



**Omolo v Family Bank Limited & another (Environment & Land
Case 76 of 2021) [2022] KEELC 2193 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 76 OF 2021
MN GICHERU, J
JUNE 2, 2022**

BETWEEN

CAROLINE MWICHESA OMOLO PLAINTIFF

AND

FAMILY BANK LIMITED 1ST RESPONDENT

NAIROBI CHANNELS AUCTIONEERS 2ND RESPONDENT

RULING

1. This ruling is on the Notice of Motion dated 17/11/2021. The notice of motion which is by Caroline Mwachesa Omolo, the Plaintiff, is brought under Articles 22, 23 and 40 of *the Constitution* of Kenya, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 Rules 1, 2, 3 and 4, Order 51 Rule 1 *Civil Procedure Rules* and any other enabling provisions of the law.
2. The Notice of Motion seeks that pending the hearing and determination of this suit, the Family Bank Limited and Nairobi Channels Auctioneers, the first and second Defendants, be restrained by an order of injunction whether by themselves or their representatives, servants, and or assigns from selling by auction or otherwise, alienating, trespassing into, and/or in any manner whatsoever interfering with or otherwise dealing with the property known as Kajjado/olekasasi/1105 located in Acacia Estate, Ongata Rongai within Kajjado County (suit land).

Secondly, it is the Plaintiffs prayer that the two Respondents be restrained from executing any property transfer instruments and any other such documents for purposes of sale or disposal of the suit land.

The application is supported by seven grounds which can be summarized as follows. The suit property was advertised for sale by the Defendants which sale was to take place on 18th November, 2021. The reason for sale is that the suit land was charged by the Plaintiff's deceased husband Andrew Winstone Oduor Olwenyo through his company Xerotech Systems Limited.



Even though the suit land is matrimonial property, the Plaintiff's consent was not obtained prior to the charge. The Plaintiff and her three young children stay in the house and they have no other place to call home. The bank did not serve the Applicant with the mandatory statutory notices required by law.

3. In addition to the grounds, the motion is supported by a 39 paragraph affidavit dated 15/11/2021 with nine (9) annexures. Further, there is a 26 paragraph supplementary affidavit dated 8th March, 2022 with ten (10) annexures.

All this material by the Plaintiff is to the effect that the loan advanced by the first Defendant is not only exaggerated and compounded by exorbitant interest and charges but it was obtained without the Plaintiffs knowledge or consent.

4. The motion is opposed by the first Respondent and one Sylvia Wambani, a legal officer of the said Respondent has sworn two replying affidavits dated 26/11/2011 and 22/3/2022 respectively.

Annexed to the two affidavits are nine (9) annexures. These annexures include an application for a banking facility of Kshs. 6.2 million dated 21/4/2016 and another one for Kshs. 5, 304, 500/- dated 3/5/2018 both of which are signed by the Plaintiff and her late husband, a copy of spousal consent duly signed by the Plaintiff among other documents.

In her deposition, the legal officer says that the Plaintiff signed the loan application form as a co-director of the borrowing company and again as a spouse as per the annexures.

In addition to the above, she continued paying much of the loan after the demise of her husband. She cannot therefore be heard to say that she was not aware of the loan advanced to her late husband. It is also her evidence that all the statutory notices were duly issued to the Plaintiff not only as a director of the borrowing company but also as a spouse who had consented. This was done through registered post via the addresses provided by the company and the Plaintiff.

5. Counsel for the parties filed written submission on 15th March, 2022 and 23rd March, 2022 respectively.

In the submissions, they both agree that this application being primarily one for the grant of an injunction, the only question to be determined is whether the Plaintiff has made a good case by proving the three prerequisites before an injunction can issue.

I have carefully considered the application in its entirety including the affidavits, grounds, annexures as well as the pleadings from both sides.

I find that the Plaintiff has not proved any of the prerequisites to the grant of an order of injunction for the following reasons;

Firstly, I find that she has not made out a prima facie case with a probability of success. For her to make out such a case, she needed to prove that she was up to date on loan repayment. This has not been done because the Plaintiff has not annexed any evidence of recent payment of the loan amount or discharge of the charge.

She has not annexed a bank statement to show that she has cleared all her obligations under the agreement by paying the principal amount, interest and other charges.

Secondly, there is evidence on oath from the first Defendant's legal officer that the Plaintiff signed twice for the loan. First, she signed as a co-director and then as a spouse. This evidence is supported by the documents duly executed by the Plaintiff.

Since the burden was on the Plaintiff to prove that the signatures were not hers, her mere denial that they are not hers is not enough. To preponderate her case, she needed the evidence of a documents



examiner to prove that the signatures exhibited by the first Defendant were forgeries. She has not done this.

On the second prerequisite to the grant of an injunction, I find that the Plaintiff has not proved that she stands to suffer irreparable loss which cannot be adequately compensated by an award of damages. Should she eventually prove her case, the Plaintiff can be compensated with a monetary award.

Having found that the first two prerequisites have not been met, I need not consider the third one namely, the balance of convenience.

For the above stated reasons, I dismiss notice of motion dated 17/11/2021.

Costs in the cause.

Dated signed and delivered virtually at Kajiado this 2nd day of June, 2022.

M.N.GICHERU

JUDGE

