



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)**

Civil Case 763 of 2009

**S W.....PLAINTIFF
VERSUS
EAST AFRICAN BUILDING SOCIETY.....DEFENDANT**

RULING

1. The Plaintiff's Chamber Summons dated 15th October, 2009 is brought under the provisions of **Order XXXIX rules 1, 2 and 3** of the **Civil Procedure Rules**. The Plaintiff is seeking for a temporary order of injunction to restrain the defendant from selling or transferring **LR. No. NAIROBI BLOCK 82/2615 Greenfields** pending the determination of this suit. This application is premised on the grounds that the applicant is an equitable owner of the suit premises; she complains that she was not notified when the property was released as security by the Defendant.
2. The application is also supported by the applicant's affidavit sworn 15th October, 2009. The Applicant has explained that she is the wife of the registered proprietor one **D K M**. However they are at the moment separated and she has been living in the suit property as the matrimonial home together with the children. She deposes that she was aware that her husband took a loan in the year 2000, and to the best of her knowledge her husband was paying the loan.
3. However she was surprised to read in the newspapers that the matrimonial home was advertised for sale on 4th October 2009 to be sold on 15th October 2009. The Applicant contends that the suit premises are her matrimonial home with her children and if the sale proceeds, she will suffer irreparable loss. She also contends that she has a right over the property under the provisions of the **Married Women Property Act** moreover as equitable owner; she had a right to be notified by the defendant of the charge and the statutory notice.
4. The defendant opposed this application. He relied on the replying affidavit sworn by **Wilfred Oroka** sworn on 10th February 2010. The defendant challenged the plaintiff's suit for failure to join the proprietor of the suit premises. The rights created under the charge are not assignable to the plaintiff. The plaintiff has therefore failed to establish the elements set out in the case **Giella vs. Cassman Brown** to warrant this court grant her an interlocutory order of injunction.
5. Moreover the property was sold pursuant to the statutory power of sale granted in the charge to the chargee. The Applicant has not even shown any contribution that she alleges to have made as a wife. There is also no evidence to support the allegation that she is married to the chargor. There is no evidence that she lives in the property and the application fails to demonstrate any prima facie case with a probability of success. This is a further ploy by the chargor with the plaintiff to frustrate the chargee's efforts of realizing the suit premises as the chargor had filed another suit being Milimani CMC No. 7484 of 2002. The chargor was represented by the same firm of Advocates who now represent the plaintiff.

6. After that suit was dismissed with costs, the chargor filed more proceedings in HCCC No. 287 of 2007 where he obtained an *ex-parte* order of injunction. The application was heard *inter partes* and the interim orders were discharged. Counsel for the defendant argued that the current application is brought in deliberate disguise to mislead and conceal material information. After engaging the defendant, for a period of almost 8 years. Eventually the Defendant was able to sell the property and a certificate of Sale was issued by the Auctioneers. The sale cannot therefore be set aside. Counsel also relied on several authorities to show that the plaintiff's application does meet the threshold of granting an interim order of injunction.

7. The above is the summary of the salient issues raised in the pleadings and the submissions by both parties. The principal issue to determine is whether the applicant has established a prima facie case with a probability of success to warrant the granting of an order of injunction. The Court of Appeal has explained what constitutes a prima facie case in their Lordships decision in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KRL 125**

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

8. The applicant has advanced the grounds that she is the wife of the registered owner. The suit property is her matrimonial home, she contributed to its acquisition and she was not notified by the Defendant of the charge or sale. With tremendous respect, the Plaintiff has not produced any documentary evidence to support that claim. Moreover the plaintiff did not join her husband who charged the property as security and failed to pay the loan. This lends credence, the submission that the Plaintiff's application is contrived to disguise the matter because the registered owner has filed two previous suits and in those suits, he was represented by the same firm of Advocates.

9. The principles that guide the court on the elements to take into consideration on whether or not to grant an order of injunction well settled in the oft' cited case of **Giella vs. Cassman Brown and Company Limited 1973**. The applicant must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which will not be compensated for in damages will arise, and if in doubt, the court will determine the matter on a balance of convenience.

10. The Plaintiff has no case against the Defendant she probably has a case against the chargor who she claims to be her husband and who probably held the suit property in trust for her but she did not join him in this suit. Moreover the plaintiff came to court too late the sale had already taken place, and the certificate of sale was issued after the suit property was sold pursuant to the charge. The Plaintiff came to court too late as the saying goes; she came to court after the horses had bolted from the stables.

11. Although I sympathies with the applicant who finds herself in this precarious situation like many a wife, I am afraid she has not met the criteria set in law to enable this court exercise its discretion in her favor. The Application is dismissed with costs to the Defendant and the interim order of injunction issued on 16th October, 2009 is hereby discharged.

RULING READ AND SIGNED ON 23RD APRIL 2010 AT

NAIROBI.

**M. K. KOOME
JUDGE**

