REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC APPEAL NO. 8 OF 2018

JOSHUA KIPNGETICH MUTAI.....1ST APPELLANT

JANET CHEBET TONUI.....2ND APPELLANT

MICHAEL KIPKORIR MUTAI.....3RD APPELLANT

WINNY CHELANGAT.....4TH APPELLANT

-VERSUS-

EQUITY BANK (K) LTD.....1ST RESPONDENT

KOLATO AUCTIONEERS.....2ND RESPONDENT

RULING

1. The application for determination before me is a motion on notice dated 26th November, 2019 filed here on the same date. It is expressed to be brought under Order 40 rules 1(a) 2(1) (2) and 4(1) of Civil Procedure Rules and Section 3A of Civil Procedure Act (Cap 21). It has seven (7) prayers but prayers 1 and 2 are now spent, having been meant for an earlier stage. The prayers for consideration now are five (5) and they are as follows:

> *Prayer 3: That pending hearing and disposal of the appeal a temporary order of injunction be issued to restrain the respondent by themselves, agents or servants from selling, alienating, leasing, advertising for sale, taking possession and/or doing anything detrimental with regard to the land parcel NO KERKCHO/KIPSONOI/17.*
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> *Prayer 4: The 1st Respondent be ordered to separate the secured and unsecured loan.*
>
> *Prayer 5: The applicants do redeem the charged land by being granted 4 months to pay the secured loan.*
>
> *Prayer 6: Costs of the application be provided for.*
>
> *Prayer 7: Any other relief may be given as deemed fit.*

2. The application is anchored on grounds, interalia, that the sale is scheduled to take place in Kericho County, and not Bomet, where the land is situated; that the applicants stand to suffer irreparable loss and damage; that the application is made in good faith and the applicants have an arguable appeal; that the applicants have interest in the land as beneficiaries and/or under trust; that the registered proprietor – **GRACE CHEPNGETICH MUGE** – is their mother; that the land is their only source of livelihood; that the loan transaction lacked their consent; and that they are willing to pay the secured loan within 4 months.

3. The application came with a supporting affidavit wherein are depositions showing, interalia, that the land is about to be auctioned; that their mother, who guaranteed the loan to the borrower, holds it for them as a trustee; that they have no notice of a loan guarantee by their mother to the borrower; that the land is their source of livelihood and they were supposed to be consulted before the land was charged; that even at the time of charging of the land, it was still subject to their rights as trustees; and that the bank should have known that there were people on the land as the valuation had clearly indicated it.

4. The applicants believe that the land is undervalued. They are also concerned that the bank wants them to pay both the secured and

unsecured loan. They aver that if the land is sold, they will suffer irreparable loss.

5. The 1st respondent, (the bank) responded to the application vide a replying affidavit dated 28th November, 2019 and filed on 29th November, 2019. According to the 1st respondent, the application herein is filed belatedly, the Memorandum of Appeal having been filed on 3rd December, 2018, and with the record of appeal itself not yet filed. The applicant was faulted for not giving reasons for the delay. Further, the issues raised were said to be fit for raising in the appeal, not in the application. The 1st respondent read mischief on the part of the applicants for receiving the requisite notices, then waiting until the lapse of the notices, only later to turn around and file this application when the intended sale was imminent.

6. The court was urged not to exercise its discretion in favour of the applicant, for they not only acted malafides, but also failed to be diligent and further failed to demonstrate the irreparable loss they are likely to suffer. They were also accused of not demonstrating willingness to repay the loan yet they admit default in repayment.

7. The application was canvassed by way of written submissions. The applicants' submissions were filed on 10th December, 2019. The submissions start with giving some background and history of the dispute. Then the issues for determination were delineated, with the first being whether the appeal is arguable, then whether the same appeal will be rendered nugatory if successful, and whether the order, if granted will prejudice the respondent. The applicant also felt that it should be established whether the issue of ***RES JUDICATA*** can apply here and whether the application as filed is vexatious, misconceived or gross abuse of the court process.

8. The appeal is arguable, it was submitted, as the court has power to order stay of execution under Order 42 Rule 6(1) and (2) of Civil Procedure Rules. The case of **CONSOLIDATED MARINE VS NAMPIJA & ANOTHER: CA NO 93 OF 1989, NAIROBI**, was cited for the proposition that the aim of stay is to preserve the subject matter, to safeguard the appellants right of appeal, and to ensure that a successful appeal is not rendered nugatory. The order sought was said to have no likelihood of prejudicing the 1st respondent as it still has the title documents and the power of sale will not be extinguished.

9. Res-judicata was also said not to apply, with the case of **BULHAN & ANOTHER VS EASTERN and SOUTHERN AFRICAN TRADE and DEVELOPMENT BANK (2004) I KLR** cited to shed light on the issue. The application decided earlier in this matter was said to be one for injunction and was essentially interlocutory or interim. The orders sought were therefore not final as the whole matter would still go for full trial and determination. According to the applicants, ***RES JUDICATA*** would apply where there is finality of the orders made. And regarding the last issue, the court was told that the pleadings by the applicants raise serious issues and the suit is therefore not vexatious, frivolous or misconceived as alleged or at all. The court was urged to grant a restraining order.

10. The submissions of the 1st respondent were filed on 29th January, 2020. The 1st respondent enunciated the principles applicable in deciding whether to grant a temporary restraining order as spelt out in the case of **GIELA VS. CASSMAN BROWN & Co. Ltd (1973) EA 358** and followed in many other cases including **VIC PRESTON MURITHI RUCHABI VS MARY WANGARI & 3 OTHERS (2018)eKLR.** The principles entail establishing whether the applicant has a prima facie case with a probability of success, whether there is likelihood of suffering irreparable loss that cannot be compensated in damages, and/or opting for consideration of balance of convenience when the court is in doubt.

11. The applicants were said to have failed to establish a prima facie case as they have not demonstrated infringements of their rights. They were said to have merely raised issues without demonstrating them. The intended sale of the property was said not to be an infringement of rights as the property had been offered as security that the 1st respondent could use to recover its money in case of default in repayment.

12. The applicants were said not to have demonstrated the irreparable loss they are likely to suffer. The 1st respondent pointed out that it is not enough to state or allege the likelihood of suffering irreparable loss. One should go further to demonstrate what that loss is and its possible extent and ramifications. The case of **NGURUMAN LIMITED VS JAN BONDE NIELSON & 2 OTHERS: CA NO 77 OF 2012, NAIROBI (2014 eKLR)** was made available to reinforce the point.

13. The balance of convenience was also said to tilt in favour of the 1st respondent. The money owed by the borrower was said to be substantial and it was feared that it might increase to the point where it surpasses the value of the charged property.

14. The applicants were said to have unclean hands and therefore undeserving of any protection by the law of equity. They were faulted for defaulting in repayment and this, according to the 1st respondent, makes their hands unclean. Apart from having unclean hands, the applicants were said also to have been indolent, which is allegedly why they delayed in filing their application. The 1st respondent invoked the maxim that delay defeats equity. Enriching the 1st respondent's submissions are quoted cases such as **NIMROD KIMANI WAKAHIA VS ANDREW MACHARIA KIMANI & 3 OTHERS (2017)eKLR**, **ANDRES MURIUKI WANJOHI VS EQUITY BUILDING SOCIETY & 2 OTHERS (2006)eKLR**, **MONICA WANGARU VS FRANCIS MACHARIA NJUGUNA & 5 OTHERS (2019)eKLR**, **CHAIRMAN, CO-OPERATIVE TRIBUNAL & 8 OTHERS EXPARTE MANAGEMENT COMMITTEE KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY LTD (2014)eKLR**, among others. Ultimately the court was urged to dismiss the application with costs.

15. I have read the application, the response made, and the rival submissions. The registered owner of land parcel **NO KERICHO/KIPSONOI/17** is **GRACE CHEPNGETICH MUGE**. Grace is said to be the mother of the applicants. She guaranteed a borrower – **BRUCE FARMS LIMIED** – to obtain a financial facility from the 1st respondent. The borrower defaulted in payment and the 1st respondent desires to sell the guarantors land. The applicants argue that their mother held the land in trust for them and never consulted them when she offered it to guarantee a loan. Both sides focused largely on whether or not it is necessary to grant a restraining order. The other prayers seem to have been largely ignored. My focus will not be different, I don't deem it good to do for the parties what they have not done for themselves.

16. It is apparent to me that the arrangement between the 1st respondent on the one hand, and the borrowers and guarantors on the other hand, was purely contractual. There is not privity of contract between the applicants and the 1st respondent. There is also no trust arrangement between them. The trust arrangement can only be said to exist between the applicants and their mother, the guarantor. It seems therefore obvious that it is the mother, not the 1st respondent, who should be the first person to be asked about breach of trust. At this stage, it appears to me unreasonable to subordinate the interests of the 1st respondent to any trust arrangements between a mother and her children. But I would be prepared to have a different view if more fully persuaded otherwise during or after trial.

17. I note that this is not the first time that a knock is being made on the door of a court of equity concerning the intended sale of land parcel **NO KERICHO/KIPSONOI/17**. The applicants were the first to do it in the lower court in PMCC NO 96/2018. They wanted restraining orders to be issued. They lost and that is why they are here on appeal. Thereafter, the applicants own mother filed her own case – ELC NO. 19 OF 2019, at SOTIK. She also tried to seek a restraining order. She lost. This therefore is the third time a restraining order is being sought. But even as that is being done, the court has not been furnished with a full record of appeal so as to appreciate better the nature of the appeal before it. And without such record, it would not be safe to say that the applicants have an appeal which is *prima facie* likely to be successful.

18. The applicants have also not done a good job of convincing the court that they will suffer irreparable loss. As pointed out by the 1st respondent, the nature, extent and consequences of such loss needed to be articulated well. It is not enough to allege likelihood of suffering irreparable loss. One should go further and demonstrate the loss. This was not done. **Nguruman's case** (*supra*) cited by the 1st respondent captures the legal position well. The applicants in the matter at hand only alleged but did not demonstrate.

19. The applicants also needed to give an undertaking to pay damages. That helps a lot in matters of this nature. In **GATI VS BARCLAYS BANK (K) LTD (2001) KLR 525**, the court held, interalia, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction can cannot issue.

20. I think the balance of convenience also favours the 1st respondent. The issue of default in repayment does not seem to be contested. Obviously, considering that the amount owed is bound to generate interests, the amount may increase to the point where it exceeds or surpass the value of the land. And as the applicants' allegations of irreparable loss is not demonstrated, it appears to me that any loss they may suffer is compensable. The 1st respondent is a going concern and in a position to pay damages.

21. The upshot, in light of the foregoing, is that the application herein is one for dismissal. And I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 6th day of May, 2020.

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A. K. KANIARU

JUDGE