



**Wendoh v SBM Bank Kenya Limited (Commercial Case E036 of 2022)
[2023] KEHC 18840 (KLR) (Commercial and Tax) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E036 OF 2022
JWW MONG'ARE, J
JUNE 12, 2023**

BETWEEN

FLORENCE EDELQUINN WENDOH PLAINTIFF

AND

SBM BANK KENYA LIMITED DEFENDANT

RULING

1. The Applicant has moved to Court by a Notice of Motion Application brought by way of a Certificate of Urgency dated September 30, 2022 under Section 13(7)(a) of the *Environment and Land Act* 2011, Order 40 Rules 1 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. That a temporary Injunction be and is hereby issued against the Defendant/Respondent to restrain the Defendant/Respondent whether by itself, by its employees, servants, agents, or any other person acting upon its instructions, from offering for sale, selling, advertising the sale of, exercising any powers whether granted by law or otherwise in relation to, or in any other manner whatsoever dealing with the property known as LR. Number 2327/277(original number 2327/68/6) pending the hearing of this suit.
 - iv. That costs of this application be in the cause.
2. The application is supported by the grounds set within it and the supporting affidavit of Florence Edelquinn Wendoh, the Plaintiff. The application is opposed and the Defendant has filed a replying affidavit sworn by Dalmas Ngui, an employee of the Defendant sworn on November 14, 2022.



3. This suit and the application were filed in the Environment and Land Court and later transferred to the Commercial and Tax Division of the High Court.

Applicants' Case: -

4. It is the Applicant's case that she was jointly registered as an owner of the suit premises being LR. No.2327/277(Original number 2327/68/6), situated in Karen, Nairobi, together with her late husband, Dr Charles Khakali Maringo. She further states that she has lived on the said property for the last twelve years and knows it as her family home. That she learnt of the Defendants purported charge while her husband was ailing and undergoing treatment for cancer and after he died, she visited the lands registry and carried out a search on the property which showed that the property was unencumbered.
5. The Applicant further alleged that she was unaware of the purported loan and that she didn't give any consent or sign any charge documents and that when the Defendant eventually availed the documents it was purporting to rely on, the signature on the said documents were not hers. She further alleged that the Defendant tried to force her to accept the existence of the loan while her husband was on his deathbed and sought to obtain an undertaking from her on the loan repayment. She denied being a party to any borrowing from Chase Bank or its successors and has clearly indicated that she did not sign the purported consent to the borrowing.

The Respondent's Case: -

6. The Respondent opposes the application and has filed a replying affidavit sworn by Dalmas Nguu sworn on November 14, 2022. The Respondent submitted that its predecessor in title, Chase Bank limited and the Plaintiff's late husband, entered into a loan arrangement sometimes in 2010 and that the said Charles Khakali Maringo pledged the suit premises being LR Number 2327/227 as security for the loan. That the Plaintiff gave her consent as spouse and co-owner of the suit premises and later gave her personal undertaking on the repayment of the loan.
7. Further, the Defendant allege that the title to the suit property was deposited with the bank as a simple security and the bank has been in continuous possession since then. The Defendant confirms that the same was never charged at the Lands Registry to formally secure the loan. That to recover the loan balance, the Defendant contents that its rights of sale has crystalized and intends to proceed with the sale to recover the loan.

Analysis and Determination: -

8. I have considered the pleadings and the submissions together with the list of authorities filed by the parties and I have identified one issue for determination, to wit; 'whether the Plaintiff/Applicant has met the threshold for a grant of an order of injunction.' In the locus classica case of *Giella v Cassman Brown Company limited, (1973) EA at page 353* and as elaborated in the Court of Appeal case of *[Nguruman Limited v Jan Bode Nielsen & 2 others, \(2014\) eKLR](#)*, the court stated that 'In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;
 - (a) Establish his case only at a prima facie level,
 - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.'
9. I have considered the facts of this case and in order for a grant of an order of injunction to issue, the facts of this case must be put through the three step test set out above. The first step is to establish



whether a prima facie case has been established. In the case of *Mrao Limited vs First American Bank & 2 others (2003) eKLR*, Justice Bosire observed as follows;

' So what is a prima facie case? I would say in Civil cases, it is a case which on 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 a rebuttal from the latter... The evidence must be that of an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly the standard, which is higher than an arguable case.'

10. From the evidence availed to the court by the parties, the following fact pattern emerge. Firstly, that the Plaintiff is registered as co-owner of the suit premises is not in dispute and has been admitted by both parties. It is also not disputed that there is no formal charge registered against the property and as such, the suit property is unencumbered. From the averments by the Plaintiff, it appears that she became aware of the relationship between the Defendant and her husband at a time when he was critically ill and was not in a position to explain to her how the same had arisen. The Plaintiff has further averred that as an owner, if any borrowings was to be secured against the suit property, she would have been expected to give her consent to the same and she denies ever having done so. She further depones to the unorthodox methods employed by the staff of the Defendant in trying to coach her dying husband to execute documents on his death bed and later force an undertaking from her at her most vulnerable time. The Defendant on its part admits having taken possession of the title to the suit property way back in 2010. No material has been placed before this court to explain or demonstrate why for a period of 9 years no proper charge was placed and registered against the title to secure its borrowing. In the premises therefore, I am persuaded that the Plaintiff has established a prima-facie case with a likelihood of success.
11. The second parameter the court needs to consider before granting an order for injunction is whether the Plaintiff stands to suffer irreparable loss if the order is not granted. From the averments by the Plaintiff, the suit premises is her home and that she together with her late husband purchased it in 2003 from one Mabel Kalegi Ayimo and has continued to live on the said premises since. In *JM v. SMK & 4 others (2022) eKLR*, Justice Odunga defined irreparable loss as follows;

' The equitable remedy of temporary injunction issued to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstratable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their mount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never adequately remedy.'

The Plaintiff has demonstrated that this is not only a family home but one in which they have occupied for a long time. I am persuaded that the emotional investment in the property is one that a monetary compensation may not adequately replace. In any event, the Defendants are still in possession of the title and will suffer no loss if they are successful in the end as they will, within the law, be able to exercise their statutory power of sale. To my mind, the second parameter for grant of an order of interim injunction is established.

12. Finally, the court is required to apply the third parameter of a balance of convenience. I have considered all the facts placed before me by the parties in their pleadings and I am persuaded that the balance tilts in favour of the plaintiff in this matter.



13. In conclusion, I find and hold that the application has merit and I shall allow the same with costs to the Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12th DAY OF JUNE 2023

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J. W. W. MONGARE

JUDGE

In the Presence of:-

1. Mr. Kuloba for the Appellant.
2. Mr. Aluoch for the Respondent.
3. Sylvia- Court Assistant

