



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT & LAND CASE NO. 78 OF 2014

PAMELA IMBUKA NJARO 1ST PLAINTIFF/APPLICANT

FRANCIS BOGE NJARO2ND PLAINTIFF/APPLICANT

VERSUS

JOSEPH VUTITA NJARO 1ST DEFENDANT/RESPONDENT

MOLYN CREDIT LIMITED 2ND DEFENDANT/RESPONDENT

KENNEDY K. SHIKUKU T/A

ESHIKHONI AUCTIONEERS 3RD DEFENDANT/RESPONDENT

RULING

By a Notice of Motion application dated 17th March 2014 brought under **Order 40 rule 1 and 4 (1)** of the **Civil Procedure Rules, 2010**, and **Sections 1A and 3A** of the **Civil Procedure Act (Cap.21)** Laws of Kenya, Pamela Imbuka Njaro and Francis Boge Njaro (the Applicants) have moved the court seeking the following main prayer:-

- a. ***“A temporary order of injunction be issued against the defendants/ respondents restraining them either by themselves and or through their agents, servants and or employees from alienating, selling or advertising or offering for sale, transferring, laying claim to trespassing onto and or in any other manner dealing or interfering with the plaintiffs’/applicants’ peaceful occupation and use of land parcel No. SOUTH MARAGOLI/KEGOYE/1316 pending the hearing and determination of this suit.”***

The application is supported by affidavits by both applicants sworn on 17/3/2014. The 1st applicant also swore a further affidavit filed in court on 2/9/2014. The 1st applicant is wife to the 1st defendant while the 2nd applicant is the 1st respondent’s brother. The application is opposed through a replying affidavit by Edeliquine Mmbone Wanyonyi sworn on 25/3/2014 who described herself as “Team leader” of MOLYN CREDIT LIMITED, the 2nd respondent herein.

Counsel for both parties agreed to put in written submissions on 22/7/2014 but only the applicants have their submissions on record and have asked the court to make a ruling based on the affidavits and materials on record and the written submissions.

The 1st applicant deposed in her affidavit, that she is the wife to the 1st defendant and that parcel number

SOUTH MARAGOLIL/KEGOYE/1316 form their matrimonial home on which they have constructed a home where they stay with their children. It is the 1st applicant's case that the suit land is a family land which was previously in the name of MESHACK NJARO KADISI (now deceased) who was the 1st applicant's father-in-law and father to the 2nd applicant and 1st defendant. According to the 1st applicant, the land is family land and the 1st respondent has no superior claim over the property even though it is registered in his name. The 1st applicant further depones, that despite being a spouse to the 1st respondent, she was not consulted and did not give her consent to the property being charged in favour of the 2nd respondent. She denies ever appending her signature on the charge document and the spousal consent. She maintained that her signature must have been forged.

The 2nd applicant on his part deposed that his brother, the 1st respondent, fraudulently transferred the suit land into his name without their knowledge or consent and therefore, holds the land in trust for himself and the other members of the family. According to the 2nd applicant, the charging of the property in favour of the 2nd respondent was without the family's consent, and therefore, irregular. He says that although they reside on the land, they were not notified of the intended sale by public auction.

In its reply, the 2nd respondent through its "Team leader" Edeliquine Mmbone Wanyonyi, deposed that the 1st respondent applied for a loan of Kshs.924,000/= and offered the suit land as security. The loan was to be repaid by a monthly instalment of Kshs.51,114/=. A charge was prepared and executed by both the 1st applicant and the 1st respondent before the loan was disbursed into the 1st respondent's account at Co-op. Bank, Mbale Branch. The 1st respondent paid one (1) instalment and no more. When further instalments were not forthcoming, the 2nd respondent instructed the 3rd respondent to realize the security leading to the issuance of notices for sale of the property to recover the outstanding loan amount. It is the 2nd respondent's case that they followed the due process in charging the property and also in realising the security.

I have considered the application, the affidavits in support and those in opposition to the application. I have also considered the applicant's written submissions. The applicants seek to restrain the respondents from selling by public auction, what they consider to be a family land, arguing that the land was not properly charged to the 2nd respondent and further that the 2nd respondent did not comply with the law in attempting to realize the security, namely parcel No. SOUTH MARAGOLI/KEGOYE/1316.

The 1st applicant is wife to the 1st respondent and she says that she did not execute the spousal consent that was purportedly used for purposes of charging the property (a matrimonial property) in favour of the 2nd respondent. The 1st applicant also says that she and other members of the nucleus family who reside on the property, were not notified of the intended auction. Section 79 (3) of the Land Act (No. 6 of 2012) provides as follows:-

S.79 (3) "A charge of a matrimonial home shall be valid only if any document or form used in applying for such a charge or used to grant the charge, is executed by the chargor and any spouse of the chargor living on the matrimonial home, or there is evidence from the document that it has been assented to by all such persons." (emphasis)

Section 79 (3) makes it mandatory that spouses residing on the matrimonial property give their consent to any intended charge. If such consent is not procured, any charge executed without such consent is invalid. The 1st applicant says that she did not give her consent to the charge created over the suit property which is a matrimonial home. She has also disowned the signatures on both the charge document and the spousal consent that have been annexed to the 2nd respondent's replying affidavit. The 1st respondent, the Architect of the whole scheme has remained mum, which has not been helpful. The 1st applicant's assertions have therefore remained uncontroverted.

The applicants have also complained that they were kept in the dark regarding the intended auction of

the land. In its replying affidavit, the 2nd respondent has attached documents purported to show that it complied with the law in its desire to exercise its statutory power of sale and realize the security.

Before a chargee exercises its statutory power of sale, Section 90 of the Land Act (No. 6 of 2012) imposes obligations on the chargee to do certain things.

S.90 (1) “If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observance of any covenant, express or implied the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.”

(2) The Notice required by sub section (1) shall adequately inform the recipient of the following matter –

a) the nature and extent of the default by the chargor.

b) if the default consist of the non payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by when the end of which the payment in default must have been completed.” (emphasis is added).

The only Notice that was purportedly issued to the 1st respondent herein is one dated 17/7/2013 annexed as EMW-5(a) in the 2nd respondent’s affidavit. With respect, that is not the Notice contemplated by Section 90 (2) (b) of the Act. That Notice does not specify the amount that “must be paid to rectify the default.” The Notice simply calls for the payment of the entire debt which was not the intention of the legislature.

Section 96 of the Act is even more important. Before a chargee exercises its Statutory Power of Sale, it is required to copy the notice to the spouse of the chargor, if that spouse has given consent. **Section 96 (3)** provides as follows:-

96 (3) A copy of the Notice to sell in accordance with Sub-section (2) shall be served on –

- a.
- b.
- c. **A spouse of the chargor who had given the consent.**
- i. **Any other person known to have a right to enter and use the land or the natural resources in, on or under the charged land by affixing a notice at the property...”**

The 1st applicant has argued that the requisite spousal consent was not procured. If that be the case then they failed to comply with the law. There is no evidence that the 2nd respondent served a copy of the Notice on the Spouse who had given consent that is the 1st applicant. The law also enjoins the chargee to serve notice on any person who uses the land and or natural resources found on the land. The 2nd applicant says he and his siblings live and use the land. He says that they were not notified of the intended auction. I have not come across any evidence to suggest otherwise. The 2nd respondent must have been aware of the fact that other people use the land and should have complied with the law. It did not.

The last issue I feel I must address in this ruling though not raised by the applicant is this: before a chargee exercises its statutory power of sale under the charge instrument, it is required to undertake a forced sale valuation under Section 97 of the Act. Section 97 (2) is in the following words:-

97 (2) “A chargee shall, before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer.”

The chargee embarked on exercising its Statutory Power of Sale and issued the notification of sale. However, there is no evidence that forced sale valuation was conducted by a valuer to bring the 2nd respondent's actions in line with Section 97 (2). In the absence of any evidence that Section 97 (2) was complied with, the auction, even if it had proceeded, would have been in violation of the law and therefore invalid.

In the end, I am satisfied that the applicants have made out a prima facie case with a probability of success as required by the principles in ***GIELLA -VS- CASSMAN BROWN [1973] EA 358***. Even if there was doubt, the balance of convenience tilts in their favour since they reside and use natural resources on the land.

The application dated 17/3/2014 therefore succeeds, and a temporary order of injunction is hereby issued against the defendants/respondents restraining them either by themselves and or through their agents, servants and or employees from alienating, selling or advertising or offering for sale, transferring, laying claim to, trespassing onto and or in any other manner dealing with or interfering with the plaintiffs/applicants peaceful occupation and use of land parcel No. SOUTH MARAGOLI/KEGOYE/1316, pending the hearing and determination of the suit. The applicants shall also have costs of this application.

Orders accordingly.

Dated and delivered at Kakamega this 21st day of October, 2014

E. C. MWITA

J U D G E