



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 115 OF 2014

STELLA NYAKIO NGUGI

(Suing as Administrator of the Estate of Michael
Rukunga
Mowesley).....PLAI
NTIFF

-versus-

WILBERFORCE NJENGA NDONGA & 7 OTHERS..... DEFENDANT

RULING

1. The Application for consideration is the Plaintiff's Notice of Motion dated 14th October 2014. The Application is brought under Sections 1A, 1B, 3A of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules and seeks the following orders:
 - i. That pending hearing and determination of this application, the 5th Defendant be restrained from interfering, selling or otherwise dealing adversely with the parcels of land known as LR. No. Mombasa/MN/Thathini Block 4/395, L.R No. Nyaki/Kithoka/1914 and LR No. Nkuene/Taita/1633.
 - ii. That pending hearing and determination of the main suit, the 5th Defendant be restrained from interfering, selling or otherwise dealing adversely with the parcels of land known as LR. No. Mombasa/MN/Thathini Block 4/395, L.R No. Nyaki/Kithoka/1914 and LR No. Nkuene/Taita/1633.
 - iii. Costs of the Application be provided for.
2. The Application is supported by the Affidavit of STELLA NYAKIO NGUGI sworn on 14th October 2014 and on the grounds on its face.
3. In a nutshell, the Plaintiff avers that the 5th Defendant, K-Rep Bank Limited, has instructed an auctioneer to sell LR. No. Mombasa/MN/Thathini Block 4/395, L.R No. Nyaki/Kithoka/1914 and LR No. Nkuene/Taita/1633 (hereinafter jointly referred to as "the suit properties") which are registered in the name of her deceased husband, MICHAEL RUKANGA MOWESLEY (hereinafter "the Deceased"). That the sale is ostensibly meant to recover a loan of Kshs. 10,000,000/- which the 5th Defendant allegedly advanced to the 1st Defendant using the suit properties as collateral. The Plaintiff averred that the suit properties were used as collateral for the alleged loan fraudulently and through impersonation of the Plaintiff by unknown woman whose details the 5th Defendant has declined to disclose.
4. The Plaintiff's case is that being the spouse of Michael Rukanga Mowesley, her consent was not obtained in the charging of the suit properties since the person who gave her consent is one STELLA WANJIRU MUREITHI and not the Plaintiff. The Plaintiff further submitted that no

- consent of the Land Control Board was obtained before the suit properties were charged.
5. The Plaintiff submitted that the issues raised in the suit are serious to warrant the granting of the injunction to ensure that the parties are at an equal footing pending hearing of the suit.
 6. The Plaintiff also submitted that she has established a *prima facie* case with high probability of success. That she has established a case of fraud, misrepresentation, non-disclosure of facts, undue influence, uttering of false documents and impersonation leading to an unlawful and irregular proprietary transaction which is null and void *ab initio*. The Plaintiff therefore urged that the order of injunction should be granted since she has established fraud.
 7. On irreparable loss and damage, the Plaintiff submitted that she will suffer irreparable loss and damage which cannot be compensated by an award of costs since the suit properties are part of the estate of the deceased which estate is yet to be distributed among the beneficiaries. That if the sale is permitted to go on, the deceased's estate will be denied the right to property accruing under sections 24, 25, 26, 27 and 28 of the Land Registration Act, sections 5 (1) (a) and 7 of the Land Act and Articles 40 and 60 of the Constitution of Kenya.
 8. Finally, the Plaintiff submitted that the balance of convenience tilts in favour of granting injunction because the Defendants' actions clearly point to the fact that the Plaintiff's right to the suit properties has been infringed.
 9. The 5th Defendant opposed the Plaintiff's application. It relied on the Replying Affidavit of HARRISON MUTIE sworn on 16th June 2010 and the Further Affidavits of MARY M. CHEGE and CYRUS KAGAI both sworn on 16th March 2015.
 10. The 5th Defendant's case is that it, by a letter of offer dated 3rd May 2013, made available to the 1st Defendant a term loan of Kshs. 6,400,000/- and an overdraft facility of Kshs. 3,600,000/- both of which were secured by legal charges over the suit properties with the Deceased as the Chargor thereof. That the 1st Defendant defaulted in repayments of the loan hence the 5th Defendant's move to realize the security.
 11. The 5th Defendant submitted that the Plaintiff has not established a *prima facie* case with a probability of success. That the consent of the Land Control Board was obtained. That the Deceased presented Stella Wanjiru Mureithi as his spouse and who duly executed her spousal consent. That, therefore, the Plaintiff cannot allege that no spousal consent was obtained. That even if the Plaintiff was the deceased's spouse, her consent was not required in respect of the three suit properties since the same did not fit the definition of "matrimonial home" within the meaning of Sections 2 and 79 (3) of the Land Act. That the mere fact that the property forms part of a matrimonial property does not necessarily subject the property to spousal consent before it is charged since spousal consent is only required in respect of matrimonial home and not any other matrimonial property.
 12. On the Plaintiff's allegation that there was fraud in the preparation and execution of the Charge instrument and Deed of Guarantee and Indemnity, the 5th Defendant submitted that the court cannot act on mere suspicion of fraud. That the Plaintiff has not presented before the court evidence that point to fraud. The 5th Defendant submitted that the Plaintiff herself has approached the court with unclean hands and therefore she does not deserve the orders sought.
 13. On irreparable loss, the 5th Defendant submitted that the realization of the security cannot in any way occasion a loss which damages cannot remedy. That should the matter end in favour of the Plaintiff, the 5th Defendant is ready and willing to compensate her in damages which will adequately repair the loss. That the 5th Defendant is a trusted financial institution with resources to compensate the Plaintiff.
 14. On balance of convenience, the 5th Defendant submitted that as the default in repayment of the loan persists, the amount due continues swelling to unconscionable and outrageous proportions to the extent that may outstrip the value of the security. That the more the default is allowed to persist, the more the balance of convenience tilts in favour of the lender. That the balance of convenience tilts in favour of the 5th Defendant exercising its statutory power of sale in order to prevent further default.

Determination :

15. From the pleadings filed and the submissions rendered supported by the case law, I deduce that the 5th defendant disbursed a loan to the 1st defendant and the suit properties were subsequently

- charged as securities for the loans. The applicant is challenging the 5th defendant's charging of the suit property because the 5th defendant failed to comply with the provisions of the section of the Land Registration Act. The 5th defendant in answer stated that the deceased presented one Stella Wanjiru Mureithi as his wife.
16. In the documents presented by the applicant, she annexed a marriage certificate to show that she was the spouse of Michael Rukunga Mowesley – deceased. The conflict on who signed the spousal consent presents a scenario that would require proof by way of adducing evidence. In order for that to happen, there is need for the injunction to issue to preserve the suit properties. The second issue for determination that fall under spousal consent is whether the suit properties fall under the category of matrimonial property as anticipated under the section above. Not all of them may be matrimonial property but it will not make sense to.
17. The applicant also pleaded that the deceased did not execute the charge documents. She alleged that she had several documents bearing the deceased signatures and therefore familiar with his signature. She pleaded that the signatures on the charge documents do not belong to the deceased. The 5th defendant/Respondent in response pleaded that the applicant is not determine which property forms part of the matrimonial property and which one does not at an interlocutory stage. The balance of convenience would be to present all until such determination an expert in handwriting to contest the signature. The 5th defendant also avers such contest is an afterthought, spurious and unsupported by any evidence. The Court is presented with the plaintiff's word against the 5th defendant's. The owner of the questioned signature is deceased. I find this is also a triable issue which can be determined by adducing relevant/necessary evidence. Taking into account the twin issues of spousal consent and fraud, I find the applicant has established a prima facie case to warrant the issuance of the orders sought.
18. The 5th defendant has submitted that it will suffer irreparable loss and the loan is not being serviced and is attracting interest therefore will rise to higher sums. This is indeed true however the 5th defendant is holding the titles as securities and the value of land in this country also does appreciate. If the applicant's case fails, the 5th defendant is cushioned by the securities it is holding which would have then appreciated in value. The balance of convenience thus tilts in maintaining the status quo. In the result, I find merit in the notice of motion dated 14th October 2014 and allow it in terms of prayer 3. Costs of the motion in the cause to abide the out come of the suit.

Ruling dated and delivered in Mombasa this 27th day of November, 2015

A. OMOLLO

JUDGE