



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 18 OF 2018

(Formerly Kitale ELC Case NO. 69 of 2018)

JOSEPHINE NEKESA TULIENGE.....1ST PLAINTIFF/APPLICANT

BARBARA SIMIYU LUSIKE.....2ND PLAINTIFF/APPLICANT

GLORIA SIMIYU KHAYANGA.....3RD PLAINTIFF/APPLICANT

TGS.....4TH PLAINTIFF/APPLICANT

(A Minor suing thro' his Mother Josephine Tulienge)

VERSUS

ABC BANK LIMITED.....1ST DEFENDANT/RESPONDENT

IGARE AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

COSMAS STEPHEN

NABUNGOLO.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. The Applicants/Plaintiffs are related to the 3rd Defendant to the extent that the 1st Applicant /Plaintiff is the wife and the 2nd, 3rd and 4th are their children respectively.

2. The 3rd Defendant charged several of his properties to the 1st Respondent hereinafter referred to as the Bank. He was unable to repay the loan and the bank exercised its Statutory power of sale by instructing the 2nd Respondent to advertise and sale the same.

3. The said properties are;

1. Maisonette No. 55 on LR No. 209/204439 (Title No. L.R. 158338 Phenom Estate – Nairobi City.

2. Waitaluk/Mabonde Block 9 (Kabulwet) 337 and 387

3.) Waitaluk/Mabonde Block 9 (Kabulwet) 343 and 344.

4. L.R. No 9072/8/Title No. L.R. 51592 – Standard estate Kitale outskirts.

5. L.R. No. 9072/9 (Title No. L.R. 51593) - Standard Estate Kitale outskirts.

6. Waitaluk/Mabonde Block 12 (Sirende) 299 and 311 Kitale Municipality.

7. Waitaluk/Mabonde Block 12 (Sirende) 319

8. Kitale Municipality Block 16 (Kaura Wabechau) 102.

4. The 2nd Defendant as stated above proceeded to advertise the same and this prompted the Applicants to seek interim orders of Injunction on the grounds that the same are matrimonial properties and they accused the 4th Respondent of surreptitiously obtaining the above loan without seeking their consent.
5. The Notice of motion dated 12th July 2018 speaks as much especially the 1st Applicant supplementary affidavit sworn on the even date.
6. The 1st Defendant has countered the same vide the replying affidavit of **Winnierohi Wafula** sworn on 23rd July 2018 in which she has attacked the said application as being *res judicata*. She contents that there is case No. Kitale ELC 105 /2017 between the 3rd defendant and the 1st Defendant which is still pending. She proceeded to attach the charge instruments which shows that contrary to the 1st Applicant's averments, she fully gave spousal consent to the whole charge transactions.
7. The 1st and 2nd Defendants then proceeded to raise a preliminary objection on a point of law that this matter was indeed *res judicata* and contravened the provisions of Section 4, 7 and 12 of the Civil Procedure Act.
8. I have perused the submissions by the parties herein on the question of whether the matter at hand is indeed *res judicata*.
9. Apparently I have dealt with case No. Kitale ELC 105/2017 and thus well conversant with the facts.
10. Save for the argument that there was no spousal consent, the issues raised by the Applicants are not new. The securities given in the earlier case as well as the charge instruments are one and the same.
11. To save previous judicial time, the most appropriate thing to do is to consolidate the two suits namely Kitale ELC 105/2017 which is now HCCC 24/2018 and this current suit.
12. In the consolidated suit the issues raised herein shall be ventilated once and for all.
13. Does the Applicants deserve interime orders of Injunction? I do not think so for the simple reason that the earlier orders of injunction sought by the 3rd Respondent were denied by my brother Njoroge J of the Environment and Land Division. His efforts at the Court of Appeal were futile vide the ruling dated 15/11/2018.
14. The Applicant has alluded that the 3rd Respondent would be unable to repay the amount if it is allowed to proceed with the sale of the charged assets, Ostensibly that it is a small bank with less liquidity ratio at Central Bank. No evidence of course was presented. At any rate that would be an issue for determination through adduction of evidence.
15. Needless to say, I have not seen any effort to show that even as a sign of good faith the Applicants have attempted to settle the loan.
16. In the premises this suit is hereby consolidated with case No. Kitale HCC 24/2018. The Plaintiff herein shall remain to be co-plaintiff therein and the Defendant herein shall be Defendants accordingly.
17. The preliminary objection for now is disallowed. The interim orders earlier issued are hereby set aside for the simple reason that the application for temporary injunction had been determined by Njoroge J as well as the Court of Appeal and both Courts had disallowed the same. To extent or issue the interim orders would run contrary to the decisions of the two courts.
18. Costs shall abide the outcome of the main case.

Orders accordingly.

Delivered, signed and dated at Kitale this 3rd day of April, 2019.

H.K. CHEMITEI

JUDGE

3/04/19

In the presence of:

Mr. Busieka for Wabomba for the Applicant

Bororio for the Respondent

Court Assistant – Kirong

Ruling read in open court.