REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 337 OF 2010

NGUGI GICHURE NJOROGE.....……..PLAINTIFF/APPLICANT

VERSUS

LOISE GATHONI NGUGI.....…1ST DEFENDANT/RESPONDENT

EQUITY BANK LTD…….....….2ND DEFENDANT/RESPONDENT

RULING

The Chamber Summons dated 4/12/2010 was filed by Ngugi Gichure Njoroge, the plaintiff/applicant herein. He seeks an order of interim injunction of a prohibitory nature, to restrain the defendants/respondents, whether by themselves or agents from selling, causing to be sold, all that property known as Lari/Kirenga/1072 whether by public auction or private treaty. The defendants/respondents are Loise Gathoni Ngugi and Equity Bank Ltd (1st and 2nd defendants). The grounds upon which the application is premised are found in the body of the application, a supporting affidavit sworn by the applicant on 4/12/2010 and a further affidavit sworn by Harry Gakinya Advocate on 19/1/2011. The applicant was represented by Mr. Githui who also filed written submissions on 17/2/2011. The application was strenuously opposed and Roseline Kivuva, Deputy Head of Debt Recovery with the 2nd defendant swore a replying affidavit dated 23/12/2010, a further affidavit was sworn by Purity Kinyanjui, head of Debt Recovery Unit with 2nd Department dated 16/6/2011. The 1st defendant filed a replying affidavit dated 29/3/2011. Mr. Munene also filed submissions on behalf of the 2nd defendant while Mr. Waiganjo appeared for the 1st defendant.

The brief facts of this case are that the applicant is the registered owner of the suit land, Lari/Kirenga/1072. By an instrument of charge dated 10/3/2010, the applicant is said to have tendered his property as security for a loan of Kshs.2,600,000/- advanced to the 1st respondent by the 2nd respondent and the applicant was therefore a guarantor. The borrower, 1st respondent defaulted in repayment and the 2nd respondent moved to realize the security. The applicant deponed that he became aware of the intention of the 2nd respondent when his son saw an advertisement in the newspaper (JOG1) that his land was up for sale by public auction and he found out from Mr. Waiganjo, counsel for the 1st respondent what had transpired. He was informed that the 1st respondent had an account with the 2nd respondent, which was mismanaged by the 2nd respondent and it became overdrawn. The 1st respondent was then asked to provide a security and the agreement was drawn that she owed Kshs.8,100,000/- to the 2nd respondent. The overdraft was converted into a term loan and it was a term of the agreement that the applicant and one Mary Nduta were to execute personal guarantees and provide collateral securities to guarantee the personal loan. He recalled that the 1st defendant had taken to him a document to sign to enable her start a business which was only one page and he signed it, but later, it transpired that it had been detached from the charge document which is in issue (NGN4). The applicant further deponed that the 1st respondent never disclosed to him that she wanted to charge his property. The applicant denied

ever having an account with the 2nd respondent that could have been overdrawn nor did he receive any loan from the 2nd respondent as stated at paragraph 3 of the charge document. He denies ever entering into a contract with the 2nd respondent. He also denies appearing before Mr. Hari Gakinya Advocate to have the document witnessed. Mr. Gakinya deponed that he was approached by the 1st respondent with a charge which already bore a signature. Upon her persistence, he signed it and he confirmed that the applicant never appeared before him nor did he witness the execution of the charge and cannot confirm whether the applicant understood the effect of **Section 74** of **the Registered Land Act**.

In her replying affidavit, the 1st respondent averred that she had an account with the 2nd defendant since 2009. After 5 months, the 1st defendant's requests were returned unpaid and she was advised that she had incurred an overdraft of Kshs.8,000,000/-. Security was demanded by the 2nd respondent's officers, a charge was prepared in favour of the 2nd defendant. According to her, the 2nd respondent had mismanaged her account with unauthorized withdrawals being made from her account and despite requests for details, the 2nd respondent declined to avail them. The 1st respondent stated that the title deed by the 2nd respondent is not genuine because the applicant never gave her the original title..

In opposing the application, it is the 2nd respondent's case that the 1st respondent applied for a loan facility from the 2nd respondent and presented the applicant as her guarantor who in turn offered a title of the suit land as security for the loan. The applicant did also execute a guarantee and indemnity and charge in favour of the 2nd respondent on 20/3/2010 (RK2). The applicant also released to the 2nd defendant the original title; that the 1st respondent defaulted in payment and the 2nd respondent issued a statutory notice on 27/7/2010 through registered post pursuant to **Section 74** of the **Registered Land Act (RK 4 & 5**). Auctioneers were appointed, attached property which was advertised for sale on 8/12/2010 after the expiry of 45 days. That the applicant admits executing the charge and therefore the 2nd respondent has acted within its legal right to realize the security and allegations of fraud are an afterthought. The 2nd respondent contents that in any event, that since the charge was executed, it was not possible for 2nd respondent to know that the signature was obtained by fraud and it is not party to any fraud. It was denied that the 2nd respondent ever mismanaged the 1st respondent's account as alleged as the 1st respondent did not even disclose how much was disputed. Mr. Munene, counsel for the 2nd respondent urged that there is no evidence to show that the title held by 2nd respondent is not genuine. He urged that money is recoverable and an injunction cannot therefore be an issue, see **Caesere Njagi Nguru V. KCB Ltd Cr. Case 1543/00**. Ultimately some of the issues that will need to be determined in this matter are:- whether there was a contract between the applicant and 2nd respondent; whether **Section 74** of the was complied with; whether the applicant's title was obtained fraudulently.

Before I go to the merits of the application, I need to address the objection to Hari Gakinya's affidavit. It was the 2nd respondent contention that the affidavit purportedly sworn by Hari Gakinya is defective in that the jurat shows that it is the applicant who swore it but not Mr. Gakinya. I have seen the affidavit. In the introductory paragraph, it is sworn by Mr. Gakinya but at the end, it is the applicant's names that appear. The affidavit is drawn by Mr. Githui, counsel for the applicant and I find that that is a matter that cannot vitiate the whole affidavit. The court will invoke its inherent powers under **Sections 1A** and **1B** of the **Civil Procedure Act** and consider the substance of the pleading in order to do justice to the parties. The defect in the affidavit must be a mistake and this court will overlook it and find it to be duly sworn by Mr. Gakinya.

The conditions upon which an interlocutory injunction may be granted were well settled in the case of **Giella V. Cassman Brown & Co Ltd (1973)EA 358.** They are:-

"1. The applicant must demonstrate that he has a prima facie case with a probability of success;

2. An interlocutory injunction will normally not be granted unless the applicant will suffer irreparable loss that cannot adequately be compensated in damages;

3. If the court is in doubt, it will decide the application on a balance of convenience."

At this stage the court is not required to make any final findings on the facts. That will be for the main hearing. The issue is therefore whether the applicant satisfies the above conditions.

From the material before the court, it is clear that the 1st respondent was advanced a loan by the 2nd respondent and there has been default in repayment. The 1st respondent has alleged mismanagement of her accounts by the 2nd respondent but that is an issue between the two parties. The applicant was not party to the loan agreement nor has he received any consideration on his title which is said to be held as security. The applicant admits having signed some paper that was taken to him by the 1st respondent who is his daughter to help her start a business. The applicant is said to be an old man. Since the 2nd respondent contends that the charge was duly executed, then it seems that is the document the applicant signed. The applicant has denied having appeared before Mr. Hari Gakinya, the advocate before whom the charge was executed nor was the effect of Section 74 explained to him. Mr. Gakinya swore an affidavit in which he has confirmed that he did not see the person who swore the affidavit and therefore did not explain to the applicant the effect of **Section 74** of the **Registered Land Act**. The advocate's conduct is obviously irregular. **Section 65** of the **Registered Land Act** provides that unless the provisions of **Section 74** of the **Registered Land Act** are excluded, an acknowledgment must be endorsed that the chargor understands the effect of **Section 74** of the **Registered Land Act. Section 65(1)** reads as follows:-

"S.65(1). A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition and the instrument shall, except, under Section 74 has by the instrument been expressly excluded contain a special acknowledgment that the chargor understands the effect of that section, and the acknowledgment shall be signed by the chargor…."

Section 74 provides for the remedies that a chargee has in the event of default. That **Section** reads as follows:-

"S.74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any chare, and continues for one month, the chargee may serve on the charger notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property;

provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months from the date of service, with a further notice served on him under that subsection.

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only –

(a) where the chargor is bound to repay the same;

(b) where, by any cause other than the wrongful act of the charger or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the charger a reasonable opportunity of providing further security which will render the

whole security sufficient, and the charger has failed to provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of the wrongful act or default of the charger;

Provided that –

(i) in the case specified in paragraph (a) –

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expires;

(ii) the court may, at it discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge."

In addition to the above, the applicant has denied giving his title to the 1st respondent to be used as security and he claims to be holding the original. The 1st respondent admits to presenting the forged title to the 2nd respondent. Infact the 1st respondent has been charged with the offence of forgery in Criminal Case No. 5538/2010. These are criminal acts (fraud) which need to be investigated. It may well be that the applicant was not aware that his property was charged to the 2nd respondent or the effects of **Section 74** of the **Registered Land Act**. The 2nd respondent cited to the court the case of **Kenya Commercial Finance Co. Ltd V. Ngeny (2002) KLR 106** where the court held that the fact that the charge did not contain an acknowledgement that the chargor understood the effect of **Section 74** was contrary to **Section 69(1)** of the **Registered Land Act**. However, it did not nullify or make void the Bank's security. That was the decision of the Court of Appeal. It was arrived at after the matter had been heard. This matter is still at an interlocutory stage and the court needs to establish at the full hearing whether a charge was signed at all, whether the charge that the 2nd respondent holds is valid or a forgery and whether the applicant was aware of the charge at all and the effect **Section 74** of the **Registered Land Act**.

It was also Mr. Githui's submission that the applicant was not served with the redemption notice. **Rule 15(d)** of the **Auctioneers Rules** requires that the chargor be given 45 days within which to redeem his property. The rule provides as follows:-

"R.15(d)… give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

One may be served personally or by registered post at his last known address. The charge document (Ex.1) and the deed of guarantee (Ex.2) indicate that the applicant's address is 125 Uplands. The notice sent by Jogi Auctioneers is given as P.O. Box 16137 Nakuru. The Nakuru address belongs to the 1st defendant. There is no evidence that the applicant was served with the notice. The court was referred to the case of **Simiyu V. Housing Finance Co. of Kenya (2001)2 EA 540** where the notice under **Rule 15(d)** of the **Auctioneers Rules** was sent to the wrong address and the court held that there was no proper notice or notification of sale to the plaintiff because the post office box used did not belong to the plaintiff. In **Muthiga V. Equity Bank Ltd (2009)1 EA 317**, the court granted an injunction to restrain the Bank from selling the plaintiff's property for want of proper service of notice on the plaintiff.

In the instant case, it is the applicant's property which was charged and which was up for sale. If indeed the 1st respondent had obtained the charge fraudulently, it is unlikely that she would have disclosed the service of the redemption notice to the applicant. In any event, the law is clear and it is couched in mandatory terms, that service must be effected on the chargor. The chargor was not served as required by

law and that calls for the court's intervention to stop the sale.

Ordinarily, the court would not issue an injunction to stop the Bank from exercising its statutory right of sale if money is owed. However, this case presents peculiar circumstances of alleged fraud; there is also an issue of whether the 2nd respondent did comply with the mandatory statutory redemption notice under **Rule 15(d)** of the **Auctioneers Rules**. The security herein is land and if an order of injunction is not granted, the stratum may be lost. If it is sold to another by way of public auction as intended, it will be put beyond the reach of the applicant. I am satisfied that the applicant has demonstrated that he has a prima facie case with a probability of success and if an order of injunction is not granted, he is likely to suffer irreparably. I grant the order for injunction as prayed pending hearing of this suit. Costs to be in the cause.

DATED and DELIVERED this 20th day of July, 2012.

R.P.V. WENDOH
JUDGE
PRESENT:

Ms Chege holding brief for Mr. Githui for the plaintiff.

Mr. Opiyo holding brief for Waiganjo for the defendants.

Kennedy – Court Clerk.