



Mwangi v Mentor Sacco Society Limited & another (Environment & Land Case E181 of 2022) [2022] KEELC 14433 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E181 OF 2022
LN MBUGUA, J
OCTOBER 27, 2022**

BETWEEN

MARY WAIRIMU MWANGI PLAINTIFF

AND

MENTOR SACCO SOCIETY LIMITED 1ST DEFENDANT

AUTOFINE LIMITED 2ND DEFENDANT

RULING

1. The application before me is dated May 23, 2022 and is brought under section 1A, 1B, and 3A of the [Civil Procedure Act](#) and order 40 rule 1 and 2 of the [Civil Procedure Rules, 2010](#). The plaintiff is seeking orders that the defendants be restrained from disposing of, selling or transferring title No Ruiru/Ruiru West Block 3/811 to any person until this suit is determined. She also seeks orders that the defendants be restrained from acting on the plaintiff's guarantee for the overdraft of Kshs 3, 900,000/= until this suit is heard.
2. The plaintiff further seeks orders directing the defendants to furnish her and file in court for scrutiny all the bank statements showing how the amount now demanded was arrived at and the interest rate applied from the date the overdraft was taken.
3. Additionally, she seeks orders that the title documents held by the defendant for title number Ruiru/Ruiru West Block 3/811 be released to her.
4. The application is based on the grounds on the face of it and on the plaintiff's supporting affidavit sworn on May 23, 2022. She avers that sometime in 2016, while in the employment of the 2nd defendant, she was persuaded by one of the 2nd defendant's shareholding director named Mr Kinandu to offer her title as security for an overdraft facility of Kshs 3, 900 000 which the 2nd defendant intended to take from the 1st defendant.



5. She further avers that at the time of the request, she had a loan of Kshs 4million with KUSCCO Sacco which she had partly paid and Kshs 3,900,00/= was outstanding. That the aforementioned director of the 2nd defendant had proposed that they could offset the outstanding loan balance at KUSCCO Sacco, redeem her title and use it to guarantee and obtain the overdraft of Kshs 3,900,000/=. She agreed to this proposal.
6. She contends that the term of the loan was however illegally and irregularly altered and varied to the sum of Kshs 30million without her knowledge and consent and to her detriment, such that now the 1st defendant is claiming Kshs 60 million from her. To this end, on September 14, 2021, she was issued with a 90 days statutory notice for the 1st defendant to commence the exercise of their statutory power of sale. It was through the said notice that she came to learn of the variation of the loan.
7. She was subsequently served with the chargee's 40 days statutory notice dated April 13, 2022.
8. The applicant urges this court to allow the application in the interest of justice.
9. The application is opposed by the 1st defendant through the replying affidavit sworn on June 3, 2022 by Joyce W Ndegwa, its Chief Executive Officer. She avers that on March 3, 2017, the 2nd defendant applied for a loan of Kshs 60 million from the 1st defendant and upon evaluation, the loan facility offered was for Kshs 30 million, with the suit property being the security. The letter of offer dated July 13, 2017 was duly accepted by the 2nd defendant and was executed by its two directors, one of them being the plaintiff.
10. It is further avered that upon accepting the terms and conditions of the offer letter, the 1st defendant registered a charge over the suit property and again, the plaintiff duly executed the charge document. The loan was to be paid with interest in 36 equal monthly installment of Kshs 1,283,400/=.
11. However, the 2nd defendant defaulted in repaying the monthly installments which resulted in accumulated interests and penalties and on August 30, 2021, the 1st defendant wrote to the 2nd defendant while copying its directors and notified them of the outstanding loan obligation and demanded that they make payment arrangements. Thus the relevant statutory notices were subsequently issued.
12. That upon receiving the statutory notice, the plaintiff wrote a letter to the 1st defendant dated March 6, 2022 requesting to repay the loan facility to the value of her charged property.
13. The 1st defendant also states that upon lapse of the statutory notice, a 40 days chargee's statutory notice was sent to the 2nd defendant and its directors and that it was scheduled to lapse on May 23, 2022 when this suit was filed to stop the 1st defendant from continuing with the procedure of realizing the security.
14. The plaintiff filed a supplementary affidavit sworn on July 24, 2022 averring that at the time of execution of the loan documents herein, she appended her signature on a blank document believing that it was for guarantee of an overdraft of Kshs 3.9 million and not a term loan of Kshs 60 million as alleged.
15. She also avers that even if the 1st defendant advanced a term loan of Kshs 30 million, it reeks of fraud and irregularity to have secured it with a charge over the suit property that is valued at Kshs 12 million and that there is no explanation how the loan sum was grossly inflated to 60 million.
16. I have duly considered all the issue raised herein as well as the submissions of the rival parties. The crux of the matter is whether the 1st defendant should be restrained from selling the suit property at this stage.



17. Interlocutory injunctions are anchored under order 40 rule 2 of the *Civil Procedure Rules 2010* and the principles for granting such injunctions were settled in *Giella v Cassman Brown* [1973] EA 358. They were reiterated by the Court of Appeal in the case of *Nguruman Ltd v Jan Bonde Nielsen & others* [2014] eKLR.
18. The plaintiff contends that at no point did she ever agree and/or consent that her title to the suit land be used by the 2nd defendant for guaranteeing a term loan of Kshs 30million or 60 million. She also avers that she was given a blank document to sign by the 2nd defendant and that she signed it to guarantee the 2nd defendant an overdraft of Kshs 3.9 million with the 1st defendant in consideration of it having offset her loan of Ksh 3.9 million with KUSCCO Sacco. She annexed her loan account statement with KUSCCO Sacco which shows that a lumpsum of Kshs 3.9 million was paid to offset her loan but she failed to show the nexus between offsetting the KUSCCO loan and the charge of Kshs 30 million created over the suit property.
19. Nevertheless, I discern that there is a need to have some clarity in relation to the figures. After all, the loan facility offered by the 1st defendant was for Kshs 30 000 000, but the 40 days notice contains double that amount, precisely Kshs 60 173 255.
20. It is also paramount that the plaintiff be given a chance to explain the circumstances under which she signed the documents in which the loan facility was offered. In the case of *Fina Bank Ltd vs Spares and Industries Ltd* [2000] 1EA 52, cited in *Benjamin Kaburi Kamuruci v Stanbic Bank Limited* [2014] eKLR, the court stated that:

“..the function of the court is to enforce what is agreed between the parties and not what the court thinks ought to have been fairly agreed between the parties...”
21. I have carefully read the letter mentioned by the 1st defendant at paragraph 15 of the replying affidavit of Joyce Ndegwa. I discern that the plaintiff is admitting to having agreed to off set the loan of Kshs 3.9 million, but she was at a loss regarding the loan of Kshs 60 million. In that regard, I am inclined to partially allow the application on some conditions as follows;
22. An injunction is hereby issued against the defendants in terms of prayer no 4 in the application dated May 23, 2022 on condition that the applicant shall deposit the amount of Kshs 3 900 000 in this court within a period of 30 days. The injunctive orders shall remain in force for a period of one year only. The applicant is to meet the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mwende holding brief for Mr. Okoth for Applicant/Plaintiff

Wanda holding brief for Mr. Juma for 1st Defendant

Court assistant: Eddel

