



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 88 OF 2010

EUNICE WAIRIMU KIBE.....PLAINTIFF

VERSUS

EDWARD KIBE MAINA.....1ST DEFENDANT
NANCY MUSILI.....2ND DEFENDANT
KENYA COMMERCIAL BANK.....3RD DEFENDANT

RULING

By a Chamber Summons dated and filed on 7th April 2010 (*the Application*) the Applicant sought temporary restraining orders, *firstly*, ex-parte, pending the hearing *inter partes* of the application, and *secondly*, pending the hearing of the suit herein. The first prayer was granted on 7th April 2010. The second prayer is the subject of this Ruling.

The Application was argued before me on 6th October 2010. Mr Githui who argued the application on behalf of the Applicant relied upon the Applicant's Supporting Affidavit sworn on the 7th April 2010, the grounds on the face thereof, and the said counsel's skeletal submissions dated 28th April 2010 and filed in court on 7th May 2010 together with a list of authorities referred to and attached to the said submissions.

On his part, Mr. Gai who appeared for and argued against the application on behalf of the 1st and 2nd Defendants/Respondents relied upon the 1st Defendants' Replying Affidavit sworn on 5th May 2010 and filed on 7th May 2010. The 2nd Defendant did not file any Replying Affidavit, but Mr. Gai filed a Defence on behalf of both the 1st Defendant, again dated 5th May 2010, but filed on 7th May 2010.

Mr. Mukele (*junior*) who appeared for the 3rd Defendant relied upon the Replying Affidavit of one Francis Komen, the 3rd Defendant's Credit Support Manager, sworn on 7th May 2010 and the authorities a list of which is dated and was filed on 7th May 2010, all to the effect that once the condition for the exercise of a mortgagee's or chargee's statutory power of sale have arisen, the chargee is at liberty and

may sell the charged property to recover its outstanding loan from the chargor or mortgagor.

The law and practice for grant of interlocutory injunctions is a well traversed and trodden road. The principles first laid down in the case of **GIELLA VS. CASSMAN BROWN & CO. LTD [1973]E.A. 358** have been reiterated in many judgments and rulings on this subject. The principles enunciated in that case are **firstly**, that an applicant must establish a **prima facie** case with a probability of success. **Secondly** the Applicant would suffer irreparable loss which cannot adequately be compensated in damages unless the orders sought are granted. **Thirdly** in case of doubt, the matter will be decided on the balance of convenience.

There are two sets of facts in this case. The **first** fact is that the Applicant and the 1st Defendant are estranged wife and husband. The **second** set of facts is that the 2nd Defendant borrowed moneys by way of loan from the 3rd Defendant on the strength of a guarantee by the 1st Defendant, and upon the security of the property known as **NAKURU MUNICIPALITY BLOCK 7/14 (the suit premises)** developed by the 1st Defendant while still married or on good terms with the Applicant. Those set of facts are not disputed.

The suit premises is the subject of the proceedings herein. The applicant claims that the suit premises are or form part of the matrimonial home where she and her children live, and therefore have an overriding interest over and above the claim of security by way of charge by the 3rd Defendant.

On his part, the 1st Defendant in his Replying Affidavit sworn on 5th May and filed on 7th May 2010 (*as already stated above*) depones that the suit premises were not his matrimonial home with the Applicant. He depones in paragraph 7 of his Replying Affidavit that the suit premises is his property which he bought and put up rental houses for commercial purposes, and in respect of which he has always taken loans and pays them.

In paragraphs 12 and 13 of the Replying Affidavit he depones that the charge was properly drawn and attested to, that the 3rd Defendant has no business advertising the suit premises for sale since he is a long standing customer of the 3rd Defendant and that he always services his loan. Lastly, the 1st Defendant depones that the 2nd Defendant who is his wife should not be dragged into the matter because she did not take the loan and her name does not appear on the title.

For the record, this latter claim is not born out by the documentation annexed by the 1st Defendant to his Replying Affidavit. The offer letter dated 25th January 2005 is addressed to and was on 10th February 2010 accepted by the 2nd Defendant in her maiden name Nancy Musili. Paragraph 6.1 of the offer letter says that the facility will be secured by the security documents detailed hereunder-

(1) As security we shall take legal charge of Ksh 2,900,000/= over property LR. NO. NAKURU MUNICIPALITY BLOCK 7/14 valued at Kshs 4,200,000/= as at 29/03/2004 in the name of Edward Kibe Kimani (Kimani).

(2) Guarantee of Kshs 2,900,000/= executed by Mr. Edward Kibe Kimani.

(3) (N/a).

It is clear from the above paragraphs that the loan was made to 2nd Defendant, while the 1st Defendants

save both his personal guarantees as well as the suit premises as security.

Mr. Githui learned counsel for the Applicant made a three pronged submission in support of the Application. **Firstly** counsel submitted, the Applicant lodged a caution upon the suit premises on 24th January 1996. Counsel argued that under Section 132(b) of the Registered Land Act (*Cap. 300, Laws of Kenya*), no disposition which is inconsistent with it can be registered so long the caution remains registered. Counsel submitted that the registration of a charge over the suit premises is a disposition.

The second prong argued by Mr. Githui is that a deserted wife has an overriding interest and equity in a matrimonial home. Counsel relied upon the provisions of Section 30(g) of the Registered Land Act which provides -

"S.30 (a) - (f)

(g) the rights of the person in possession or in actual occupation of the land to which he is entitled in right only of such possession or occupation save where inquiry is made of such person and the right is not disclosed."

Counsel relied on the English case of **NATIONAL PROVINCIAL BANK VS. HASTING CAR MART [1964] 1 ALL ER 688** for the proposition that at common law, the applicant, as a deserted wife has equity over the property and a licence to remain in occupation. Counsel also referred to Halbury's Laws of England, Vol. 3rd Edn. at p. 849 to the same effect.

Counsel also relied upon the case of **KITALE vs. KITALE [2001] 1 E.A. 90** where the court stated -

"Where a spouse bought a property intended for common use, which per se did not give proprietary interest in the property, the spouse seeking to establish beneficial interest in the property could only do so by establishing that the legal owner held the property in trust for her."

The **third** point urged by Mr. Githui is that the Applicant would **suffer irreparable loss** if the prayer for injunction were declined, and that the balance of convenience would also be in her favour.

On his part, Mr. Gai, Counsel for the 1st and 2nd Respondents did not dispute the basic set of facts, the Applicant and the 1st Defendant are estranged wife and husband; the 1st and 2nd Defendant are also husband and wife. Counsel submitted that the suit premises are not the matrimonial home but that the suit premises are a commercial development for rental purposes, and that the Applicant had moved into one of the units. Counsel submitted that the application is mischievous and incompetent and asked that it be dismissed.

Mr. Mukele (*Junior*) who urged in opposition to the application on behalf of the 3rd Defendant submitted on five broad grounds; the caution; interest of a deserted wife in a matrimonial home, the non-disclosure of on-going divorce proceedings, the validity of the charge, and the principles for grant of interlocutory injunction. Counsel relied on his list of authorities - **LUCY INDA vs. STANDARD CHARTERED BANK LTD & 2 OTHERS** (*Milimani Commercial Courts HCCC No. 450 of 2004*), **HOUSING FINANCE CO. LTD vs. FAITH KIMEMIA & HARRISON C. KIMERIA** (*COURT OF APPEAL, CIVIL APPEAL NO. 214 OF 1996*), **JANE MUTHREW KALOKI VS. BARCLAYS BANK LTD & DANIEL KALOKI KIOKO** (*Milimani Commercial Courts H.C.C.C. No. 206 of 2008*). In all of these cases prayers for injunction were declined on the principles of **GIELLA VS. CASSMAN BROWN & CO. LTD.**

I have considered the rival arguments set out above and the cited cases, including the case of **PETER KIMONYE & 2 OTHERS VS. BARCLAYS BANK OF KENYA LTD & 2 OTHERS** (*Milimani Commercial Courts HCCC No. 403 of 2004*) cited by Mr. Gai Counsel for the 1st and 2nd Defendant.

I will first deal with the technical issues of the effect of a caution upon registered title. There is no doubt as Mr. Githui, counsel for the Applicant argued that Section 132(b) of the Registered Land Act prohibits my dealing in, or disposition of land so long as a caution remains registered. Mr. Githui relied upon what appears to be a copy of a caution lodged in 1996 prohibiting any such dealing without reference to the cautioner. It is difficult to say what happens in our Land Registries, but suffice it to say, in accordance with the Replying Affidavit of Francis Komen there already existed a charge on the suit property way back on 18th May 1995, further charge of 15th May 1995, Second Further Charge, and Third Further Charge dated 14th June 2005 to secure Kshs 2,900,000/= the subject of the 3rd Defendant's notice to exercise its statutory power of sale for default by the borrower/guarantor - 1st and 2nd Defendants.

Any caution lodged in 1996 would be subject to the existing encumbrances by virtue of their prior registration. The strange aspect of the Applicant's caution is the fact that a search conducted by the 3rd Defendant did not reveal existence of such caution. That would however be subject of a different inquiry. For the purposes of this ruling, I could only observe that the absence of such caution weakens the Applicant's case.

The second technical issue raised by Edwin Mukele is that the Applicant failed to disclose that there are current or existing divorce proceedings between her and her estranged husband, the 1st Respondent. I think the non-disclosure does not affect the Applicant's case for an interlocutory injunction.

Having disposed of those technical objections, I now revert to the main basis or ground in this application. The application herein is not in the usual grounds of challenging the chargee's statutory power of sale on the ground of either invalidity of the instrument of charge, that the condition for the exercise of the power have not arisen, or that proper statutory notices were not given either by the chargee or its agent the auctioneer or that the claims are disputed. None of those grounds are raised by the Applicant. Neither is the Applicant claiming merely that the suit premises are merely a matrimonial home. The Applicant's claim is that the suit premises or part of them, is what she and her children are in possession or occupation and is her home as a deserted wife, and the home of her children.

Mr. Edwin Mukele for the 2nd Respondent argued that the Applicant had not shown any evidence of her contribution towards the purchase of the suit property, that there are on-going divorce proceedings, nor is there any challenge of the validity of the charge, and alternatively, that the applicant would suffer no loss which the 3rd defendant could not adequately compensate in damages, and for the same reason the balance of convenience would lie with the 3rd Defendant.

These arguments are no doubt valid, but they are not even part of the applicant's case. The Applicant's case, which as I said in the beginning of this Ruling, is that the Applicant is a deserted and estranged wife of the 1st Defendant, that there may be divorce proceedings in progress does even strengthen her case for an interlocutory injunction - but that would not be the main ground. Her main ground and contention is that she is in possession and actual occupation of part of the suit property. Under Section 30(g) of the Registered Land Act such possession and occupation is an overriding interest, and does not need to be registered, until that right is displaced by inquiring to establish the legitimacy of her possession or actual

occupation of the suit premises.

I agree with Mr. Githu's submission that at common law, and S.30(g) of the Registered Land Act the Applicant as a deserted wife has equity over the suit property and a licence to remain in possession and occupation, in this case, in respect only of that part where she is in actual occupation.

I agree with and endorse the words of Lord Denning MR in the case of **NATIONAL PROVINCIAL BANK VS HASTING CAR MART** (*supra*) where the learned MR said -

"Where a husband owns a matrimonial home, and is living there himself, he cannot turn his wife out. He cannot treat his wife as a stranger. He cannot exclude his wife from the house without good cause. Now suppose he deserts his wife and goes on leaving her in the matrimonial home with the children, is he in any better position "because he deserted her? .. clearly not ... the reason is simply this; it is the husband's duty to provide a roof over her head and by giving her a matrimonial home he gives her an authority to be there. This is an authority which he cannot revoke so long as it remains the matrimonial home."

The position would not be different if the 3rd Defendant sold the suit premises and the purchaser, the successor in title to the husband, wanted to or sued the wife for possession, the purchaser cannot turn out the wife. In the same case **National Provincial Bank vs Hastings Car Mart** Lord Denning said -

"So far as registered land is concerned, the right of a deserted woman to remain in occupation is a right within Section 70(1)(g) and is an overriding interest, available against all persons, save where an enquiry is made to her rights and her rights are not disclosed."

Section 70(1)(g) of the English Land Registration Act (1925), is in very similar language to one Section 30(1)(g) of the Registered Land Act -

"30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without being noted on the register -

(a) - (f)

(g) the right of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed."

The test, it seems to me, whether or not any of the rights under Section 30 of the Registered Land Act, are overriding and need not be noted on the register is whether or there is a *contrary intention* expressed in the register. The question is, how is that contrary intention expressed in the register? Is the registration of a charge or mortgage such a contrary intention? Again, it seems to be not to be so. The charge is a creation of contract under the said instrument. The overriding interest is a creature of statute. To displace it, there must be a notification in the register that there are no overriding interests under Section 30 of the said Act.

That way, there is notice to the whole world that there is an encumbrance to or that overriding interest has

been displaced by a superior right.

Where therefore, as in this application, there is no notification of a contrary intention to defeat that interest, that interest is said to subsist (*or remain*) and affect the registered land without being noted on the register.

The Replying Affidavit of Francis Komen refers in para. 18 to a Valuation Report annexed as "FK 9". It is observed in paragraph 4.8 of the Report that-

"the property is part owner occupied and part let out to monthly tenants."

This clearly confirms the overriding interest of a person in possession or actual occupation, which interest subsists until an inquiry establishes that possession or actual occupation is wrongful.

Being a deserted wife in possession and actual possession, that right is protected by Section 30(g) of the Registered Land Act.

For those reasons, I think, the Applicant has established a prima facie case with a probability of success. As a deserted wife she would certainly suffer irreparable loss which no damages would compensate as the process of recovery of such damages would take a considerable period of time. The balance of convenience would lie in her favour. I therefore allow the Applicant's application in terms of prayer 3 thereof. The costs herein shall abide the outcome of the main suit.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 11th day of February 2011

M. J. ANYARA EMUKULE

JUDGE