



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL SUIT NO. 4 OF 2019**

**MIRIAM NYAWIRA MWANIKI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SERAH NJERI MWANIKI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NATIONAL BANK OF KENYA....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

On 17 January 2018, the 2<sup>nd</sup> respondent placed an advertisement in the print media, more particularly the Daily Nation of the even date scheduling for auction the applicant's property known as **Title No. Nyeri/Municipality Block II/31** (hereinafter, "the suit property") in what was alleged to be 2<sup>nd</sup> respondent's exercise of its statutory power of sale to recover the sum of Kshs. 11,918,324/= owed to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent. The precipitate action by the 2<sup>nd</sup> respondent jolted the applicant into a series of moves the ultimate of which turned out to be the institution of the present suit.

In a relatively lengthy plaint dated 17 January 2018, initially filed in the Environment and Land Court the date after, the plaintiff averred that the suit property is one among several properties vested in her by way of transmission in Nairobi High Court Succession Cause. No. No. 18A of 2001(In the matter of the Estate of Stephen Mwaniki Wairera). She owns the property but her interest in it is subject to her lifetime; in other words, she has no more than a life interest in the property.

The applicant pleaded further that notwithstanding her limited interest in the suit property, the 1<sup>st</sup> respondent procured a loan from the 2<sup>nd</sup> respondent and, as security for repayment of the loan, she caused to be registered a charge over the suit property in favour of the 2<sup>nd</sup> respondent. This she did without the applicant's knowledge or consent; it is her contention that she was misrepresented in the charge documents as a guarantor, guaranteeing to repay the loan in the event the 1<sup>st</sup> respondent defaulted on her primary obligation to the 2<sup>nd</sup> respondent. It is in this context that she is alleged to have presented the suit property as security for the alleged guarantee.

She has also disputed her purported identity appearing in the charge document and the abstract of title as Milliam Nyawira Mwaniki insisting that her true name is Miriam Nyawira Mwaniki. I understand her to be saying that the two names do not refer to one and the same person; if one was to follow her argument to its logical conclusion, she is not the purported guarantor and the alleged guarantor is not the owner of the suit property. For this latter reason, the said Milliam Nyawira Mwaniki could not possibly have offered any or any valid security whether as a chargor or a guarantor on the strength of a property which she does not have.

So, in summary that is the applicant's case; if it finds favour with this Honourable court, the applicant prays for, inter alia, a declaration that the charge registered on the suit property is fraudulent, null and void; that the charge did not confer to the 2<sup>nd</sup> defendant any statutory power of sale or any other right for that matter. She has also sought for a permanent injunction against the 2<sup>nd</sup> respondent restraining it from acting on the purported charge and, in particular, from disposing of the suit property.

Filed alongside the suit is a motion dated 17 January 2018 which, for purposes of this ruling, is seeking an interim injunction restraining the 2<sup>nd</sup> respondent, by itself, its agents or servants from exercising a statutory power of sale, or entering into, or remaining on, or advertising for sale or dealing in any manner whatsoever with or any portion of the suit property pending the hearing and determination of the motion or until further orders of this Honourable court.

The motion is anchored on Sections 1A, 1B and 3A of the Civil Procedure Act, cap. 21; Order 40 Rule 1,2,3, 7 and 10 of the Civil Procedure Rules. It is supported by the applicant's own affidavit again sworn on 17 January 2018.

In that affidavit, she has sworn that the suit property is one of the assets comprising the estate of her late husband, Stephen Mwaniki Wairera who, I gather, died intestate sometimes in 1999; following his demise, she was appointed the sole administratrix of his estate.

The grant of letters of administration intestate was confirmed way back in October 2006. According to the schedule to the certificate of confirmation of grant, the suit property devolved upon her but subject to life interest.

She deposed that apart from herself, the deceased was survived by four children who include the 1<sup>st</sup> respondent and who are entitled to the remainder of the estate upon determination of her life interest.

The applicant also swore that she is illiterate and therefore she couldn't have signed the alleged charge document. She reiterated that she is Miriam Nyawira Mwaniki and not Milliam Nyawira Mwaniki.

The suit property fetches a monthly rental income of Kshs. 456,000/= which she is bound to lose should the 2<sup>nd</sup> respondent proceed and dispose of it.

She further swore that it is only on 21 August 2017 when she conducted an official search at the lands registry that she learnt that a charge had been registered on the suit property in favour of the 2<sup>nd</sup> respondent to secure payment of Kshs. 18,300,000/= advanced to the 1<sup>st</sup> respondent.

She was further surprised that the suit property was registered in the name of one Milliam Nyawira Mwaniki yet she still holds the title documents which, apparently, still reflect her deceased husband as the owner notwithstanding that the title has been vested in her name.

The applicant has denied knowledge or execution of the charge documents and that whatever document or documents presented by the 1<sup>st</sup> respondent purporting to show that she assented to any loan with the suit property as security for repayment was fraudulent.

Assuming a valid charge is registered on the suit property, so the applicant has deposed, a statutory notice ought to have been served; in her case, it was not.

Despite bringing to the attention of the 2<sup>nd</sup> respondent her reservations on the purported charge, the latter ignored them and proceeded to advertise the property for auction.

It is her plea that if the auction proceeds, her husband's estate will suffer irreparable damage.

Fatuma Mohammed, a manager with the 2<sup>nd</sup> respondent swore a replying affidavit in the 2<sup>nd</sup> respondent's behalf. In it she deposed that on 3 March 2014 the 1<sup>st</sup> respondent was offered a term loan of Kshs. 18,243,145/= out of which Kshs. 10,243,145/= was to settle the outstanding loan due to Equity Bank Limited and the balance of Kshs. 8,000,000/= was to be invested in the 1<sup>st</sup> respondent's business as what she has described as 'a working capital'.

The loan was secured by a legal charge over the suit property which is registered in the name of '*Milliam Nyawira Mwaniki aka Miriam Nyawira Mwaniki.*'

In discharge of its obligations under the charge, the 2<sup>nd</sup> respondent advanced the loan to the 1<sup>st</sup> respondent who, on her part, serviced it as agreed until December 2015 when she defaulted in the repayments. It is in the wake of this default that the 2<sup>nd</sup> respondent moved to activate the default clause and demanded repayment of the entire loan. As at that time, the total outstanding amount was Kshs. 14,783,425.15.

The 2<sup>nd</sup> respondent issued a statutory notice on 13 April 2016 and a notice of intention to sale on 11<sup>th</sup> August 2016. On 7 March 2017, Messrs. Spotlight Intercepts Auctioneers, acting on the instructions of the 2<sup>nd</sup> respondent, issued a 45-day notification of sale to the 1<sup>st</sup> respondent informing her that the auction of the suit property was scheduled for 11 May 2017.

The 1<sup>st</sup> respondent made a payment of Kshs. 800,000/= and requested the 2<sup>nd</sup> respondent to suspend the auction on the understanding that she would settle the outstanding arrears by 15 May 2017. She did not, however, honour her promise and so the 2<sup>nd</sup> respondent issued another notice of intention to sale on 23 August 2017.

It is only after this latest notice was issued that the applicant emerged and alleged that the charge on the suit property was fraudulent, null and void. Fatuma admitted that the applicant's concerns were communicated to the 2<sup>nd</sup> respondent by her advocates on record vide a letter dated 18 September 2017.

The 2<sup>nd</sup> respondent insisted that the charge was valid and therefore instructed its auctioneers to proceed and auction the suit property. They acted accordingly and placed an advertisement in the Daily Nation of 17 January 2018 advertising the suit property for auction.

The 2<sup>nd</sup> respondent's bank manager deposed further that prior to the registration of the charge, the 2<sup>nd</sup> respondent had undertaken due diligence on the status of the suit property and established that it was registered in the name of the applicant as its proprietor.

Further, despite the applicant's denial, she has not provided any proof that her true identity is Miriam Nyawira Mwaniki and not Milliam Nyawira Mwaniki.

Like the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent also opposed her mother's application and filed a replying affidavit in that regard.

She swore that her late father entered into an agreement for sale of the suit property with one Ruga Githuka but died on 8 September 1999 before the transaction was completed. Githuka took proceedings against her father's estate in Nairobi in High Court Civil Case No. 1314 of 1994 for a refund of the deposit made towards the purchase price; he succeeded in the suit and so the estate was ordered to refund his money.

She swore that since she was running a supermarket and had an active bank account with Equity Bank Limited, the applicant asked her to obtain a loan from that bank to settle the court decree against the deceased's estate.

Together with the applicant, the 1<sup>st</sup> respondent secured another loan from the 2<sup>nd</sup> respondent in order to offset the outstanding loan due to Equity Bank Limited. The applicant, according to the 1<sup>st</sup> respondent was not only aware of this second loan but she also executed the necessary documents to facilitate its advance.

As a matter of fact, it was the applicant who had been repaying the loan due to the 2<sup>nd</sup> respondent until 2017 when she started defaulting. She further swore that, contrary to the applicant's allegations, her name appears in her national identification card as Milliam Nyawira Mwaniki.

My appreciation of the applicant's application, the responses by the respective respondents together with the parties' submissions leads me to three pointed questions that, in my humble view, are central to the determination of not just the present application but the entire suit. The first question is whether the applicant was privy to the contract between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent. Two secondary components to this question are, first, whether the name Milliam Nyawira Mwaniki refers to the same person as Miriam Nyawira Mwaniki who in this case, is the applicant. The second component is, irrespective of whether the two names refer to the applicant, whether the latter executed any document, including the charge registered on the suit property, guaranteeing to pay the loan in the event of default and, in the process, offering the property as security for the payment.

Assuming the applicant was a guarantor as alleged by the respondents, the second fundamental question that follows is whether she was legally capable of offering the suit property as security for repayment of a loan taking into account her limited interest in the property.

The applicant has urged that even if she was privy to the contract between the respondents, she was not served with the requisite notice of the intended sale of the suit property. The respondents, on the other hand, are of the contrary position; the 2<sup>nd</sup> respondent, in particular, insists that all the necessary notices, including the statutory notice, were duly served before the property was advertised for sale.

What emerges from this conflicting positions is the third question which is simply this: whether the statutory notice was duly served.

The fourth question is, by and large, the overarching one and it is whether the contract between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent is a valid contract and whether it is enforceable in law after all.

I regard this final question as overarching because if it is ultimately determined that the contract is either invalid and or unenforceable, then any debate on the preceding three questions would be moot and of no consequence.

But I am minded that in addressing all or any of the foregoing questions at this stage of the proceedings, it is necessary that I exercise enough restraint and avoid making any remarks that may pre-empt the determination of this suit on merits. Bearing that in mind, I will only say as much as is necessary for resolution of the present application.

As is always the case with these sort of applications, all that this Honourable court would be concerned with at the moment is whether, based on the material before it, the applicant has made out a prima facie case with a probability of success; and, whether she will suffer damage so irreparable that an award of damages would not be an adequate remedy. And if the court is in doubt as to the probability of success of the applicant's case or whether she will suffer irreparable damage if the injunction sought is not granted, then the court has to consider, whether the grant or refusal of the injunction will serve the interests of justice or, put in more popular parlance, whether the balance of convenience tilts in favour of or against the grant of the injunction. (**See Giella versus Cassman Brown & Co. Ltd (1973) E.A. 358.**)

These are the principles for grant of an injunction but which, in any event, are subject to the discretion of the court either to grant or decline the injunction.

As earlier noted, the legality of the contract whose terms the 2<sup>nd</sup> respondent sought to enforce when it advertised the suit property for sale is a material question. This question is traced back to the undisputed fact that the suit property was initially part of the estate of the late Stephen Mwaniki Wairera and it was only vested in the applicant at what was obviously the tail end of administration process.

As far as the devolution of this particular asset of the estate is concerned, this Honourable Court ordered that it devolves upon the applicant subject to life interest. For avoidance of doubt, the Court directed that each of the deceased's four children who survived him would be entitled to a quarter of this particular asset upon the extinction of the applicant's interest. The certificate of Confirmation set out the distribution of this asset in the following explicit terms:

“

***(a) MRS. MIRIAM NYAWIRA MWANIKI is entitled under section 35(1) of the Law of Succession Act, to a life interest until she re-marry (sic) in the whole residue of the net intestate estate, to wit;***

***(a) L.R.NO. Nyeri/Municipality/Block 11/31***

- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) ...
- (j) ...
- (k) ...
- (l) ...
- (m) ...

***(b) JORAM WACHIRA MWANIKI is entitled under section 35 (1) of the said Act and subject to sections 41 and 42 thereof and to any appointment or award hereafter made under section 35(2) or section 35 (4) thereof to a quarter share in the whole residue of the net estate upon the death of or re-marriage of the said Miriam Nyawira Mwaniki, to wit a quarter of :-***

***(a) L.R.NO. Nyeri/Municipality/Block 11/35***

- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) ...
- (j) ...
- (k) ...

***(c) NEHEMIAH GITONGA MWANIKI is entitled under section 35 (1) of the said Act and subject to sections 41 and 42 thereof and to any appointment or award hereafter made under section 35(2) or section 35 (4) thereof to a quarter share in the whole residue of the net estate upon the death of or re-marriage of the said Miriam Nyawira Mwaniki, to wit a quarter of :-***

***(a) L.R.NO. Nyeri/Municipality/Block 11/35***

- (b) ...
- (c) ...
- (d) ...
- (e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

(k) ...

**(d) SARAH NJERI MWANIKI is entitled under section 35 (1) of the said Act and subject to sections 41 and 42 thereof and to any appointment or award hereafter made under section 35(2) or section 35 (4) thereof to a quarter share in the whole residue of the net estate upon the death of or re-marriage of the said Miriam Nyawira Mwaniki, to wit a quarter of: -**

**(a) L.R.NO. Nyeri/Municipality/Block 11/35**

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

(k) ...

**(e) ROSEMARY WAMBUI MWANIKI is entitled under section 35 (1) of the said Act and subject to sections 41 and 42 thereof and to any appointment or award hereafter made under section 35(2) or section 35 (4) thereof to a quarter share in the whole residue of the net estate upon the death of or re-marriage of the said Miriam Nyawira Mwaniki, to wit a quarter of:**

**(a) L.R.NO. Nyeri/Municipality/Block 11/35**

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

(k) ...”

This scheme of distribution of the deceased's estate, no doubt, resonates section 35 of the Law of Succession Act which, by and large, vests the net intestate estate in the surviving spouse, but subject to life interest; and, where the surviving spouse is a widow, her interest in the property is extinguished if and when she remarries. Owing to its centrality in the determination of the present application, it is necessary to reproduce the entire section here; it reads as follows: -

**35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to -**

**(a) the personal and household effects of the deceased absolutely;**

**and**

**(b) a life interest in the whole residue of the net intestate estate:**

**Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.**

**(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.**

**(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.**

**(4) Where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to -**

**(a) the nature and amount of the deceased's property;**

**(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;**

**(c) the existing and future means and needs of the applicant and the surviving spouse;**

**(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;**

**(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;**

**(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will, if any; and**

**(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.**

**(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.**

Looked at in its entirety, this provision of the law is to the effect that where the deceased is survived by a spouse and children, the latter end up being the ultimate beneficiaries of his net intestate estate; of course, if there be only one child, he remains the sole heir upon the demise of his surviving parent or upon remarriage where such a parent is a widow.

The surviving child's or children's right to the residue of the net intestate estate is so central that the surviving spouse is expected to exercise his or her power of appointment of all or any part of the capital of the net intestate estate by way of gift for the benefit of the surviving child or children; whenever it is exercised, that power takes effect immediately.

As a matter of fact, where the children or any of them is of the view that the power has been unreasonably exercised or withheld, he is at liberty to apply to the court for the appointment of his share of the estate. When so moved the court may award him a share of the capital of the estate bearing in mind such circumstances as have been prescribed in section 35(4) (a) to (g).

All these go to explain why the surviving spouse does not and cannot hold absolute interest in the residue net intestate estate of a deceased where there is a surviving child or children. Unless the children consent to such absolute proprietorship, the interest of the surviving spouse is nothing more than a life interest and, as much as such a spouse is entitled to every right accruing to life interest, he or she is, to some degree as a trustee to the extent that the ultimate beneficiaries of the net intestate estate are children; where they are more than one. (See section 35 (5)).

This position is firmed further by section 37 of the Act which, in my humble view, not only discounts any lingering notion that the surviving spouse is free to deal, as he or she wishes, with the immoveable property comprising the deceased's net intestate estate but also asserts, in no uncertain terms, the voice of the deceased's surviving children whenever any decision on the disposal of the property has to be made. That section reads as follows:

***37. Powers of spouse during life interest***

***A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:***

***Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.***

It is apparent from this section that the surviving spouse can only sell the property in very limited circumstances for his or her own maintenance and even then, the consent of the surviving children who are of age or the consent of court must have been first obtained. Where the property is immoveable, as in the present case, it cannot be sold without the sanction of the court.

By necessary implication, a surviving spouse cannot initiate any transaction on the property or deal with it in any manner that is likely to expose it to the risk of sale or disposal in any manner howsoever adverse to the surviving child or children's residual interest.

In a nutshell sections 35, 36 and 37 of the Act demonstrate that a surviving spouse' power to dispose of a deceased's residue net intestate estate is curtailed; he or she cannot deal with such property as if he or she is its absolute proprietor particularly where the deceased is survived by a child or children.

Looking at the applicant's application from this legal perspective, there is some force in the argument that regardless of whether the applicant was privy to the contract between the 1<sup>st</sup> and the 2<sup>nd</sup> respondents, no charge could validly be registered on the suit property to secure repayment of the loan advanced to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent. None of the parties, be it the applicant, the 1<sup>st</sup> applicant or the 2<sup>nd</sup> respondent could possibly deal with the suit property outside the boundaries delineated by sections 35, 36 and 37 of the Act.

And if I am right in this, it matters not that the applicant may or may not have committed herself as a guarantor; or she was Milliam Nyawira Mwaniki rather than Miriam Nyawira Mwaniki; or that a statutory notice was or was not served. All these questions would, in my humble view, be of no legal effect.

For present purposes, it is sufficient to say that, in the ultimate, the applicant has demonstrated she has a suit with probability of success.

Would damages be an adequate remedy if her suit succeeds? I reckon not. The applicant, as noted, only holds a life interest in the property; it is an interest that would diminish upon her death or on her remarriage. But no one can tell with any measure of certainty when either of these events will accrue; for this very reason, if the applicant's suit succeeds, it would be impossible to put any figure on the damages she would have suffered if, by then, the suit property would have been auctioned.

At any rate, the deceased's four children have a beneficial interest in the property that will crystallize at such time or times as has been envisaged under section 35 (2), (3) and (4). It is similarly impossible to assess the scale of damages the applicant is likely to suffer if her children were to lose part of their father's estate as a result of a transaction they were not privy to.

Accordingly, I hold that the applicant merits an order for injunction in terms proposed in her motion dated 17 January 2018; it is hereby allowed. Costs shall be in the cause. Orders accordingly.

**Signed, dated and delivered this 10<sup>th</sup> day of July 2020**

**Ngaah Jairus**

**JUDGE**