



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 90 OF 2019

YVONNE CELIA ADHIAMBO RAREIYA PAUL BRIAN OHULA RARIEYA

(suing on behalf of the late TABITHA OBALA OGUTU.....PLAINTIFF

VERSUS

OLOO ONYANGO ELLY T/A EPIC AVIATION COLLEGE.....1ST DEFENDANT

KENYA WOMEN MICROFINANCE BANK LTD.....2ND DEFENDANT

GEOFFREY O. MULANYA T/A MULANYA & MAONDO ADVOCATES.....3RD DEFENDANT

RULING

1. In these proceedings, the Plaintiffs challenge the validity of the charge over L. R. Nairobi/Block 72/1149 (The charged property) taken in favour of Kenya Women Microfinance Bank Limited (Kenya Women or the 2nd Defendant). In the meantime the Plaintiffs have moved the Court through the Notice of Motion dated 25th February 2019 for injunctive orders as follows:-

3. THAT pending the hearing and determination of this Suit this Honourable Court be pleased to issue temporary injunction restraining the Respondents whether by themselves or through their servants or agents or howsoever otherwise from advertising for sale, selling or disposing of, transferring or in any other way interfering with the title to the property Title Number Nairobi/Block 72/1149

2. The Plaintiffs are children of the late Tabitha Obala Ogutu (the Deceased) who died on 3rd October 2017. The two also hold limited grant of letters of administration *ad litem* to the estate of the deceased.

3. The impugned charge was registered on 9th March, 2017 (in the life of the deceased) to secure a sum of Kshs.9,300,000 advanced by Kenya Women to Oloo Onyango Elly t/a Epic Aviation College (The 1st Defendant). The Plaintiffs fault the charge on two main grounds.

4. It is alleged that the charged property was registered in the joint names of the Deceased and George Ouma Rarieya (**George**) and it was irregular for the Deceased to alone execute the document without the alleged co-proprietor. The co-proprietor George is also deceased having died on 25th February 2009. This date is important!

5. It is also alleged that at the time of signing the letter of offer and charge, the deceased was terminally ill with cancer and undergoing intensive chemotherapy treatment which rendered her weak and of diminished mental capacity. That in spite of her physical and mental state the Defendants induced her to participate in the transaction without the knowledge of her children, relatives and/or close friends. It is alleged that the 1st Defendant was the sole beneficiary of the facility yet he was never a spouse, business partner nor relative of the 2nd Deceased.

6. The Plaintiffs are apprehensive of losing the charged property because of the apparent default in repayment of the facility by the 1st Defendant.

7. On the part of the Defendants, their case is that the charged property was and is registered in the sole name of the deceased who, without inducement, executed the charge in favour of the Bank. As for the 1st Defendant, he deposes that the Deceased confided to him about her health and that she was getting little or no support from her children (the Plaintiffs) at those difficult times.

8. In distress, the Deceased asked for money to meet her medical expenses hence the decision to take the loan. The 1st Defendant avers that

it was agreed that out of the loan of Kshs.9,300,000 he would pay Kshs.1,500,000 to the Deceased and that he did so. The 1st Defendant says that he is committed to repaying the loan but has fallen into tough times because his business is not doing well.

9. The Court has considered the submissions of the parties herein against the well-known principle for grant of an injunction set out in Giella vs Cassman Brown[1973] E.A 358 which are;

- i. An application must show a prima facie case with a probability of success;
- ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparably injury;
- iii. When the court is in doubt, it will decide the application on the balance of convenience.

10. From the documents filed by the Defendants and which are not challenged by the 1st Plaintiff, it has emerged that George died before the Deceased. Secondly, on the strength of a search taken after the charge was registered it would seem that the Deceased was registered as a sole proprietor to the charged property on 20th February 2017. So that at the time of execution of the charge on 23rd February 2017 and its registration on 9th March 2017, the Deceased was the sole proprietor of the charged property. The interim view the Court has to take is that on the basis of the material before it the assertions that the charge is irregular because it was not executed by a co-proprietor is not supported by evidence. The prospects of that assertion are so much the weaker.

11. On the second limb, the Plaintiffs have produced a bundle of documents showing that the Deceased was unwell in the most part of early 2017. Indeed there is concession by the 1st Defendant that the Deceased had confided in him about the disease that was afflicting her. What, however, the Plaintiffs did not demonstrate (and that would have to be by some form of evidence) is that because of her illness, the Deceased was so impaired mentally or physically that she was vulnerable to manipulation by the Defendants and that the Defendants did in fact take advantage of her state to unlawfully induce her into the transaction.

12. On the aspect that the 1st Defendant was a sole beneficiary, the unchallenged evidence produced by the 1st Defendant is that out of the facility he advanced to the Deceased a total sum of Kshs.1,500,000 paid out in two batches both on 21st March 2017 by way of cheques.

13. The inescapable conclusion the Court reaches is that the Plaintiffs have failed to establish a prima facie case with probability of success. The tests in Giella –vs- Cassman being of sequential application and the application having collapsed on the first, it cannot go further. The Application of 25th February 2019 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 18th Day of October 2019

F. TUIYOTT

JUDGE

PRESENT:

Onani for Plaintiff/Applicant

Maina for 2nd Defendant

Mulenyia for Juma for 3rd Defendant

Court Assistant: Nixon