



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE 81 OF 2007

IRENE CHEPKOECH CHUMO:.....PLAINTIFF

VERSUS

DAVID KIPLETING RUGUT:.....1ST DEFENDANT

BARCLAYS BANK LTD:.....2ND DEFENADNT

R U L I N G

The Plaintiff is the daughter of the late Jackson Chumo Terikin the registered owner of the parcel of Land known as LR.NO. 9399/27. She filed the plaint dated 30/4/2007. In it she pleads that the 1st Defendant obtained from her deceased father the certificate of title over the suit land by misrepresenting to the deceased that the 1st Defendant was going to pledge the certificate of title to Mumias Sugar Company so as to be given sugar on credit and that the two, that is to say, the deceased and the 1st Defendant would share the profits from the sugar business. She pleads that contrary to that representation the 1st Defendant without the consent of the deceased went ahead and fraudulently mortgaged the suit land to the 2nd Defendant. She gives the particulars of fraud as that, causing the suit land to be charged without the consent of the deceased, causing the suit land to be charged without a land control board consent and/or a valid land control board consent, 1st Defendant obtaining the lease certificate to the suit land from the deceased by misrepresenting his intentions and purpose of taking the same, forging the deceased's signature/thumb print on the purported application for the land Control Board consent and the charge documents; and that the 1st Defendant took advantage of the deceased's advanced age to defraud him. The Plaintiff then prays for a declaration that the whole process of charging the property was a nullity and void and of no legal consequence amongst other prayers.

On the same day of filing the plaint the Plaintiff took out a chamber Summons under Section 3,3A and 63 (e) of the civil Procedure Act and Order XXXIX Rules 1,2 and 9 of the Civil Procedure rules and all the enabling provisions of the law praying, inter alia,

a)

b) This Honourable court be pleased to issue temporary orders of injunction restraining the 2nd Defendant from disposing, selling, transferring or in any other manner realizing the security comprised in all that parcel of land known as LAND REFERENCE NUMBER 9399/27 registered

in the name of the late JACKSON CHUMO TERIKIN pending the hearing and determination of this application inter-partes.”

c)

d)

It is based on the grounds that the late Jackson Chumo Terikin passed on the 26th August 2005 and the charge was fraudulently registered in that the 1st Defendant secured the lease certificate from the deceased by misrepresenting why he needed the title. The late Jackson Chumo Terikin did not sign the application for land Control Board consent and did not attend any Control Board and no consent was therefore obtained and if a consent was obtained then the same was fraudulently obtained by forging the deceased's signature and/or thumb print rendering the said consent, if any, invalid, null and void. The further grounds are that the deceased did not sign the charge documents and the purported charge documents are works of forgery which render them null and void. That the deceased was a very old man and needed the assistance of the family to even move and walk outside the homestead at the time the property was charged and the family would have known of the transaction leading to the charge if they had been validly done. That the 2nd defendant has put up an advertisement of sale in respect of the suit land and the family of the deceased stand to be disinherited of their just entitlement unless the orders sought are granted and the Plaintiff and the other dependants and/or beneficiaries of the estate of the deceased stand to suffer irreparable loss and damage that cannot be compensated by an award of damages. The Applicant contents that she has a prima facie case with overwhelming chances of success and the balance of convenience favours the estate of the deceased for the reasons that the suit land has not been sold and the estate of the deceased live on that land and the 2nd Defendant can still charge interest which can be recovered if the Plaintiff is unsuccessful in this suit.

The Applicant swore a supporting Affidavit and deponed that sometime during 2000-2001 the 1st Defendant visited their home and requested her deceased father to give him the lease certificate in respect of the suit land so that he could pledge it to Mumias Sugar Company to obtain sugar on credit and the deceased would then share in the profits. That the deceased told the 1st Defendant to give him time to consult his family as he himself was old and after consultations the deceased released the title to the 1st Defendant on the understanding that the title document would be used as security with Mumias Sugar Company Limited for the purposes of buying sugar on credit; that upon the business stabilizing a meeting would be organized so that the profit sharing scheme would be agreed and that upon the sugar business becoming self reliant and good-will established with Mumias Sugar Company Limited, the title document would be released to the deceased. She adds that no profits were ever shared as the 1st Defendant said the business was struggling and the title document had therefore not been released. She states that her father passed on on 26th August 2005 (Death certificate annexed) and on 14th April 2007 the 1st Defendant delivered a letter to the Plaintiff's mother and left in a huff. That letter was the notification of sale dated 6/2/2007 and 16/2/2007 annexed to the affidavit as "ICC 111 (A) and (B)". That the Plaintiff, her mother and siblings confronted the 1st Defendant to explain what the letters meant but he was arrogant and uncooperative and that is when she rushed to her advocates. Upon a search being conducted it was discovered that the land had been changed to the 2nd Defendant on 22nd October 2001 to secure a loan of 9,700,000/= and it was then decided that the Plaintiff obtain Letters of Administration to give her capacity to sue which she did and hence instituted this suit. She then adds in her affidavit in support of the application that her old and sickly father depended on the family for mobility and did not execute any charge and Land Control Board application for consent or any other documents without the family knowing it. And so she stated that if any document was said to bear the signature and/or thumb print of her late father then that must be a forgery and the 2nd Defendant is a beneficiary of fraudulent acts by the 1st Defendant and itself. She stated that she had a prima facie case and loss of the land would be irreparable and damages would not be adequate compensation as the suit land is of some sentimental value and has no price tag. As earlier stated she says the balance of convenience is in favour of the family of the deceased.

At the hearing of the application counsel for the Plaintiff Mr. Cheruiyot submitted that S.69 (a) (i) of the Indian Transfer of Property Act was not complied with as the statutory notice was not served on firstly an administrator of the estate of the deceased as there was no such administrator until 5th June 2007 when the Plaintiff was appointed and secondly no one held a power of attorney from the deceased person. He submitted further that the charge was not executed by the deceased and the alleged charge document annexed to the affidavit on behalf of the 2nd Defendant was not even signed by the 1st and 2nd Defendants and even if it were to be shown that the execution was in order the compliance with Indian Transfer of Property Act was missing. Counsel concluded that the Plaintiff stands to succeed at trial and the balance of convenience tilts in favour of the estate of the deceased who are in occupation of the suit land. He was of the view that loss of the suit land would not be compensated in damages.

The 2nd Defendant filed its defence on the 6th of June 2007 and denied the averments in the plaint save its description. The 2nd Defendant further stated in its defence that neither the chargor nor the borrower made any effort to pay the moneys due and on its part denied any allegations and particulars of fraud on its part.

The 2nd Defendant also filed its Replying Affidavit to the application under consideration. It is sworn by Faith Muthoni Majiwa described as its Corporate Recoveries Officer. She depones that the 2nd Defendant granted banking facilities to the 1st Defendant upon the security of several securities including the suit land belonging to the deceased. She adds that the charge document was prepared by the Bank's advocates and it was executed by the chargor and attested by an advocate of his choice. That there was also produced a Land Control board Consent issued after application for the same which was signed by the deceased. The deponent then explains how default in payment was made and the process put in place in realizing the securities. She further adds that the bank's appointed auctioneers served a Notification of sale and a Redemption Notice on the chargor's family which service she describes as personal. She adds that the debt to the bank by the 1st Defendant is due and owing and the charge having been properly executed and attested the same cannot now be challenged as fraudulent. She says that the Plaintiff's application is frivolous and unmeritorious and an attempt to parvade justice by wrongfully negating the charger's legal obligation to have the suit property sold in settlement of the due debt to the 2nd Defendant.

At the hearing **Ms. Njoroge** learned counsel for the 2ND Defendant opposed the application and relied on the Replying Affidavit filed. She submitted that the charge and guarantee are not denied. She added that these documents were executed by the chargor and attested by an Advocate of the chargor's choice at Kapsabet which she described as the place of abode of the deceased. She said all the signatures corresponded and as they were not challenged by an expert then they stood as the signatures of the deceased. As concerns the Plaintiff's averment that the deceased was sickly counsel submitted that there was no medical proof attached to the application to prove it. She also said that the Plaintiff was guilty of laches. The statutory Notice was sent to the postal address of the deceased, and as there was no evidence that the chargor did not know what he was signing when he signed the charge, guarantee and application for land Control Board consent, then the Plaintiff has not a prima facie case and has not met the conditions set out in the case of **Giella –vs- Cassman Brown (1973) E.A. 8358** and her application must be dismissed with costs, counsel concluded.

The 1st Defendant filed his defence on 19th June 2007 denying all material averments in the plaint and stating that the charge was executed by the deceased and there was no fraud on the part of the 1st Defendant.

The 1st Defendant did not file a Replying Affidavit to the application under consideration and although he was represented by Counsel **Mr. Tanui** at the hearing of the same, the said counsel did not say anything in reply. Both **Mr. Cheruiyot** and **Ms. Njoroge** appearing for their respective parties relied on various authorities that the court found useful.

This now is an opportune time for the court's consideration of this application. For the Plaintiff to succeed she must show:-

i. A prima facie case with a probability of success (and not overwhelming chances of success as counsel wrongly pleaded).

ii. That she will suffer irreparable injury if the injunction is not granted. And if the court is in doubt it will decide the application on the balance of convenience.

This application revolves around the twin issues of execution of the charge document, the application for Land Control Board Consent and the service of the Statutory Notice. Resolving those settles the application.

The Plaintiff has pleaded in the plaint and demonstrated by affidavit evidence that her deceased father did not execute those documents and if his signature is on them then the same is a forgery. She has also stated that the lease certificate over the suit land was obtained by the 1st Defendant from the deceased by a misrepresentation of the purpose for which the same was to be used. This she called fraud. The one person who could effectively contradict this was the 1st Defendant. He had all the opportunity to do so. He chose not to. Why he acted the way he did only he can explain but it is not lost to my mind that the person he obtained the material document from is dead. All the allegations of fraud and forgery are against the 1st Defendant who has chosen not to answer them one way or the other. His very loud silence is to be interpreted by whoever wishes to interpret it as they may wish to interpret it. The arrogance attributed to him by the Plaintiff stands uncontradicted at this point. If there was fraud and forgery as alleged, then to my mind those are matters to be investigated by way of evidence at a trial. The allegations of fraud set out in paragraph fifteen (15) of the plaint cannot be taken lightly. They must be investigated. The only way to do that is by adducing evidence and subjecting it to cross-examination.

The 2nd Defendant sent a Notification of sale by their Advocates' letter dated 19th July, 2006 that, if there be no payment there would be sale of the security. This letter was sent by registered post to P.O.BOX 108 Nandi Hills and it was addressed to Jackson Chumo Arap Terigin. By that date the said Jackson Chumo Arap Terigin was dead, very dead having died on 26th August 2005 as per certificate of Death B. No.758218. The Statutory Notice was therefore sent to a person not at the address given on the notice.

The Notification of sale under the Auctioneers Rules and which was addressed to the deceased was received by and signed by the 1st Defendant herein as is evidently clear from the copy attached to the Affidavit of Service by Patrick Ngigi. Patrick Ngigi's explanation as to why the widow of the deceased whom he allegedly served with the notification of sale did not sign herself is in my view best settled by evidence given the allegations of bad blood (arrogance, it was called in the affidavit of the Plaintiff) of the 1st Defendant to the family of the deceased. No reason is given as to why the widow, if served, could not herself sign for the Notice. Now it is settled that the power donated by S.69A (1) of the Transfer of Property Act cannot be exercised until and unless "notice requiring payment of the mortgagor money has been served on the mortgage or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof for three months, after such notice." In this case I find that notice was not served and hence the mortgagees power of sale has not therefore crystallized and/or accrued. The point was taken that at any rate no one had obtained Grant in respect of the estate of the deceased and no one had his power of attorney but having found that notice was not served I consider it unnecessary to consider that issue. Validity of the Statutory Notice must depend, amongst other things, on its service to the mortgagor.

It was submitted that the charge document was executed by the deceased and attested by an advocate of his choice at Kapsabet which was described as the chargor's place of abode. I note that the address of the deceased is Nandi Hills and that of the 1st Defendant who has been accused of fraud and forgery is Kapsabet. Perhaps the advocate who attested the charge must resolve the issue at hearing.

An injunction will issue in an appropriate case to protect legal and equitable rights of a party which rights are under threat of violation. I consider this an appropriate case in which an injunction should issue. I find that the Plaintiff has brought herself within the four corners of the **Giella** case above and I hereby exercise my judicial discretion in her favour. To do otherwise is to appear to benefit the 1st Defendant

before the allegations of fraud and forgery are settled by way of evidence. That I leave to the trial judge.

The upshot is that the Plaintiff's application succeeds.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF MAY 2009

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

.....Court clerk

.....Advocate for the Applicant

.....Advocate for the 1st Defendant.

.....Advocate for the 2nd Defendant