



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA NO. EOO1 OF 2021

FREDA NJOKI NGIGI.....APPELLANT /APPLICANT

VERSUS

WILSON NGIGI WAITHAKA.....1ST RESPONDENT

ANDREW KAMAU NGIGI.....2ND RESPONDENT

PAULINE WANJIKU NGIGI.....3RD RESPONDENT

ALLIANCE TECHNOLOGIES SOLUTION LIMITED.....4TH RESPONDENT

AFRICAN BANKING CORPORATION LIMITED.....5TH RESPONDENT

VALLEY AUCTIONEERS.....6TH RESPONDENT

CHIEF LAND REGISTRAR, MURANG'A.....7TH RESPONDENT

RULING

1. The applicant instituted an appeal against the respondents accompanied with an application for orders:

a) Spent

b) Spent

c) THAT this Honorable Court be and is hereby pleased to issue an order of injunction restraining the respondents either through their agents, servants, auctioneers or advocates or anyone claiming under them from selling by public auction, private treaty or otherwise dealing with the property known as **L.R LOC.3/GITURU/329** pending the hearing and determination of this instant appeal.

d) THAT the costs of this application be provided for.

2. The application is based on twelve grounds and the dispositions by Freda Njoki Ngigi. It is the applicant's contention that the suit property is a matrimonial home which she immensely contributed towards its purchase. That through fraudulent means, the respondents caused a charge to be registered on the property. That whereas the 1st -4th respondents defaulted in repaying the loan, the 5th respondent under the instructions of the 6th has threatened to auction the same.

3. That she was not aware to the existence of the loan and only became aware after a friend informed her. That she filed for an injunction at the subordinate court which was struck out the suit for being res judicata in light of **Nairobi Civil No. 365 of 2018**. That she never consented to any loan and its thus not clear how the court reached the conclusion. Being dissatisfied with ruling of Hon EN Muriuki Learned SPM, the applicant preferred the instant appeal. That the appeal will be rendered nugatory should the injunction not be granted. That she stands to suffer irreparable loss as she has no other home.

4. She gave a detailed history on how she was part of purchasing the suit property and the developments thereon. She also deponed that the consent was fraudulently obtained and pointed out the inconsistencies in the consents presented. That had the trial court considered her evidence; it could not have struck out the case.

5. The 5th and 6th respondents filed their combined response vide a Replying Affidavit sworn by 5th respondent's legal manager, FAITH NTEERE. It is their dispositions that 1st to the 4th respondents took a loan with them using the suit property as security. That the applicant was well aware of the loan and the execution of the spousal consent was witnessed by an advocate who filed an Affidavit detailing so.
6. That the 1st -4th respondents defaulted in repaying the loan and failed to heed the demands to regularize the loan, causing the Bank to exercise its' statutory power of sale. That the high court case in Nairobi was instituted by the 1st respondent seeking to stop the 5th respondent from exercising their statutory power of sale. That the issue of spousal consent raised by the appellant was dealt with by the trial judge in **Nairobi Civil No. 365 of 2018**. That the applicant ought to have filed an application seeking to set aside the orders in the foregoing suit but opted not to.
7. That the property is advertised for sale the second time, nonetheless, the requisite statutory notices were served on the appellant and the respondents. That the appellant has not met the threshold of being issued injunction and if any, the balance of convenience tilts in their favor. It is their averments that the suit is collusion between the 1st to 4th respondents and the appellants to avoid paying the loan.
8. The 1st respondent filed his response asserting that the suit property is a matrimonial property. It was his response that, the 2nd and 3rd respondent sought to secure a loan and requested to use the suit property as a charge. At the time of taking the loan, he was not in good terms with the appellant. He alleges the bank informed him that no charge would be registered on the property and if that was to happen he would be informed. Further that his wife was not aware of the loan details, he only gave to the bank his wife's details whereupon they prepared a document.
9. The applicant filed a Supplementary Affidavit to which she dismissed the 5th and 6th respondents' response. She maintains that she never signed any spousal consent and denies appearing before any advocate and sunders herself with signature in the spousal consent. She points an issue with the legality of the consent. She deponds that she never attended any LCB consent and disputes ownership of the address. That she was not party to the proceedings in Nairobi Civil No. 365 of 2018. It is her contention that the appeal was duly filed and served on all parties. She reiterates the contents of her Supporting Affidavit.
10. Parties elected to dispense with the application by way of written submissions. The 1st respondent elected not to file any submissions and deponed so in his response.
11. The appellant framed two issues to submit on. On whether she has met the threshold to be granted an injunction, she submitted that the conditions to be met are as laid out in **Giella vs Cassman Brown and Co. Ltd (1973) EA 358**. It is her submission that the meaning of prima facie was well defined in **Mrao vs First American Bank of Kenya Ltd and Nguruma Ltd**. It is her submission that the first charge was governed by the provisions of section 17 of the Married Women's Property Act of 1882 since the Land Act and Land Registration Act had not been enacted. To buttress this, she relied on the cases of **Mugo Muiru Investment Ltd vs EW B & 2 Others [2017]**. That the facts in the foregoing case being similar to hers, this court should be guided in finding that her beneficial interest on the suit property is not inferior.
12. Further that there has been adduced no evidence as to the legality of the consent. That there being doubt on the consent as obtained she is entitled to an injunction and that she has demonstrated she has a prima facie case. On whether she will suffer irreparable loss, it is her submission that the suit land is a matrimonial home and she will be rendered destitute. She quoted a number of cases that this court should consider. On balance of convenience, she submits that granting an injunction will result in justice as it will help to await the outcome of the fraud case. That since the purported sale may result in deprivation of her rights as was stated in **Fidelity Bank Case** and injunction should be issued. That the balance of convenience tilts in favor of granting an injunction.
13. It is the applicant's submissions that the application is not res judicata and clothes her arguments on a myriad of cases. In the end she submits that she entitled to the prayers ought.
14. The 5th and 6th respondents submitted on the strength of the cases of **Charter House Investment Ltd vs Simon K Sang and others and Antoine Ndiye vs African Virtual University {2015}**. It is their submission that the applicant is not properly before this Court as she relied on the provisions of order 40 rule 1 in place of order 42 rule 6. That whereas the former would have been applicable in the trial court, the latter is applicable in the instant court. That the application is incurably defective.
15. It is their submissions that the applicant should demonstrate the substantial loss it will suffer as was established in **Charles Wahome Gethi vs Angela Wairimu Gethi{2008}** and **Samvir Trustee Limited vs Guardian Bank Limited**. That she has failed to demonstrate within the standard set above. Being the successful party in the lower court case they should be allowed to enjoy the fruits of their judgment. It invites this court to the reasoning in **Mohammed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat** in balancing the applicant's right of appeal and their right to enjoy fruits of its judgment.
16. It is further their submission that the applicant has not furnished any security or demonstrated any willingness to furnish. That the requirement for security is core and its purpose was laid out in **Aron C Sharma vs Ashana Raikundalia**. That the condition for security is mandatory as set out in **Charles Kariuki Njuri vs Francis Kimaru**.
17. On whether the applicant has demonstrated grounds for grant of an injunction, it is their submission that she has not. As to the prima facie case, the respondents' takes the meaning of it was in the **Mrao and Nguruman cases**. They submit that the applicant has not adduced any evidence as to any collusion between the respondents. To the contrary the respondents submit the existence of collusion between the applicants and the 1st to 4th respondents. That the issues of consent the applicant is raising were conclusively settled in the Civil Case No. 365 of 2018. That the applicant has failed to demonstrate that the suit property is a matrimonial property and therefore has no prima facie case.

18. As to whether the applicant will suffer irreparable harm, it is their submission that the subject matter being land, the same can be quantified. Thus the same can be adequately compensated. On the balance of convenience, it is their submission that the same tilts in their favor being the successful litigant, reliance is placed on two case laws. It is their final submission that the application is fatally defective, vexatious and should be dismissed.

19. Parties highlighted their submissions on 7/06/2021 reiterating the contents as raised in their submissions and respective responses.

20. It is my considered view that main issues for determination are

a) Whether the application is fatally defective

b) Whether the application is merited

21. As to whether the application is fatally defective, the applicant is seeking orders for injunction pending appeal. The application is premised on orders 40 rule 1 (a) and (b), order 51 rule, Articles 40 and 159 of the Constitution and sections 78 (2) of the Civil Procedure Act. The respondent objects to the same provisions on the ground that order 40 is in reference to application made at the trial court. That the guiding order should have been order 42 rule 6 since the application takes the nature of stay. That the matter is not on interlocutory stages but it is on appeal.

22. Order 42 rule 6 of CPR provides:

6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

23. I do not fully agree with the respondent, the application is at the interlocutory stages of the appeal so an injunction may be granted. There is no injustice that will be occasioned should this court proceed to pronounce itself as if the application was brought under the correct provisions of the law. The application is thus not fatally defective.

24. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are:

“that firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”

25. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 EKLK)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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”.

26. In the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others EKLK** the Court of Appeal stated as follows;

“.....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 threatened with violation....The Applicant need not establish title it is enough if he can show that he has a fair and bona fide 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. This means no more than that the Court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed.”

27. It is not in dispute that the applicant is the wife of the 1st Respondent, the registered owner of the suit land. She avers that the suit land was charged without her mandatory spousal consent having been sought and obtained. She alleges that the spousal consent being exhibited by the 5th and 6th Respondents is a forgery, a position that the respondents have vehemently opposed. The 1st Respondent joins issue with the applicant on the issue. The 5th and 6th respondents contend that the issue of spousal consent was determined by the court in HCCC No 365 of 2018.

28. The parties have gone into great length to argue what I would say are substantial issues in the appeal and I am constrained into delving into this as they are best left to the appellate court to determine.

29. As to whether there is irreparable harm, I have always held that once land is used as a collateral in a loan transaction, the same is capable of being merchandised and damages assessed accordingly.

30. I note that the purpose of the court at this time is not to look into the merit of the appeal but to preserve the status quo of the subject matter of the appeal to avoid a scenario where the appeal is rendered an academic exercise.

31. For the reasons given above and in the interest of justice I exercise my discretion in favour of granting status quo orders in terms of

prayer 3 in the application for a period of 90 days within which time the applicant should have prosecuted her appeal to its logical conclusion.

32. The costs of the application shall be met by the Applicant.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF JULY, 2021.

J G KEMEI

JUDGE

Delivered online

Mrs Kihika for Appellant

1st – 4th Respondents - Absent

Ndathi Advocate for 5th – 6th Respondents

7th Respondent - Absent

Kuiyaki/Alex, Court Assistants