



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 15 OF 2018**

**MARTHA MUMBI MUTHEE.....1<sup>ST</sup> APPLICANT**

**LOISE MUTHONI MUTHEE.....2<sup>ND</sup> APPLICANT**

**DAVID KARIUKI MUTHEE.....3<sup>RD</sup> APPLICANT**

**AND**

**PETER MAHU MUTHEE.....1<sup>ST</sup> RESPONDENT**

**UNITED CREDIT LIMITED.....2<sup>ND</sup> RESPONDENT**

**JOSEPH M. GIKONYO T/A GARAM AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Notice of Motion was filed under a certificate of urgency and is dated the 24<sup>th</sup> September, 2018; the application is premised under the provisions of Order 40 Rules 1(a) and 2(1) and Order 51 Rule (1) of the Civil Procedure Rules 2010, Section 6 of the Land Control Act and Section 13(2)(f) of the Consumer Protection Act; the applicants seek the orders as set out hereunder;

a. Spent.

b. A temporary injunction do issue restraining the 2<sup>nd</sup> respondent by itself, its employees, its agents and the 3<sup>rd</sup> respondent Garam Investments Auctioneers from advertising, alienating or disposing of the suit property Title No. Ruguru/Karuthi/140 Ngorano Village Karuthi sub-location Nyeri County pending the '*inter partes*' hearing and determination of the application;

c. An injunction do issue restraining the 2<sup>nd</sup> respondent by itself, its employees, its agents and the 3<sup>rd</sup> respondent Garam Investments Auctioneers from advertising, alienating or disposing of the suit property Title No purported . Ruguru/Karuthi/140 Ngorano Village Karuthi sub-location Nyeri County pending the '*inter partes*' hearing and determination of the suit;

d. The costs of the application be awarded to the applicants.

2. The applicants rely on the grounds on the face of the application, on the Supporting Affidavit and a Further Affidavit made by Martha Mumbi Muthee on behalf of the other applicants;

3. The application was opposed by the respondents and is in terms of the Replying Affidavit made by Naina Haria on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents;

4. At the hearing hereof the applicants were represented by learned Counsel Mr. Mungai, the 1<sup>st</sup> respondent did not file any response and was not in attendance at the hearing hereof; the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Learned Counsel Mr.Kimani; the application was canvassed by way of written submissions which were then highlighted; hereunder are the submissions made by the respective parties;

**THE APPLICANTS' CLAIM**

5. The Applicants' case is that they had a beneficial interest in the suit property as it was a family home and a family burial ground; and that

the family had agreed that the suit property be registered in the name of the 1<sup>st</sup> respondent in trust for the other family members; therefore he did not have exclusive ownership of the suit property; that the 2<sup>nd</sup> respondent failed to conduct due diligence on the suit property and their approval/consent was not sought before the Charge was effected therefore any dealings with the suit property was wrong; making the purported sale of the suit property by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents illegal and fraudulent as the 1<sup>st</sup> respondent had no capacity to charge the property;

6. The applicants also contend that the 2<sup>nd</sup> respondent has not followed the procedure laid down in the provisions of the law in that it did not issue or serve upon them the requisite statutory notices which are; the three (3) months statutory notice under Section 56(2) of the Land Act; the three (3) months statutory notice under Section 90 of the Land Act; the three (3) months statutory notice under Section 96(1) of the Land Act; and relied on the cases of **Trust Bank Ltd vs Eros Chemists Ltd & Anor [2000] eKLR** and **Joseph Mwangi vs Equity Bank Ltd & Anor [2008] eKLR** to support their contention that without the notices the right of sale had not arisen; and further aver that they were not served with the 45 days statutory notice as required under Rule 15(d) of the Auctioneers Act.

7. The applicants also submitted that the 2<sup>nd</sup> respondent was illegally carrying on financial business without a licence in total breach of Section 3(1)(a) of the Banking Act; that despite numerous requests the 2<sup>nd</sup> respondent has neglected and or refused to provide the 1<sup>st</sup> respondent with information and the loan documentation in breach of the Consumer Protection Act and Article 3:2 of the Prudential Guidelines which requires that a consumer be treated in a fair, reasonable and humane manner;

8. They submitted that they had made out a prima facie case to warrant the granting of the injunctive orders sought; and that they had sentimental attachment to the suit property and would suffer irreparable loss if the property was sold; and that no monetary compensation would ameliorate such loss;

### **RESPONDENTS RESPONSE**

9. The 2<sup>nd</sup> respondent in its Replying Affidavit to the application made on the 13/11/18 opposed the averments of the applicants and stated as follows;

10. In the year 2015 the 1<sup>st</sup> respondent in his capacity as a director of New Age Developers & Construction Ltd (“**the company**”) applied to the 2<sup>nd</sup> respondent for a term loan in the total sum of Kshs.66 Million repayable in 36months; the 1<sup>st</sup> respondent was the chargor and the company was the borrower; the title deed indicated that the 1<sup>st</sup> respondent was the registered owner of the suit property and he offered it as the security and the impugned Charge was duly executed and registered on the 9/02/2015 after the 1<sup>st</sup> respondent’s wife had given spousal consent; no mention was made that the property belonged to the family;

11. That the 2<sup>nd</sup> respondent duly fulfilled all its obligations under the agreement but the 1<sup>st</sup> respondent and the borrower failed to do so by failing to service the loan; on the 2/11/2016 two demand letters were sent to the 1<sup>st</sup> respondent as the charger and the company as the borrower in which the 2<sup>nd</sup> respondent demanded the sum of Kshs.8,830,337/-; both never responded to the demand letters;

12. The loan was restructured on the 9/05/2017 and when the 1<sup>st</sup> respondent breached the same a statutory notice of 90 days under Section 90 of the Land Act was issued to him on the 21/12/2017; upon expiry of the 90 days a notice dated 10/04/2018 of 40 days under the provisions of Section 96(2) of the Land Act which indicated the 2<sup>nd</sup> respondent’s intention to exercise its right of sale was issued;

13. The 1<sup>st</sup> respondent’s advocates responded that the notice was improperly issued as it did not conform to the provisions of Section 56(2) of the Land Registration Act and Sections 90(3) and 96(1) of the Land Act; the 2<sup>nd</sup> respondent duly responded stating that there was no anomaly in the notices issued and upon the lapse of the 40 days notice proceeded to conduct a valuation of the suit property; the Valuation Report dated 12/08/2018 indicated the open market value and the forced sale value;

14. The 3<sup>rd</sup> respondent was duly instructed to issue the 45 days notice to the 1<sup>st</sup> respondent; and upon expiry of the notice adverts were placed in the Daily Nation Newspaper for the sale of the suit property by way of Public Auction; which adverts prompted the instant application; at the time of filing this application the 1<sup>st</sup> respondent’s indebtedness to the 2<sup>nd</sup> respondent was in the sum of Kshs.98,455,800/-;

15. The 2<sup>nd</sup> respondent contention is that the applicants have no locus to prosecute the case as they are neither the chargors nor the borrowers; they are also not the registered proprietors of the suit property and thus the 2<sup>nd</sup> respondent was under no obligation to issue them with any of the statutory notices under the provisions of the Land Act; that all requisite notices were served on the rightful parties that is the 1<sup>st</sup> respondent and his spouse;

16. The 2<sup>nd</sup> respondent carries on business of hire purchase and was not regulated by the Central Bank and hence does not require any licence under the CBK regulations;

17. The sole ground the applicants had was that the suit property was a burial site and this was not a ground for the granting of an order of injunction; that irreparable damage was not proved and that sentimental value could not operate as a bar to the 2<sup>nd</sup> respondent’s rights to exercising its power of sale as held in the case of **David Ngaari vs Kenya Commercial Bank Ltd [2015] eKLR**;

18. That the balance of convenience was in favour of the 2<sup>nd</sup> respondent and even if the suit property was sold there would be a substantial shortfall as it is owed more than the value of the suit property; it cited the case of **New Age Developers & Construction Co. Ltd vs Sidian Bank Ltd [2018] eKLR**;

19. In the event the impugned sale is adjudged as wrongful the 2<sup>nd</sup> respondent is able to compensate the applicants for any damage that may arise on account of its exercise of its statutory right of sale;

### **ISSUES FOR DETERMINATION**

20. After hearing the rival submissions made by the respective and reading the respective written submissions this court has framed the following issues for determination;

- i. Whether the applicants have locus standi;
- ii. Whether the conditions for granting the injunctive orders have been met by the applicants;
- iii. Costs.

### **ANALYSIS**

21. The application was brought under a certificate of urgency and the applicants obtained temporary injunctive orders pending the *inter-partes* hearing and determination of the application; there are indeed very many issues arising from the application for determination but as indicated this court will only address two issues that is the applicants '*locus standi*' and whether they are deserving of the orders sought;

#### **Whether the applicants have locus standi**

22. The 2<sup>nd</sup> respondent contends that the applicants have no *locus standi* to prosecute the case as they are neither the chargors nor the borrowers; they are also not the registered proprietors of the suit property and thus the 2<sup>nd</sup> respondent was under no obligation to issue them with any of the statutory notices under the provisions of the Land Act; that all requisite notices were served on the rightful parties that is the 1<sup>st</sup> respondent and his spouse;

23. On this issue of this court is guided by the case of **Nguruman Ltd vs Jan Bonde Nielson & 2 others [2014] eKLR**; the Court of Appeal when deliberating on what amounted to a prima facie case made the following observation;

**“All that the court has to see is that on the face of it the person applying for an injunction has a right, which has been threatened with violation. Positions of 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 bona fide question to raise as to the existence of the right which he alleges.”**

24. The right to obtain an interlocutory injunction is ancillary relief and is not a cause of action but is a separate action within a larger claim; and so as to be amenable to the jurisdiction of a court of equity all the applicants have to demonstrate is that they have a legal or equitable right which is under threat; the order is usually granted to preserve the status quo pending the ascertainment by the court of the rights of the parties upon the dispute being resolved;

25. In this instance the Applicants claim that the suit property has their family home thereon and that the family had agreed that the suit property be registered in the name of the 1<sup>st</sup> Respondent in trust for the other family members; and that the 1<sup>st</sup> Respondent did not have exclusive ownership of the suit property;

26. At this juncture the Applicants do not need to prove their locus and also need not make full and frank disclosures of all relevant facts all they have to show is that they have a right whether legal or equitable which is in need of protection by an injunction; refer to the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Anor [1990] KLR**.

27. This court is therefore satisfied that there is sufficient material that has been placed before it for it to conclude that the Applicants have raised a fair and bona fide question as to the existence of a right/interest to the suit property which is need of protection;

#### **Whether the conditions for granting the injunctive orders have been met by the applicants;**

28. The substantive law for granting of injunctions is found under the provisions of Order 40 Rule 1(a) of the Civil Procedure Code; and the three principles for granting injunctions are enshrined in the renowned case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**; the Applicant has to satisfy the court on the following requirements which are that;

- a. The Applicant must establish a prima facie case with a probability of success;
- b. The Applicant must demonstrate irreparable injury that cannot be adequately compensated by an award of damages;
- c. If in doubt, then the balance of convenience tilts in whose favour;

29. This court reiterates that the applicants in discharging a prima facie case do not need to prove their positions or establish title in the suit property; it is enough to demonstrate that they have a bona fide right in the suit property;

30. But it is trite law that it is not sufficient to merely establish a prima facie alone the Applicants must satisfy the court that the injury they will suffer in the event that the injunction is not granted is irreparable and that damages would not be an adequate remedy; in the case of **Nguruman (supra)** it was held that;

**“The existence of a prima facie case does not permit “leap frogging” by an Applicant to injunction directly without crossing the other hurdles in between.”**

31. Which then leads to the issue of irreparable damage; the Applicants contend that the suit property has a family home and is also family burial ground and that they had sentimental attachment to the suit property and would suffer irreparable loss if it was sold; and that no monetary compensation would ameliorate such loss;

32. In rebuttal the 2nd Respondent avers that irreparable damage was not proved and that the sole ground the Applicants had was that the suit property had a family house and was a burial site and that sentimental value could not operate as a bar to the 2<sup>nd</sup> Respondent’s rights to exercising its power of sale; that this was not a ground for the granting of an order of injunction; and it was willing to compensate the Applicants for any damage that may arise on account of its exercise of its statutory right of sale and in the event that the impugned sale is adjudged as wrongful; and made reference to the case of **David Ngaari vs Kenya Commercial Bank Ltd [supra]**;

33. This court will not belabor itself in addressing the issue of sentimental value as there are legions of authorities that state that once a property is given as security for a loan it becomes a commodity for sale and therefore the sentimental attachment to the property becomes inconsequential and the property then must be sold in accordance with the law; reference is made to the case of **Isaac Litali vs Ambrose W. Subai & 2 others NBI HCCC 2092 of 2000 (UR)**.

34. The Applicants saving grace is that they are seeking an equitable remedy and it is trite law that equity relies less on precedent but more on the need that justice be served; the remedy is discretionary and the Applicants do not have to prove the underlying claim all they have to do is persuade the court that there is good reason why the Respondents’ rights should be restricted;

35. This court is not pre-judging the 2<sup>nd</sup> respondent but is satisfied and persuaded that from the material tendered there is a serious questions and doubts arising on the nature of the 2<sup>nd</sup> Respondent’s business and financial dealings; the applicants are found to have a good and arguable case as this is a question that needs to be established; in this instance this court will exercise its discretion on a balance of convenience;

36. Both parties contend that they both stand to lose; the 2<sup>nd</sup> Respondent avers that there was misrepresentation on the value of the suit property and that even if the suit property were to be sold there would be a substantial shortfall; therefore in the exercise of balancing and in weighing the relief vis a vis the injury this court has satisfied itself that the potential injustice that may be caused to the Applicants arising from the questionable dealings greatly outweighs the injury that may be done to the 2<sup>nd</sup> Respondent; and as such the sale should not be allowed to proceed;

37. For those reasons this court finds that the balance of convenience tilts in favour of the Applicants; nevertheless, all is not lost as the Applicants shall hereby be directed to tender security as a condition precedent to the issue of the injunctive orders;

#### **FINDINGS AND DETERMINATION**

38. The Applicants are found to have a right to seek the orders sought;

39. The Application is found to be meritorious and is hereby allowed; as this court finds that the applicants have met the conditions for the grant of an injunctive orders;

a. An interlocutory injunction hereby issues restraining the 2<sup>nd</sup> Respondent by itself, its employees, its agents and the 3<sup>rd</sup> Respondent Garam Investments Auctioneers from advertising, alienating or disposing of the suit property Title No. Ruguru/Karuthi/140 Ngorano Village Karuthi sub-location Nyeri County pending the ‘*inter-partes*’ hearing and determination of the suit; on condition that;

b. The Applicants start and continue making monthly interest payments with effect from the 30/04/2019 and thereafter on the last day of each and every succeeding month; the sums shall be payable direct to the 2<sup>nd</sup> Respondent during the pendency of this suit;

c. In default of any one payment the injunctive order herein shall automatically be discharged;

d. The Applicant to ensure the matter is disposed of within 12 months from today’s date.

40. The Respondents shall have the costs of this Application.

Orders accordingly.

**Dated and Signed and Delivered at Nyeri this 4<sup>th</sup> day of April, 2019.**

**HON.A.MSHILA**

**JUDGE**