



REPUBLIC OF KENYA



KENYA LAW
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**Yator v Cheronno & 2 others (Environment & Land Case E004 of 2022)
[2022] KEELC 13340 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E004 OF 2022
MN MWANYALE, J
SEPTEMBER 29, 2022**

BETWEEN

JULIUS KIPKOSGEI YATOR APPELLANT

AND

BEATRICE CHERONO 1ST RESPONDENT

KALATO AUCTIONEERS 2ND RESPONDENT

KENYA COMMERCIAL BANK LTD 3RD RESPONDENT

RULING

1. This ruling is in respect of a notice of motion application dated May 24, 2022 seeking the following orders;
 - i) spent
 - ii) spent
 - iii) That pending the hearing and determination of this appeal, a temporary injunction be and is hereby issued against the 2nd defendant/respondent whether by themselves, their servants, employees or agents from selling of charged property LR No Nandi/Kapsabet municipality /1181/504 through public auction scheduled for May 25, 2022 or any other day.
 - iv) That the costs of this application be provided for.
2. The motion is premised on grounds set out on the face of it and supported by affidavit of Julius Kipkosgei Yator, the appellant herein.
3. The appellant/applicant deponed that he had filed an appeal against the ruling in Kapsabet CM ELC No E035 of 2022 delivered on May 24, 2022. The said ruling exposed the suit property to sale by public auction subjected applicant to loss and damage.



4. He also deponed that he is the husband to the 1st respondent, who is the registered owner of the suit, property, having been married under Nandi customary law in 2010. As a result, the suit property was matrimonial property since it was acquired in 2016 during the subsistence of their marriage. Spousal consent was therefore necessary in the circumstances but the same was not obtained rendering the charge null *ab initio* and legally untenable.
5. The 1st respondent filed a replying affidavit dated June 7, 2022 deponed by Beatrice Cheron. In the said affidavit, the 1st respondent is in support of the motion coming up for determination and prayed that the same be allowed. She generally confirmed that at the time of execution of the security, she was legally married to the applicant.
6. The 2nd respondent on their part opposed the motion vide replying affidavit sworn by Irene Chemeli its universal banker on behalf of the bank.
7. The substance of the response was that the memorandum of appeal annexed to the motion did not demonstrate an arguable appeal. Further that the application did not meet the threshold for grant of temporary injunction pending appeal.
8. It was also deponed that the 1st respondent defaulted in repayment of the loan who outstanding balance stood at kshs 7,178,972.92 as at May 4, 2022. The same continued to attract interest and penalties and in the event an injunction is granted the outstanding amount would outstrip the value of suit property condemning 2nd respondent to little or no chance of recovery of outstanding loan amount.
9. Furthermore, the loan facility, advanced to the 1st respondent by the 2nd respondent was for the purposes of financing purchase of suit property. According to the 2nd respondent, this was a clear case of fraud involving the applicant and the 1st respondent after monies were disbursed.
10. The applicant then filed a supplementary affidavit dated June 21, 2022 reiterating the contents in affidavit in support of the motion.
11. When the matter came up on June 6, 2022, the court directed that the application be canvassed by way of written submissions.
12. The applicant filed written submissions dated June 21, 2022. The applicants submissions are based on the fact that he is the legal husband to the respondent, who is the registered owner of suit property, having been married under Nandi customary law in 2010. As a result, the suit property was a matrimonial property at the time of execution of loan advanced by 2nd respondent. That being a spouse to the charger, his consent as a spouse was necessary and since the same was not obtained then the charge was rendered legally untenable. They relied in the Court of Appeal case of *Mugo Muiru Investments Limited v EWB and 2 others* [2017] eKLR as well as the case of *Kadzo Mkutano v Mukutano Mwamboje Kadosho and 2 others* [2016] eKLR.
13. The 1st respondent also filed, written submissions dated June 17, 2022 submitting that the 2nd respondents statutorily power of sale was tainted with irregularities, irregularities, lack of proper procedures hence same was illegal, null and void. They relied in the case Thika ELC No 559 of 2017 *Goefrrey Kinuthia Mungai and another v Progressive Credit Limited*.
14. The 2nd respondent equally filed written submissions dated July 1, 2022. They submitted that his was a clear case of a well – orchestrated ploy by the applicant and 1st respondent to use this court to escape their obligations. It was also submitted that granting the orders sought had far reaching consequences to the 2nd respondent as the outstanding loan amount would surpass the value of suit property. On this they relied in the case of *Quantum Petroleum Limited v Diamond Trust Bank Kenya Ltd* [2017] eKLR.



15. Generally, the 2nd respondent submitted that the application coming up for determination did not meet threshold to grant temporary injunction pending appeal. As a result they asked this court to dismiss the application with costs.

Analysis And Determination: -

16. I have carefully considered the application, the affidavit in support, the response thereto as well as rival submissions. In my view, the sole issue for determination is whether the applicant has met the threshold for grant of temporary injunction pending hearing and determination of this appeal.
17. The principles for grant of temporary injunction pending appeal were set out in the case of *Patricia Njeri and 3 others v National Museum of Kenya* [2004] eKLR. They include;
- “a) an order of injunction pending appeal is discretionary which will be exercised against an applicant whose appeal is not frivolous.
 - b) The discretion should be refused where it would inflict greater hardship than it would avoid.
 - c) The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d) The applicant must present a prima facie case with a probability of success.
 - e) The applicant must demonstrate that they will suffer/irreparable injury if a temporary injunction is not granted; and
 - f) The applicant must show that the balance of convenience tilts in their favour.”
18. This court has had a chance to peruse ruling being appealed against, the motion herein as well as responses and has noted that there is a discrepancy on the suit property mentioned. The substantive prayer on the face of the motion (prayer No 3) refers to property known as LR No Nandi/Kapsabet municipalit/181/504, a copy of sale agreement has been annexed making reference to the same property number while the development application form annexed making reference to the same property number while the development application form annexed to the same application makes reference to property number LR No 1181/504 which is the same property number as the one that was charged by the 1st respondent in favour of the 2nd respondent. This discrepancy in title/property name and number was pointed out by the 2nd respondent in their replying affidavit dated June 6, 2022. The applicant having been served with this affidavit dated June 21, 2022 but failed to address the said issue. It therefore remains that the orders being sought by the applicant are in reference to property known as Nandi/Kapsabet municipality/118/504.
19. The 2nd respondent contends that it advanced loan facility in favour of 1st respondent for purchase of residential property know as LR No 1181/504, which property was also charged in favour of 2nd respondent.
20. It is clear from the record that the properties being referred to by the applicant and 2nd respondent are different. Moreover, no relationship has been demonstrated between the two properties in terms of whether one property was as a result of sub-division of the other.
21. In view of the above, granting orders sought would be an exercise in futility. In other words granting a temporary injunction pending appeal over property Nandi/Kapsabet municipality/118/504 will



not deter the 2nd respondent from proceeding with the sale by public auction over property LR No 1181/504.

22. Consequently the motion dated May 24, 2022 is struck out with costs to 2nd respondent and interim orders discharged.

Orders accordingly

DATED AT KAPSABET THIS 29TH SEPTEMBER, 2022.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Kirui for the Appellant/Applicant

Mr. Mayiga for 2nd Respondent

Mr. Omboto for 1st Respondent

