REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 3 OF 2019

JOICE BAIDDAWA OPAR.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

FRANCIS MUNIALO OPAR.....2ND DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **24 December 2018.** It was filed by the Plaintiff pursuant to **Sections 1A, 1B and 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya;** Order **40 Rules 1 and 2; and Order 50 Rule 1** of the **Civil Procedure Rules, 2010,** for the following orders:

[a] Spent

[b] Spent

[c] That pending the hearing and determination of the suit herein there be a temporary injunction restraining the Defendants either by themselves, their servants, agents, employees or by any one acting under their express or implied authority on their behalf from trespassing onto, advertising for sale, negotiating, selling either by public auction or otherwise, transferring or disposing of **LR NO. ELDORET MUNICIPALITY/BLOCK 13/788** until further orders of the court.

[d] The Court be pleased to make further order necessary for the ends of justice.

[e] That the costs of the application be provided for.

[2] The application was predicated on the grounds that the Plaintiff is the wife to the 2nd Defendant; and that the property in issue is matrimonial property which the 2nd Defendant charged without her knowledge or consent. It was further the Plaintiff's contention that the Defendants are colluding to dispose of the Suit Property at a throw away price; which act will likely result in her eviction from the Suit Property, along with the issues of the marriage. In her Supporting Affidavit sworn on **24 December 2018**, the Plaintiff deposed that the Suit Property was acquired jointly by her and the 2nd Defendant; and that they agreed that it be registered in the name of the 2nd Defendant in trust for her and their children.

[3] According to the Plaintiff, the current value of the Suit Property stands at over **Kshs. 50 million**, taking into account its location, which is a prime locality within Eldoret Town. Thus, it was her averment that in **2015**, she discovered that the 2nd Defendant had secretly borrowed a loan from the 1st Defendant and charged the Title of the Suit Property as security for the borrowing without informing her; and that when she confronted him over the issue, the 2nd Defendant assured her that he was committed to the repayment of the loan, and asked her to shelve any issues of concern over the matter. That it was not until **2016** that she got to learn that the 2nd Defendant was badly in arrears and that the Bank was threatening to take adverse action. She thereupon sought audience with the Bank Manager and was advised to continue paying the loan so as to forestall any precipitate action by the 1st Defendant.

[4] It was further the averment of the Plaintiff that she then took over the repayment of the loan until **November 2018** when she learnt, through **Zennith Management,** that the 2nd Defendant had been served with a Statutory Notice of the Bank's intention to dispose of the Suit Property unless the outstanding sum of **Kshs. 3,462,981.68** was paid forthwith. She added that she also got to learn that the 2nd Defendant was looking for buyers to purchase the property by way of private treaty and had written to the Bank for its approval. Hence, it was her

contention that she and her three children have no other home to go to; and that they will undoubtedly suffer irreparable harm should the property be disposed of as proposed by the Bank. To buttress her averments, the Plaintiff annexed to the Supporting Affidavit copies of an Affidavit of Marriage, Certificates of Birth for their three children as well as copies of cheques and correspondence to confirm that she had been repaying the loan.

[5] On behalf of the 1st Defendant, a Replying Affidavit was sworn by **Fredrick Mung'athia** on **2 April 2019** to the effect that the Bank was approached by the 2nd Defendant for a loan facility for **Kshs. 2,930,000/=,** which application was granted by the Bank; and that the 2nd Defendant, as the registered proprietor of the Suit Property, offered it as security for the loan. That since that Charge was executed and registered before the enactment of the **Land Act, 2012**, spousal consent was not a requirement. It was further averred that, since there is no dispute that the borrower is in default, no justifiable cause has been shown to warrant the issuance of the injunctive relief sought by the Plaintiff; and that the same is purely intended to provide the borrower and the Plaintiff breathing space; and to assuage the Plaintiff's apprehensions and fears. Thus, the Defendant posited that the Plaintiff's application is not only lacking in merit, but also amounts to abuse of the court process.

[6] The 2nd Defendant, **Francis Munialo Opar**, similarly opposed the application and relied on the averments set out in his Replying Affidavit sworn on **5 March 2019.** He conceded that the Plaintiff herein is his wife, and added that he is also married to **Beatrice Sarah Namukhosi Wakwabubi** and **Rachael Odongo Okida**. The 2nd Defendant further averred that, after marrying the Plaintiff, he set up their matrimonial home for her in **Mukhweya**, where the Plaintiff has a 3 bedroomed house. In respect of the Suit Property, it was the averment of the 2nd Defendant that the same was procured solely by himself using the Moi University Pension Scheme funds; and therefore, that the allegation of joint acquisition is misplaced. He further averred that he singlehandedly sought for finance to refurbish the said house, which was in a dilapidated state at the time of its acquisition.

[7] The 2nd Defendant denied that there was an agreement between him and the Plaintiff to have the title for the Suit Property registered in his name in trust for her and her children as alleged by the Plaintiff. His assertion was that, if indeed the property was jointly acquired as alleged, then nothing would have stopped the Plaintiff from being registered as a co-owner thereto; and that the fact that the Plaintiff was unaware that the title had been charged is proof enough that she had no interest at all in the Suit Property. The 2nd Defendant justified the need to sell the Suit Property in paragraphs 10 to 18 of his Replying Affidavit, by averring that he fell ill in **2009** and has had to lose his job and savings as a result; and that the only viable option open to him presently is to sell the Suit Property to enable him pay off the bank loan and to obtain further medical attention. He was, consequently, opposed to the issuance of the orders sought by the Plaintiff in the application dated **24 December 2018.**

[8] In her reply to the responses by the Defendants, the Plaintiff reiterated her contention that the Suit Property is indeed matrimonial property; and that it was acquired jointly by herself and the 2nd Defendant. She explained that the financial crisis that has entailed the 2nd Defendant's inability to service the loan was attributable to the 2nd Defendant's misjudgment by involving himself in politics as a parliamentary candidate. She downplayed the 2nd Defendant's averment that his medical condition was the reason for his default. Thus, in the Plaintiff's eyes, the 2nd Defendant having deserted her and the children, in now colluding with the 1st Defendant to dispose of the property at throw-away price to serve his selfish interests.

[9] The application was disposed of by way of written submissions as directed by the Court on **6 March 2019**. Thus, the Plaintiff's written submissions were filed on **29 March 2019**, while the 1st Defendant's written submissions were filed on **3 April 2019**. Counsel for the Plaintiff relied on the cases of **Giella vs. Cassman Brown [1973] EA 358, Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, Habib Bank A G Zurich vs. Eugene Marion Yakub, Civil Application No. 43 of 1982** and **Francis Jumba Enziano & Others vs. Bishop Philip Okeyo & Others, Nairobi HCCC No. 1128 of 2001** to support his argument that the Plaintiff has made out a *prima facie* case with probability of success by demonstrating that she is the wife of the 2nd Defendant and that the property in issue is matrimonial property.

[10] It was further the submission of Counsel that the Plaintiff has demonstrated that irreparable harm will befall her and her children should the property be sold as they have no alternative home. The cases of **Suleiman vs. Amboseli Resort Ltd [2004] 2 KLR 589; Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others [2001] 2 EA 540; Mwathi vs. KCB Finance Ltd [1987] KLR 523** and **Anne Mumbi Hinga vs. Gaitho Oil Ltd [2013] eKLR** were cited to buttress Counsel's argument that it is the Plaintiff, rather than the Defendants, that stands to suffer irreparable loss should the orders sought not be granted. He further argued that the Plaintiff has demonstrated that she has lived on the property with her children for over 10 years and therefore has so much sentimental value attached thereto which cannot be quantified in monetary terms. It was further the contention of the Plaintiff that the balance of convenience tilts in her favour; the *status quo* being that she is residing on the Suit Property.

[11] Counsel for the 1st Defendant, on the other hand, was of the view that the Plaintiff has failed to prove that she is deserving of the orders sought. Relying on **Esther Njeri Mwangi vs. Equity Bank Ltd & Another [2017] eKLR,** it was the submission of Counsel for the 1st Defendant that a spouse claiming overriding interest must prove that there is a marriage in existence and that the suit is indeed a matrimonial home; and that on both scores, the Plaintiff herein failed to adduce sufficient evidence to demonstrate a *prima facie* case; his argument being that spousal consent was not necessary prior to the enactment of the **Land Act, 2012**.

[12] In response to the Plaintiff's contention that she stands to suffer irreparable harm, Counsel for the 1st Defendant relied on **David Ngugi Ngaari vs. Kenya Commercial Bank Ltd [2015] eKLR; Nahashon K Mbatia vs. Finance Company Ltd [2006] eKLR** and **Maithya vs. Housing Finance Co. of Kenya Ltd & Another [2003] 1 EA 133** for the proposition that once a chargor charges property, the property is converted to a commercial commodity with a monetary value that can be easily attained; and therefore that its loss can be adequately compensated by damages. He urged the Court to find that the balance of convenience is in favour of the 1st Defendant and to be guided by the words of **Kwach JA** in the **Mrao Ltd Case** that a debtor should not be shielded from his lawful responsibilities to repay the debt, otherwise, banks would be crippled if not driven out of business altogether. Thus, it was the submission of Counsel for the 1st Defendant that the Plaintiff's application does not meet the threshold for grant of temporary injunctive orders and therefore ought to be dismissed with costs

to the 1st Defendant.

[13] The Court has given careful consideration to the application, its Supporting Affidavit and the annexure thereto, as well as the responses filed herein by the Defendants. Consideration has also been given to the parties' written submissions and the authorities relied on therein. One of the enabling provisions cited in support of the application is **Order 40 Rule 1(a)** of the **Civil Procedure Rules.** It provides that:

> **"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

[14] There is no dispute that the 2nd Defendant did approach the 1st Defendant for a loan, in respect of which title for the Suit Property, namely, **LR ELDORET MUNICIPALITY/BLOCK 13/788,** was charged as security by the 2nd Defendant in favour of the 1st Defendant. The Plaintiff's **Annexure "JBO 3'a'** confirms this and shows that the Charge was registered on **20 July 2007**. There is further no dispute from the facts deposed to in the parties' affidavits that the 2nd Defendant defaulted in servicing that facility; and that this was the reason why the 1st Defendant initiated the process of realizing the security; the process that triggered the institution of this suit. The Plaintiff now contends that she has a genuine grievance herein and has, to that end, filed a Plaint dated **24 December 2018** seeking the following reliefs:

[a] A Declaration that the intended sale of the Suit Property is null and void for want of spousal consent or input;

[b] An Order that the Suit Property be valued by an independent professional valuer to determine its actual value;

[c] A Permanent Injunction restraining the Defendants herein from trespassing on, advertising for sale, negotiating, selling, transferring or disposing of the Suit Property;

[d] An Order for accounts;

[e] Any other relief that the Court may deem fit to grant.

[15] Thus, in the Plaintiff's instant application, her main prayer is for a temporary injunction to stop the intended sale pending the hearing and determination of her suit. In the premises, the key issue for the Court's determination is whether the Plaintiff has satisfied the conditions for granting a temporary injunction for purposes of **Section 63(c)** of the **Civil Procedure Act** and **Order 40 Rule 1** of the **Civil Procedure Rules**; and the touchstone in this regard is the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), wherein it was held that:

> **"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

[16] As to what amount to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 furnished the following helpful definition:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the 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 rebuttal from the latter."**

[17] From the Plaint and the Supporting Affidavit, it is manifest that the Plaintiff's case is premised on the contention that the Suit Property is matrimonial property; and that no spousal consent to charge the property was obtained by the Defendants. As rightly pointed out by Counsel for the 1st Defendant, it was imperative for the Plaintiff to demonstrate, albeit on a *prima facie* basis, the existence of a marriage between her and the 2nd Defendant. To this end, the Plaintiff exhibited an Affidavit of Marriage and averred that they were in the process of registering their marriage when the 2nd Defendant deserted their matrimonial home. She further averred that their union was blessed with three issues, namely **Daisy Victoria, Elizabeth Opar, Samuel Albert Wanzala Opar,** and **Joel Simon Bill Opar**. In their Certificates of Birth, annexed to the Supporting Affidavit and marked Annexure JBO 2 'a' 'b' and 'c', the names of the Plaintiff and the 2nd Defendant are given as the children's parents.

[18] The Plaintiff further averred that, in the course of their marriage, they jointly acquired the Suit Property and agreed with the 2nd Defendant that the same be registered in his name in trust for her and their children, only to discover later in **2015** that the 2nd Defendant had secretly charged the property to the 1st Defendant without her knowledge or consent. Although the 1st Defendant denied the Plaintiff's contention that she contributed to the purchase of the property, he did not dispute her assertion that, when she got to learn that the 2nd Defendant had defaulted in his repayments, she took it upon herself to negotiate with the 1st Defendant and to personally assume the duty of making the repayments. Her averment is vindicated by the documents marked Annexure JBO 4 'a', 'b' and Annexure JBO 5 to the Supporting Affidavit. She further contended that the only reason she made the aforesaid intervention is because the Suit Property is their matrimonial home wherein she is currently residing with her children; and that they have no other home.

[19] For the purposes of these proceedings, matrimonial home is defined in **Section 2** of the **Matrimonial Property Act, 2013** to mean any property that is owned by one or both spouses and occupied or utilized by the spouses as their family home. Hence, although the 2nd

Defendant averred that he has another home in **Mukhweya**, he fell short of demonstrating that the Plaintiff has a house there; having conceded, as he did, that the Plaintiff is only one of his wives. Thus, the Plaintiff has demonstrated, on a *prima facie* basis, that she is a spouse to the 2nd Defendant and that the Suit Property is her matrimonial home.

[20] In the Lease for the Suit Property (marked **Annexure JBO 3 'b'** to the Plaintiff's Supporting Affidavit, and **Annexure FM3** to the 1st Defendant's Replying Affidavit), it is manifest that the property was registered under the **Registered Land Act, Chapter 300** of the **Laws of Kenya**, (now repealed). However, the process of realizing the security was commenced with the Statutory Notice dated **29 November 2017 (Annexure JBO '5').** Thus, according to the Plaintiff **Section 93** of the **Land Registration Act**, is applicable. **Section 93(3)** of the Act requires that:

> **"Where a spouse who holds land or dwelling house in his or her name individually undertakes a disposition of that land or dwelling house--**
>
> **(a) the lender shall, if that disposition is a Charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, consented to that Charge..."**

[21] The Plaintiff proposes to prove at the hearing that she contributed towards the purchase of the Suit Property; and that, as a spouse, it was necessary for her to give consent to the Charge. Thus, it remains to be seen, at the trial, whether the subject Charge required spousal consent. In the premises, I take the view that the Plaintiff has indeed demonstrated that she has a *prima facie* case with a probability of success.

[22] Moreover, as a co-owner of the Suit Property, the Plaintiff would be entitled to notice of the 1st Defendant's intention to sell the Suit Property by dint of **Section 96** of the **Land Act**, which stipulates that:

> **(1) Where a chargor is in default of obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under section 90(1), a charge may exercise the power to sell the charged land.**
>
> **(2) Before exercising the power to sell the charged land, the charge shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.**
>
> **(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on –**
>
> **…**
>
> **(f) any person who is a co-owner with the charger;**
>
> **…**
>
> **(i) Any other person known to have a right to enter on and use the land…**

[23] Thus, sight must not be lost that this is an interlocutory application; and that the issues in contest form the basis of the Plaint dated **24 December 2018** and, therefore, would best be resolved at the trial and not on the basis of affidavit evidence. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012,** the Court of Appeal made this point thus:

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the 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. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

[24] Moreover, caution and balance must be exercised when weighing the averments in the parties' affidavits at the interlocutory stage. In **Shah vs. Padamshi [1982] eKLR**, the Court of Appeal held that:

> **A party who contends that he did not receive a particular letter by post can do no more than to deny the receipt of it, and bare though the denial appears by itself, it is capable of raising a triable issue. As the situation stood, with respect, the judge failed to note that a triable issue existed. He was also in no position to hold that the appellant "*in fact*" received the notice. If he meant to say the appellant *must* have received the notice, he should have said so, and said what he meant with the reasons for his opinion. Except in the clearest of cases, which this one was not it is inadvisable for the court to prefer one affidavit to another... A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial.**

[25] In the premises, I am satisfied that the Plaintiff has indeed demonstrated, on a *prima facie* basis, that she has a right in connection with

the Suit Property **which has apparently been infringed by the Defendants"...as to call for an explanation or rebuttal from the latter..." within the** definition of a *prima facie* case provided in **the Mrao Ltd Case** above.

[26] As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is a manifest breach of the provisions of the law, an applicant cannot be compelled to accept damages as recompense. In Kanorero River Farm Ltd and 3 others –vs- National Bank of KenyaLtd (2002) 2 KLR 207 for instance, **Ringera, J.** (as he then was) held as follows at page 216:

> **"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."**

[27] Similarly **Warsame, J**. in the case of **Joseph Siro Mosioma V Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR** held as follows:-

> ***"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."***

[28] *The same position was taken* ***in Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation [2008] eKLR*** *thus:*

> ***"… a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)***

[29] *As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in* ***Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004*** *is instructive that:*

> ***"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.***

[30] *Moreover, it is imperative that* the Court opts for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

> **"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …"**

[31] In the instant matter, the path leading to the lower risk of injustice would be to sustain the *status quo* by stopping the impugned auction pending the hearing and determination of the Plaintiff's case. Accordingly, I find merit in the Plaintiff's application and would grant orders in her favour in the following terms:

[a] That pending the hearing and determination of the suit herein, there be a temporary injunction restraining the Defendants either by themselves, their servants, agents, employees or by any one acting under their express or implied authority on their behalf from trespassing onto, advertising for sale, negotiating, selling either by public auction or otherwise, transferring or disposing of **LR NO. ELDORET MUNICIPALITY/BLOCK 13/788** until further orders of the court.

[b] That the costs of the application be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2019

OLGA SEWE

JUDGE