REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 113 OF 2019

CONSOLIDATED BANK OF KENYA LTD.....,APPELLANT

VERSUS

MONICA WANGARI NDUNGU.....1st RESPONDENT

JOEL K. NJERU.....2nd RESPONDENT

THE LAND REGISTRAR MERU

CENTRAL DISTRICT.....3rd RESPONDENT

THE ATTORNEY GENERAL.....4th RESPONDENT

FINA BANK LIMITED.....5th RESPONDENT

GUARANTY TRUST BANK LIMITED.....6th RESPONDENT

(Being an appeal from the ruling of Honorable T.M Mwangi, SPM dated 10th September 2019 in Meru CM ELC No. 30 of 2018)

JUDGMENT

1. The appellant being the Plaintiff in the trial court filed an application dated 1st May 2019 seeking leave to enjoin the 5th and 6th respondents herein as the 5th and 6th defendants through an amended plaint. The appellant had also sought orders of a temporary injunction restraining all the defendants from selling land parcel No. Ntima/Igoki/7408 through public auction or private treaty pending hearing and determination of the suit and an order of inhibition over the suit land plus costs. Further, the appellant also filed a Preliminary Objection dated 3.7.2019 seeking to have the replying affidavit and notice of change of advocates dated 24. 5. 2019 struck out on the basis that Messrs Mithega and Kariuki were not properly on record.

2. The aforementioned application was opposed by the 6th respondent herein on the grounds that it was grossly incompetent, **bad in law as it was time barred**, prejudicial to the interest of the 6th defendant and that the prayers sought could not be awarded as they were against a none party to the proceedings.

3. The application was canvassed by way of written submissions and the trial court gave its ruling on 10th September 2019 dismissing the application with costs to the respondents having found that the case against the respondents was statute barred.

4. The appellant being aggrieved by the decision of the trial court filed its memorandum of appeal on 26/9/2019, raising twelve grounds. In summary, it is averred that the trial magistrate erred in-: **holding that the suit was time barred, failing to allow the prayer for injunction and inhibition and dismissing the preliminary objection.**

Analysis and determination

5. The appellant filed its submissions on 18.2.2021 averring that there were no advocates on record for the intended 6th defendant known as Oraro & Co. advocates whom the firm of Messrs Mithega & Kariuki advocates purported to file a notice of change from. Thus the firm of Mithega & Kariuki had no locus standi to file the replying affidavit of 24.5.2019.

6. On the issue of joinder, it was submitted that the application before the trial court was for enjoining a party who was necessary for the final

adjudication of the proceedings. Since the appellant had already filed the main suit in court within the stipulated timelines in the Limitation of Actions Act, then the running of time was interrupted as against all persons whose activities contributed to the action herein and those who claim through the defendant sued or through whom the defendant is sued. The appellant argued that the matter before the lower court was therefore one of joinder to prevent the wastage and or alienation of the suit land by the intended parties hence the said parties were necessary in the suit.

7. To this end, appellant contended that the doctrine of *"relating back"* applies in favour of the appellant who filed the suit against 1-4th respondents in time. On this point, the appellant cited the case of **Yusuf Abdallah Gitau vs The Building Centre (K) Ltd (2007) eKLR.**

8. Further, it was submitted that the trial court in its ruling missed the mark by delving into the substance of the amendments proposed in the amended plaint and went ahead to determine an issue that was not properly before it. On this point the appellant made reference to the case of **Kalenjin Auto Hardware Ltd vs John Songok & another (2019) eKLR** where it was observed:

> ***"On the first issue as to whether the court should allow the amendment sought, counsel relied on the court of appeal case of Central Kenya Limited vs Trust Bank Limited & 5 others (2000) eKLR and cited with approval in the case of AAT holdings limited vs Diamond Shield International Limited (2014) eKLR where the court of appeal held that amendment of pleadings and joinder of parties was aimed at allowing the litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. Further that the court has inherent powers to make such orders as may be necessary for the ends of justice and in order to avoid multiplicity of suits. Counsel also submitted that pursuant to section 100 of the Civil Procedure Act, the court has the discretion to allow all necessary amendments for the purpose of determining the real question or issue raised".***

9. It was the submission of the appellant that the issue of limitation must be specifically pleaded. The trial court ought not to have considered the merits of the proposed amendments. To this end, the appellant cited the Court of Appeal case of **Patrick Nyakundi vs Kenya National Union of Teachers (KNUT headquarters) & another (2017) eKLR** where it was observed that;

> ***"In addressing the issue of limitation we observe that it was not specifically pleaded in the respondent's defence as required by Order 2 rule 4 of the civil procedure rules, but was raised in the respondent's submissions before both the trial court and this court. The trial court did not address the issue of limitation in its judgment. It is trite that statutory limitation must be specifically pleaded by a party to a suit in a defence or in a reply to a counterclaim".***

10. The court in the above case of **Patrick Nyakundi vs Kenya National Union of Teachers (KNUT headquarters) & another** cited the case of **Achola & another vs Hongo & another LLR 4007 (CAK)** where it was stated that;

> ***"the defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release any relevant statute of limitation, fraud or any act showing illegality".*** *(Emphasis added).*

11. In light of the forgoing, the appellant has urged the court to set aside the ruling of 10.9.2019 before the trial court.

12. The 6th respondent (intended party) has relied on its submissions filed on 20.1.2021. It is averred that the discovery of the fraud by the appellant was in May 2014 as set out in paragraph 8, 9 and 10 of the plaint. Thus the appellant ought to have enjoined the 6th respondent at the time the suit was filed.

13. It was further submitted that a claim founded on tort should be instituted within a period of three years and time starts to run from the time of the discovery of the fraud.

14. The respondents relied on the following cases; **Kimani Kabogo vs William Kabogo Gitau (2018) eKLR** and **Edward Moonge Lengusu Suranga vs James Lanaiyara & Another (2019) eKLR**.

Determination

15. The records indicate that the appellant had filed the initial suit in Meru ELC case No. 113/2014 which was later transferred to Meru Chief Magistrate's Court where it was registered as CMCC No. 30 of 2018. In its pleadings, the appellant contended that in September 2012 or thereabout it advanced a loan of Shs.13,600,000 to 1st and 2nd respondents who are husband and wife. The security thereof was land parcel No. Ntima/Igoki/7408 registered in the name of the 1st respondent.

16. That without settling the sums advanced, the 1-3rd respondents colluded to have the discharge of charge dated 6.5.2013. Thereafter, another charge was created in favour of Fina Bank (Now GBT Bank Ltd) and registered on 22.7.2013. Fina Bank went ahead to advance a loan of Kshs.8, 000,000 to the 1st and 2nd respondents. The appellant contended that all these transactions were illegal.

17. The applicant filed the notice of motion dated 1.5.2019 whose dismissal forms the subject matter of this appeal.

18. The main issues arising herein for determination are; whether the trial court erred in dismissing the preliminary objection as well as the application of 1.5.2019.

The Preliminary Objection dated 3.7.2019

19. For reasons which this court cannot fathom, the appellant has not availed the proceedings of the lower court. The court is therefore unable to discern the exact directions given by the court on the prosecution of the preliminary objection. However, the submissions of the 6th respondent before the trial court are headed;

> *"Submissions on the application dated 1.5.2019 and preliminary objection dated 3.7.2019".*

20. The ruling of the trial court of 10.9.2019 on page 7 also captures the analysis on the preliminary objection.

21. To this end, I am inclined to believe that the preliminary objection was being determined alongside the application. In such circumstances, one would expect the mover of the preliminary objection to prosecute the matter, advancing its arguments on why the preliminary objection should be allowed.

22. However, nothing about the preliminary objection was mentioned in the submissions filed by the appellant on 8.8.2019. The issue was only captured in the further submissions of the appellant which was a response to what was submitted by the opponents. There in the appellants gave an unconvincing account of why the firm of messrs M. Kariuki were not properly on record. If the appellants were serious on the preliminary objection, they ought to have duly prosecuted the preliminary objection properly in their main submissions. The claim that the trial magistrate's erred in dismissing the preliminary objection is therefore unfounded.

The application dated 1.5.2019

23. As far as this application is concerned, the pertinent issue the court will determine is whether the trial court erred in determining the question of limitation of action instead of determining the issue of amendment. The court will also determine whether the trial court erred in failing to grant the prayer for injunction and inhibition.

Joinder vis a vis limitation of actions

24. A look at prayer no. 2 and 3 of the application dated 1.5.2019 reveals that the applicant was seeking leave to enjoin the intended 5th and 6th respondents and to amend the plaint accordingly. The 6th respondent through the replying affidavit of Joan Arang'a at paragraph 7 did raise an averment that appellant's claim against the 6th respondent was time barred.

25. In its ruling of 10.9.2019, the trial court held that as at May 2014, the appellant was aware that a legal charge over the suit land was registered. Citing the case of *Elijah Ntaiya vs Lekinini Kulale and 3 others (2008) eKLR*, the trial court held that the limitation period for an action founded on tort is 3 years, of which the limitation period begins to run when fraud is discovered. That in the case before the trial court, appellant discovered the fraud in 2014 hence he ought to have sued the 5th and 6th respondents within three years thereafter. The application was dismissed based on this singular holding.

26. The aforementioned verdict indicates that the trial court delved straight into the merits of the proposed amended plaint. There was no pleading on record touching on the case relating to the 6th respondent. This is because the issue of amendment was yet to be determined.

27. The provisions of **Order 2 Rule 4 of the Civil Procedure Rules** stipulates that:

> ***A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality— (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raises issues of fact not arising out of the preceding pleading".***

28. The above provisions of law were aptly elucidated in the case of **Patrick Nyakundi vs Kenya National Union of Teachers (KNUT headquarters) & another (2017) eKLR** (supra). Thus a person who raises the issue of limitation ought to be a party, otherwise how can a non-party have valid pleadings in which such issues like limitation are raised. In the instant case, the proposed amended plaint had not been admitted as a pleading.Thus the 5th and 6th respondents were yet to be parties and they had not yet filed their statements of pleadings. To this end, I am in agreement with the arguments raised by the appellant that the trial court missed the mark in delving into the substance of the proposed amendments.

29. Now that the question of limitation did become a subject of contest before the trial court, then I find it expedient for this court to determine the issue as to whether 5th and 6th defendants ought to have been enjoined in the suit.

30. **Order 1 Rule 3** of the **Civil Procedure Rules** relates to who may be joined as defendants and provides as follows;

> ***"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where if separate suits were brought against such persons any common question of law or fact would arise.***

31. **Order 1 rule 9** further provides that;

> ***"No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.***

32. **Order 1 rule *10 (2)*** on substitution and addition of parties provides that;

> ***"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added".*** *(Emphasize added).*

33. For an applicant to succeed in a claim of joinder, he must demonstrate that the proposed interested parties have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty. In **Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002] eKLR** Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be enjoined in a suit:

> ***"…… it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit".***

34. The reasons advanced by the appellant in his application for joinder was that during the subsistence of its contract with the 1st and 2nd respondents, a forged discharge of charge was made dated 6.5.2013 and thereafter another charge was registered in favour of 5th respondent which later became the 6th respondent.

35. The argument before the trial court was that in so far as the claim against the 6th respondent was concerned, the claim was stale. However, the series of events captured in the copy of the green card availed by the appellant in his application of 1.5.2019 indicates that the activities of the 6th respondent arose from the same facts raised by the appellant in his initial pleading.

36. In the case of **Yusuf Abdallah Gitau vs the building centre (K) (supra)** Justice R. Nambuye observed as follows:

> ***"when the provisions of law cited here in as well as the principle in the authority cited by the defence are applied to the facts of this application it is clear that two issues emerge for determination by this court namely:-***
>
> ***(1) The issue of limitation.***
>
> ***(2) The issue of necessity of the presence of intended defendants in these proceedings.***
>
> ***The issue of limitation was raised by the defence on account of the transaction herein being a contractual relationship for a specified period which period has expired and thus according to the defence making the action time barred. In response to this the court takes judicial notice of the provisions of the law of limitation of actions act cap 22 Laws of Kenya as regards the life span of a cause of action arising from a contractual relationship which is six years. Section 4 (1) (a) states "the following actions may not be brought after the end of six years from the date on which the cause of action accrued.***
>
> ***(a) Actions founded on contract.***
>
> ***From the pleading in the plaint paragraph 6 thereof the contract was allegedly unlawfully brought to an end by a letter dated 8.5.1996. The 6 year period started running from that date. The original plaint herein is dated 9th March 1998 and filed on 25.6.1998. By then six years had not elapsed. The filing of the action interrupted the six year period from running against the plaintiff. This means that all persons whose activities contributed to the action herein and those who claim through the defendant sued or through whom the defendant sued claims are covered by the action in so far as the action herein is concerned and the period of limitation does not affect them. Anybody else outside that bracket is protected by the period of limitation. The authority cited by the defence of Liff vs Peasley and Another (1980) I.A.E.R 63 prohibits the doctrine of relating back from taking place to validate an action against a person to be joined to the proceedings at a later date if at the time of joinder the said action had become extinct by virtue of limitation period. This authority is however distinguishable from the Kenyan situation as order via rule 3 (2) permits the joinder of such a person if the court thinks it is just to do so. In which case the doctrine of relating back operates to protect the claimant as the effectiveness of joinder relates back to the date of the filing of the suit to validate the action against the incoming party event if at the date of joinder the claimant's action against him has become barred by virtue of limitation of action legislation. This doctrine operates to shield the plaintiff herein".***

37. I have found it necessary to extract the above analysis by R. Nambuya in order to appreciate the in depth import of the doctrine of *"relating back"*. And it is quite apparent that the said doctrine is applicable in favour of the appellant herein who duly filed the suit on 28.7.2014. The appellant was not instituting a new suit. He desired to bring on board parties who snugly fit the definition set out under order 1 rule 10 (2) of the Civil Procedure Rules.

38. In the final analysis, I come to the conclusion that the trial magistrate erred in disallowing the prayer for amendment.

Injunction/Inhibition

39. No determination was made on this issue on account of the fact that the 5th and 6th respondents had not been enjoined as parties. However, the matter was still placed before the trial court as a subject of contest even if it was not determined. This court will therefore analyze the material presented before the trial court and make its own determination.

40. The law relating to the issuance of interlocutory injunction is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides that:-

> ***"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; or***
>
> ***(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."***

41. In the Court of Appeal case of **National Bank of Kenya Limited v Juja Coffee Exporters Limited [2021] eKLR**, the court had this to say on applications for injunctions;

> ***"In keeping with the long-standing principles in Giella vs. Cassman Brown Co Ltd [1973] E.A. 358, the grant or refusal of an interlocutory injunction is a matter of exercise of judicial discretion and an applicant is required to show a prima facie case with a probability of success; secondly, that it would suffer irreparable harm which would not be adequately compensated by an award of damage; and lastly if the court was in doubt, to determine the application on a balance of convenience".***

42. The first question to determine is whether the appellant had established a prima facie case. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

> ***"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."***

43. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR,** the court held that:

> ***"We reiterate that in considering whether or not a prima-facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima-facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima-facie case is on a balance or, as otherwise put, on a preponderance of probabilities".***

44. The appellant had presented material facts before the trial court to the effect that it advanced a loan to 1st and 2nd respondents for Shs.13,600,000 thus creating a charge in its favour in respect of parcel Ntima/Igoki/7408. The letter of offer indicated that the loan was to be paid within a period of 120 months (10 years). The green card shows that the charge in favour of the appellant was registered on 5.9.2012. However in a span of 8 months, a discharge had been registered on 14.5.2013 and less than 3 months thereafter, another charge had been registered in favour of Fina Bank which became the 6th respondent. There was no rebuttal on these averments. In particular, no evidence was tendered to show how the loan of 13 million was paid in 8 months instead of 10 years so as to warrant the discharge.

45. To this end, I am inclined to believe that the appellant had established a prima facie case with a probability of success.

46. One of the grounds set forth by the appellant in the application of 1.5.2019 is that the suit land was in the process of being auctioned by the 6th respondent. That the appellant would have no other platform to recover the advanced loan of 13,000,000 plus interests. Indeed the 6th respondent admitted in its response that it kicked off the process of realization of its security since the borrowers (read 1st & 2nd respondents) had failed to pay the loan. This means that the land was on the verge of being alienated to other parties. In that process, the land would be out of reach of the appellant. It follows that the appellant stood to suffer irreparable damage which may not be compensated by any award of damages. The balance of convenience thus tilts in favour of the appellant.

47. I thus conclude that the appellant deserved to have the injunctive orders in his favour.

48. As regards the prayer for inhibition, I make reference to the provisions of **Section 68 of the Land Registration Act** where it is stipulated that:

> ***"The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge".***

49. This is a situation where by, the suit land was in the process of being auctioned when the appellant filed the application of 1.5.2019. It is therefore necessary to preserve the suit land through an order of inhibition so that the final orders of the court are not rendered an academic exercise.

50. In the final analysis, I find that this appeal is merited and I proceed to give the following orders:

> **(1) The ruling of 10.9.2019 is hereby set aside and substituted with an order allowing the application dated 1.5.2019.**
>
> **(2) Each party is to bear their own costs in this appeal.**
>
> **(3) The lower court file is to be severed from this file to be remitted back to the trial court for determination.**

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 5TH DAY OF MAY, 2021

IN PRESENCE OF:

C/A: Kananu

Ms. Muriithi for appellant

Ms. Nyaga for 5th and 6th respondent

Kimathi K. for 1st and 2nd respondents

HON. LUCY. N. MBUGUA

ELC JUDGE