



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 31 OF 2021**

**RUTH KIMATHI JOHN.....APPELLANT/PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LIMITED..1<sup>ST</sup> RESPONDENT**

**ROSEMARY MUKIRI MURANGIRI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a notice of motion dated 16<sup>th</sup> February 2021 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant/appellant seeks the following orders;

1) Spent.

2) Spent.

3) *That this Honorable court be pleased to issue an order of temporary Injunction staying the sale of land parcel no. NYAKI/KITHOKA/1791 by the 1<sup>st</sup> respondent whether by itself, its agents or its servants and/or anyone else acting at its behest from selling and/or alienating Land Parcel No. NYAKI/KITHOKA/1791 pending the hearing and determination of this Appeal.*

4) *That cost of this application be provided for.*

2. The application is based on the grounds on the face of it and on the supporting affidavit of the applicant, who avers that the suit land was originally registered in the name of their late mother and it is their ancestral land. The 2<sup>nd</sup> respondent without the family's knowledge secretly transferred the land parcel to herself and took a loan facility of Kshs. 8,000,000 which she has since failed to repay and the bank has started the process of recovery of the charged property. That the applicant moved the lower court and was granted interlocutory injunctive orders but upon an application of the 1<sup>st</sup> respondent, the said orders were discharged vide a ruling dated 11<sup>th</sup> January, 2021 which ruling is the subject of this appeal.

3. The 1<sup>st</sup> respondent has advertised the sale of the suit land by way of public auction and unless restrained, the 1<sup>st</sup> respondent is likely to sell the suit property.

4. The applicant contends that she has lived on the suit land from the time her mother was alive and the property is of great economic and sentimental value to her and her family. She stands to suffer irreparably if the suit property is sold and it is in the interest of justice that the orders sought be granted.

5. The Application is opposed by the 1<sup>st</sup> respondent vide a replying affidavit dated 25/02/2021 sworn by Samuel Muthomi Kibiti the 1<sup>st</sup> respondent's Operating Manager. He avers that the suit land is charged in their favor to secure a loan facility of Kshs. 8,000,000 extended to the 2<sup>nd</sup> respondent. Prior to lending, they commissioned a pre-lending valuation report which showed that at the time, the suit land was occupied as the matrimonial home of the 2<sup>nd</sup> respondent. The subject facility fell into arrears and the 1<sup>st</sup> respondent embarked on recovery process by exercising its statutory power of sale but was subjected to litigation by way of a suit in Meru ELC Suit No. 237 of 2017 which was transferred to the lower court as CM ELC Suit 99 of 2018 where the 2<sup>nd</sup> respondent herein was the applicant seeking injunctive relief but the same was declined.

6. That there is nothing before this court which demonstrates that the trial court abused or improperly exercised its discretionary powers to warrant interference by this court. The ruling being sought to be appealed against was delivered on 11/01/2021 and this appeal was filed on 09/02/2021 after an advert for sale was published on 8/02/2021. The application for injunction pending appeal was lodged without any explanation as to why such an application was lodged so close to the intended auction date proving that the application was not made in good

faith as is expected under equity.

7. The reliefs sought by the appellant are legally untenable as they are bound to defeat legitimate interests of the 1<sup>st</sup> respondent without offering any recourse as regards the recovery in issue. The 1<sup>st</sup> respondent prays for the dismissal of the application.

8. The 2<sup>nd</sup> respondent is not opposing the application.

9. The parties have duly filed their submissions, those of the applicant are dated 22/04/2021, while the ones of the 1<sup>st</sup> respondent are dated 29/03/2021. I have carefully considered the present application, affidavits both in support and opposition to the application as well as the submissions of the parties. The issue for determination is **whether the conditions for issuance of an injunction have been met and who should bear the cost of this application?**

10. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the **Civil Procedure Rules 2010** which provides:-

*"Where in any suit it is proved by affidavit or otherwise—*

*(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;*

*(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."*

11. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before, and courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set out in the case of **Giella Vs. Cassman Brown [1973] EA 358** to wit:-

*a) Has the Applicant established a prima facie case with high chance of success?*

*b) Will the Applicant suffer irreparable damages unless an injunction is issued? and*

*c) Where does the balance of convenience lie?*

12. In the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** a prima facie case was defined as follows;

*"..in Civil cases, it is a case in 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."*

13. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests, then the court should determine the matter on a balance of convenience.

14. From the arguments thereof, it is not disputed that the 2<sup>nd</sup> respondent is the registered owner of the charged property and is in default of the repayment of the loans advanced to her by the 1<sup>st</sup> Respondent. Consequently, this court cannot restrain the bank from exercising its statutory power of sale. I adopt the principle so clearly stated by the Court of Appeal in **Joseph Okoth Waudi v National Bank of Kenya [2006] eKLR** which was quoted with approval in **Turitu Service Station Limited v Housing Finance Company of Kenya Limited & another; Lazinos Hotel & Restaurant Limited & another (Interested Parties) [2020] eKLR** that:

*"It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive."*

15. I am not persuaded that the applicant has established a prima facie case, in line with **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014)eKLR**. In this respect I would do no better than adopt what the court stated in **Palmy Company Limited v Consolidated Bank of Kenya Limited ML [2014] eKLR** that:

*"Needless to state that having an arguable point, as is the case here, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under Article 40 of the Constitution."*

16. The court also notes that the Charge that was executed by the chargor and chargee did not include the applicant herein as a party to the said charge which created contractual obligations and therefore the applicant cannot take over the chargors' obligations.

17. I also find that the 1<sup>st</sup> respondent has stated that there exists another suit **CM ELC NO. 99 OF 2018** where the 2<sup>nd</sup> respondent had unsuccessfully sought injunctive orders against the 1<sup>st</sup> respondent. The applicant and the 2<sup>nd</sup> respondent are siblings and the latter is not opposing the current application. Though the issue of existence of the other suit was brought out in the ruling of 11.1.2021 before the trial court, the applicant herein has given this issue a black out in these proceedings. I find that she is guilty of material non- disclosure.

18. It is discernible that the two siblings are on one side of the coin and the current proceedings are geared towards scuttling the orders given in case no CM ELC 99 of 2018, where the 2<sup>nd</sup> respondent was apparently denied injunctive orders against the 1<sup>st</sup> respondent. I therefore term the current application as a red herring!

19. It is also apparent that the current application was filed only 5 days to the scheduled date of sale, yet the ruling of the trial court had been delivered way back on 11.1.2021. This timing is a manifestation of bad faith.

20. I find and hold that the applicant has not established a prima facie case with a probability of success. Further, in view of the admitted indebtedness, the balance of convenience is against the applicant as the debt will continue to escalate thus eroding the value of the security.

21. In view of the foregoing, the conclusion becomes irresistible that the applicant has not demonstrated that she deserves the orders sought. Accordingly, the application dated 16.2.2021 is dismissed with costs to the 1<sup>st</sup> Respondent. Any temporary orders of injunction given herein are hereby discharged.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF MAY, 2021**

**IN PRESENCE OF:**

C/A: Kananu

J.G Gitonga for 2<sup>nd</sup> respondent

Mrs. Mutegi Mugambi for applicant Kimaita for 1<sup>st</sup> responden

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**