the parties as such. This is an issue with preliminary connotation and I will decide on it *in limine*. I need not mention that *locus standi* is defined as;

“The right to bring an action or to be heard in a given forum”. See Black’s Law Dictionary Ninth Edition at pg. 1026.

I will, therefore, consider this issue within the broad constitutional precincts. The Applicant stated that she has applied on the basis of her right as a spouse to the chargor of the suit property. The 1st Respondent disputed the claim and asserted that the Applicant does not have any *locus*, because the suit property was registered in the name of the chargor, and the law did not require any spousal consent to be sought before a charge is executed and created on the property. Therefore, according to the 1st Respondent, the right to deal with the suit property vested solely in the chargor.

[11] The Applicant relied on section 103 of the Land Act as well as Section 2 of the Matrimonial Property Act. I will deal with the provisions of the Land Act later when analyzing the substantive issues. Let me begin with Section 2 of the Matrimonial Property Act which provides that a matrimonial home;

“...means any property that is owned by one or both spouses and occupied or utilized by the spouses as their family home, and includes any attached property.”

[12] From the provisions, for property to be a matrimonial in the sense of the law, it has to be owned by either one or both of the spouses and occupied or utilized as a family home. The Certificate of Title produced show that James Mwangi Njiiri is the proprietor of the suit property. In paragraph 5 of the Applicant’s Supporting affidavit, she averred as follows;

5. THAT the registered proprietor of the suit property is one JAMES MWANGI NJIIRI.

The Applicant produced a marriage certificate which shows that she was married to James Mwangi Njiiri on 23rd August 1974. No doubt she is a spouse of the chargor. She has also averred at paragraph 7 of her affidavit that they both established and lived on the suit property as a family home. Therefore, the suit property is a matrimonial home in law. The only question is; does the

fact that the suit property is a matrimonial home clothe the Applicant with locus standi to apply in court?

[13] In answering this question, I cannot avoid to confront the arguments on retrospective application of the law. The issues here are a kind of squirm and present a unique mix. I will tackle this issue in two perspectives. I will separate matters of locus standi from the arguments on retrospective application of the law especially on the spousal consent. The separation is necessary in law and makes the former the easier hurdle to surmount in order to give way to the substantive issues herein. I am not mistaken to state that *locus standi* has now been enlarged by the Constitution as a way of actualizing the right of every person to access justice, the benefit and protection of the law under the Constitution. My own view on the matter, therefore, is that a spouse has a right in a matrimonial home and if that right is threatened or is being affected by some action by another person, the spouse may apply in court for relief. On that basis, I am persuaded to hold that the Applicant as a spouse has a right to apply. Nevertheless, whether she will succeed on the relief sought is a different thing all together, and that will be determined out of the overall impression by the court on the facts of the case and the applicable law. Is she entitled to relief?

Substantive issues

[14] The Applicant registered a caveat over the property as a way of affirming her interest in the matrimonial home. I agree with Odera that Under Section 23(1) of the now repealed Registration of Titles Act and also section 26 of the Land Registration Act that the certificate of title issued by the registrar to person is to be taken by the courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. Section 26 of the Land Registration Act, uses the phraseology “shall be taken by all courts as prima facie evidence...” There is no dispute that the proprietor of the suit property is the chargor. His ownership is not being challenged except the Applicant is claiming two things. The first one is that as a spouse and occupant of the land in question, she was not served with the notices requisite statutory notices under the law. And the second, that the entire transactions were null and void for they did not adhere to the Land Control Act. These are huge matters of law. There are other grounds adduced in the application, namely; 1) that the loan was for a sum of Kshs. 1.1 million and so a sum being claimed of Kshs. 19 million is just unreasonable and unconscionable; 2) the bank has never rendered accounts on the sum claimed; 3) there is no debt owing as same was paid in full and a certificate of nil balance was issued by the bank; and 4) application of in duplum rule under section 44A of the Banking Act.

[15] The Respondent argued that the Applicant is engaged in another attempt to abuse the court process. Similar suits had been filed in the past by the chargor and his son but they were dismissed or withdrawn.

Spousal consent

[16] Under the Land Act, spousal consent must be sought and obtained before a charge is created on a matrimonial home. That was not a requirement in the repealed Act under which this charge was created and the applicable law is the one that existed then. Courts have stated this in cases without number. But see sections 104 and 162 of the Land Registration Act and Land Act, respectively. Whereas the Applicant may apply as a spouse of the chargor under section 103 of the Land Registration Act, she must, however, base her application on the appropriate law. On matters of validity of the charge, the applicable law is the repealed law which did not require a spousal consent before creation of charge. She must also specifically cite the new law which she thinks will apply and benefit her. But in so far as spousal consent is concerned, the arguments fail. Except, I should think that, it will be different in my view, if a notice to sell the charged property

is issued after the enactment of the new land laws. In that case, it will be in order for the chargee to serve notice on any spouse and or occupant of the suit premises as a matter of recognizing such possessory interests. I do not think such requirement is retrospective application of the law but rather a matter of adhering to the law. I note that the notice of sale of the suit property and notification of sale were issued in 2011 and 2013. I will take that fact into account when I shall be making my final decision.

In duplum rule and accounts

[17] An injunction will not be granted merely because there are disputes as to amount owing or interest charged, except, however, the mortgagor will be restrained where the amount claimed is paid in court or is excessive and unconscionable, and or the interest charged is un-contractual or illegal. But these two factors should be easily discernible from the charge. See Halsbury's Laws of England and Mrao case. The Applicant based her argument on the fact that the chargor does not owe the 1st Respondent any monies and was even issued with a Certificate of nil balance as at 31st arch 1999. The 1st Respondent has explained the circumstances in which the said Certificate was issued. The bank also gave further insights on the matter and stated that there was no transfer of accounts as claimed; the bank was simply migrating from one system to another and so the Certificate was issued on the closure of the earlier systems. According to the bank, the Certificate did not, therefore, mean that the debt has been paid in full. The explanation seems plausible. The issue is nonetheless very important in the resolution of the entire dispute yet it is crowded by conjecture and does not lend itself to easy resolution on the affidavit evidence. Much more will be needed for the court to determine the issue. Again, the Applicant claims that the debt advanced was Kshs. 1.1 million and was paid, whereas the 1st Respondent claims it was 5.235 million. The Applicant, basing her claim on a figure of Kshs. 1.1 million asserted that a sum of Kshs. 19,000,000 is therefore astronomical, unreasonable and unconscionable; it also offends the *in duplum* rule in section 44A of the Banking Act. She also claimed that no statements were ever issued on the sum claimed. The 1st Respondent on the other hand claims the figure is not unconscionable. But, the Bank did not advance any specific arguments on the *in duplum* rule. This also is a very important legal issue at the core of this suit and is incapable of resolution by way of affidavit evidence. Much more is needed through a hearing. Meanwhile, depending on the order of the court, rendering of statements and accounts will be addressed forthwith.

Consent of land control board

[18] What seems to strike the court is the argument on lack of consent to charge the land in question as that would mean the charge is in contravention with the Land Control Act. This is a huge legal issue with serious implications if it is proved to be so. The 1st Respondent did not address the issue. But silence is not consent in law. However, it should be noted that lack of consent may not necessarily affect the chargor's obligations to pay the debt on the loan agreement except it may affect the charge and any sale of the charged land. Again, I will prefer the entire issue to be canvassed inter partes.

[19] As I stated earlier, this case has many issues which are not very clear. There are previous suits which were filed by the chargor himself and his son under a power of attorney but which were dismissed or withdrawn. It is still not clear whether the debt owes or has been paid; there is the Certificate of nil balance which was issued by the bank on the one hand, and the explanation on the said Certificate which the bank has given the court. The court has also found that the Applicant has locus standi to apply for relief; note of worth, the notices to sell the property and notifications of sale were issued in 2011 and 2013 after the new law. Questions abound whether the notices should have abided by the new land law especially on the persons to be served with the notice say, the Applicant who claims as a spouse and occupant of the matrimonial home. The recapitulation of all these things is to show that the entire circumstances leave the court in serious doubt as to which way the balance of convenience will hold sway. There is no clear fall here. Now, therefore, the balance of convenience will be attained by taking a path with lowest risk of

injustice should it turn out that the court was wrong in its decision. See the case of **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 when he rendered himself thus:-**

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong””

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.

- i) Is there a prima facie case....**
- ii) Does the applicant stand to suffer irreparable harm...**
- iii) On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...[Underlining mine]**

[20] Accordingly, I issue the following orders:-

- a) That, subject to the conditions below,I hereby issue a temporary injunction and restrain the Defendants by themselves or their agents or servants or employees from selling the charged property namelyL.R 7660/40 Tigoni Kiambu District;**
- b) That the Applicant shall, within 30 days, deposit a sum of Kshs. 19,000,000 in an interest earning account in the joint names of counsels for the Applicant and the 1st Defendant in a bank to be agreed upon by the parties.**
- c) That the Applicant shall pay the auctioneers charges to be taxed or agreed among the parties;**
- d) The bank should render full and accurate account of the debt herein within 30 days;**
- e) The Applicant shall pay the costs of this application; and**
- f) Any party is at liberty to apply.**

Dated, signed and delivered in court at Nairobi this 15th day of June 2015.

F. GIKONYO

JUDGE