



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 393 OF 2018**

**MONICA MUTHIKWA MASYUKO.....PLAINTIFF**

**-VERSUS-**

**JAMES NGANDA MWANZA .....1<sup>ST</sup> DEFENDANT**

**STANDARD CHARTERED BANK LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Through an initial plaint filed before the Environment and Land Court (ELC) on 31<sup>st</sup> July 2018, the plaintiff/applicant herein sued the defendants seeking the following orders:

- i. That a mandatory injunction be and or do issue requiring the defendants to stop the intended sale of all that property known as NAIROBI/BLOCK 99/75, NAIROBI.**
- ii. That a permanent injunction do issue restraining the defendants, their agents, servants and or employees or any persons claiming in their name from entering, disposing off or the selling, and or transfer of the suit property to anyone.**
- iii. Costs of the suit.**
- iv. Any other or further orders this honourable court may deem fit and just to grant.**

2. The plaintiffs case is that the house known as Nairobi/Block 99/75 (hereinafter “the suit property”) is registered in her name and that of the 1<sup>st</sup> defendant and that by a letter dated 17<sup>th</sup> July 2018, the 2<sup>nd</sup> defendant issued a notice of intention to sell the suit property yet the suit property is a matrimonial home jointly owned by her and the 1<sup>st</sup> defendant. The plaintiff’s claim is that the 1<sup>st</sup> defendant charged the suit property to the 2<sup>nd</sup> defendant without her consent and that she only came to learn about the charge much later after the 1<sup>st</sup> defendant had defaulted.

3. It was the plaintiff’s case that the 1<sup>st</sup> defendant had forged her signature on the spousal consent and that the 1<sup>st</sup> defendant therefore obtained the loan from the 2<sup>nd</sup> defendant fraudulently, in which case, the 2<sup>nd</sup> defendant had no right over the suit property.

4. Concurrently with the plaint, the plaintiff also filed an application dated 30<sup>th</sup> July 2018, which is the subject of this ruling in which she sought the following orders:

**1. Spent**

**2. That pending the inter parties and determination of this application a temporary injunction to issue restraining the defendants, their agents, employees and or servants and or anyone else whatsoever claiming in their name from entering, selling and or disposing off all that parcel of land known as NAIROBI/BLOCK 99/75, NAIROBI (hereafter “the suit property”)**

**3. That pending the interparties hearing and determination of this application, a temporary injunction do issue restraining the defendants, their employees, agents and or servants from interfering with the quiet enjoyment of the suit property by**

plaintiff and or the plaintiffs' quiet possession and enjoyment of the suit property.

**4. That pending the hearing and determination of this suit, a temporary injunction to issue restraining the defendants, their agents, employees and or servants and or anyone else whatsoever claiming in their name from entering, selling and or disposing off all that parcel of land known as NAIROBI/BLOCK 99/75, NAIROBI( hereafter "the suit property").**

**5. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the defendants, their employees' agents, and or servants from interfering with the quiet enjoyment of the suit property by plaintiff and or the plaintiffs quiet possession and enjoyment of the suit property.**

5. The application is premised on the grounds that the suit property is a matrimonial home belonging to the plaintiff and the 1<sup>st</sup> defendant which property the 1<sup>st</sup> defendant fraudulently and without her knowledge/consent charged to the 2<sup>nd</sup> defendant in order to obtain a loan.

6. She claims that that the 1<sup>st</sup> defendant defaulted in paying the loan as result of which the 2<sup>nd</sup> defendant has issued a notice of intention to sell the suit property thereby placing her proprietary interest in the suit property in great jeopardy.

7. At the hearing of the application, Miss Masaki, learned counsel for the plaintiff/applicant submitted that the main issue in the application is the charge on matrimonial property without the consent of the plaintiff. She argued that the plaintiff did not give consent to the charge on the suit property and that her signature was forged. For this argument counsel cited the provisions of Section 79(3) of the said Act 2012 on the requirement of spousal consent.

8. The plaintiff argued that the 1<sup>st</sup> defendant took the loan in bad faith in order to punish her following their divorce. Counsel submitted it is therefore in the interest of justice that the orders sought in the application be granted so as to preserve the suit property pending the hearing of the suit.

9. Counsel cited the decision in the case **of Beatrice Chelangat Rop & Another -vs- Housing Finance Company of Kenya Ltd [2006] eKLR** in which the court dealt with the principles to be considered by the court when determining whether or not to grant interlocutory injunction.

#### **1<sup>st</sup> respondent's case.**

10. The 1<sup>st</sup> respondent opposed the application through a replying affidavit sworn on 6<sup>th</sup> September 2018 wherein he avers that he is the registered owner of the suit property. He attached a copy of the title to the replying affidavit as annexure "**JNM1**". He avers that he acquired the suit property in 1997 and that sometimes in the year 2013 he obtained a loan from the 2<sup>nd</sup> defendant to finance their daughters education with the full knowledge and consent of the plaintiff.

11. He avers that the plaintiff filed Miscellaneous Criminal Application No. 7 of 2015 in which she sought orders to institute private prosecution against him and the 2<sup>nd</sup> defendant on claim of fraud and forgery of her signature on the spousal consent forms and adds that a forensic report by the Kenyan Police revealed that the applicant's signature on the spousal consent for the loan facility was not a forgery. He attached a copy of an affidavit containing the forensic report to the replying affidavit as annexure "**JNM-5**".

12. At the hearing of the application, Mr. Mwenesi learned counsel for the 1<sup>st</sup> defendant submitted that the applicant had not established that she had a prima facie case against the defendant as she was not only a divorced spouse, but was also not the registered proprietor of the suit property as she had alleged.

13. Counsel further submitted that there were proceedings before other courts over the issue of division of matrimonial property between the plaintiff and the 1<sup>st</sup> defendant and that an order of injunction issued in this matter would defeat the said ongoing division of matrimonial property.

14. Counsel submitted that the applicant was not entitled to the equitable orders sought as the basis of her claim was that her signature on the bank's spousal consent form were forged yet the 1<sup>st</sup> defendant had demonstrated, through the forensic document examiners report that the signature in question was hers. Counsel argued that the applicant's case had no probability of success since the matrimonial property was offered as security for the loan.

#### **2<sup>nd</sup> respondent's case**

15. The 2<sup>nd</sup> respondent opposed the application through the replying affidavit of its Legal Manager, Boniface Machuki, who avers that the 1<sup>st</sup> defendant obtained a loan from the 2<sup>nd</sup> defendant using the suit property as security. He attached a copy of the letter of offer and charge to the replying affidavit as annexures "**BMI** and **BM2**" respectively. He further avers that all the loan documents were duly executed by the parties and that the 1<sup>st</sup> defendant defaulted in the loan repayment thereby prompting the 2<sup>nd</sup> defendant to invoke its statutory power of sale of the suit property as is envisaged by the law.

16. Mr. Muriithi, learned counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff had not met the criteria/conditions set for the grant of orders of injunction. Counsel argued that the applicant did not present any evidence to counter the document examiner's report which showed that the signature on the spousal consent form belonged to her. It was the 2<sup>nd</sup> respondent's case that the plaintiff was guilty of concealment of material facts and was therefore not entitled to the orders sought in the application. For this argument, counsel relied on the

decision in the case of Abdullahi Mohammed Ali & 2 Others –vs- Abdullahi Shariff & 2 Others [2014]eKLR wherein I was held:

**“As was correctly pointed out by the 1<sup>st</sup> defendant, the granting of an injunction is an equitable relief. It behoves upon an applicant to bare all the facts of its case to the court. Withholding and/or non-disclosure of material facts would disentitle such a party from enjoying an equitable relief.”**

### **Determination**

17. I have carefully considered the pleadings filed herein, the history of the dispute between the plaintiff and the 1<sup>st</sup> defendant and the submissions tendered by all the parties together with the authorities that they cited.

18. From the facts and evidence tendered before this court, it was not disputed that the 1<sup>st</sup> defendant, obtained a loan from the 2<sup>nd</sup> defendant using the suit property as a security. It was further not disputed that the 1<sup>st</sup> defendant defaulted in the loan repayment thereby resulting in the 2<sup>nd</sup> defendant’s decision to exercise its statutory power of sale by issuing a statutory notice to that effect.

19. The main point of challenge by the plaintiff/applicant is that her signature, on the spousal consent form used in securing the loan was forged. In effect, the applicant’s case is that the loan was acquired without her consent through forgery of her signatures and that the 2<sup>nd</sup> defendant therefore had no right to the suit property.

20. I find that the main issue for determination in this application is whether the plaintiff has made out a case for the grant of orders of injunction. The principles governing the grant of orders of injunction are well known.

21. In this case, as I have already stated, the applicants main challenge to the 2<sup>nd</sup> defendant’s notice of intention to sell the suit property was that she was not only a registered owner of the said property but that her consent to charge the property was not obtained as is required under Section 79(3) of the Land Act, 2012 which stipulates that:

**“Section 79(3) of the Land Act, 2012 provides that “A charge of a matrimonial home, shall be valid only if any document or form used in applying for a such a charge, or used to grant the charge, is executed by the charger and any spouse of the charger living in the matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”**

22. The respondent’s case on the said was that the plaintiffs claim that her signature on the spousal consent form was forged had been upstaged by the document examiner’s report produced in criminal proceedings initiated by her, being Chief Magistrates Miscellaneous Criminal Application No. 7 of 2015 in which it was shown that the impugned signature was indeed hers.

23. Looking at the above facts in totality, I find that the applicant was under a duty to disclose to this court the goings on in the criminal proceedings that she had initiated with the intention of prosecuting the defendants for forgery.

24. My take is that the existence of the document examiners report, countering the applicant’s claim in forgery was a critical issue to this application which ought to have been disclosed by the applicant. It turns out that the applicant is guilty of concealment of a material fact to this case and is therefore not worthy of equitable orders of injunction sought.

25. Furthermore, the applicant did not avail any evidence before this court to counter the document examiner’s report that shows that the signature on the spousal consent form is hers. Consequently, I find that her claim that she did not consent to the charge on the suit property, which was the main basis for her application for injunction, was not proved. In sum, I find that the applicant has not established that she has a prima facie case against the defendants so as to warrant the issuance of the orders sought.

26. The upshot is that the plaintiff has not established the first condition for the grant of a temporary injunction as set out in the case of Giella –vs- Cassman Brown & Company Ltd [1973] EA 358. In the circumstances I do not have to consider the other conditions for granting injunctions as set out in the Giella case (supra).

27. Consequently, I find that the application dated 30<sup>th</sup> July 2018 is not merited and I therefore dismiss it with costs to the respondents.

**Dated, signed and delivered in open court at Nairobi this 14th day of May 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Okega for plaintiff

Mr. Muriithi for 2<sup>nd</sup> defendant/respondent

Mr. Mwenesi for 1<sup>st</sup> defendant

