



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 151 OF 2019

MARY NJERI GAKUNGA.....1ST PLAINTIFF

BRIAN NDUNGU GAKUNGA.....2ND PLAINTIFF

JENNIFER CAROLINE GAKUNGA.....3RD PLAINTIFF

(suing as the Administrators and legal representatives

of the Estate of Aloysius Ndungu Gakunga (deceased)

VERSUS

MIDDLE EAST BANK KENYA LIMITED.....DEFENDANT

RULING

1. This suit is filed by three plaintiffs in their capacity as legal representatives of the **Estate of Aloysius Ndungu Gakunga** (deceased). The deceased's banker, during his life time, was the defendant that is **Middle East Bank Kenya Limited**.

2. It is not denied that the defendant availed, from time to time, loan facilities to the deceased. What is in contention in this case is the exact outstanding amount of the loan facilities; whether the loan facilities were secured by a charge over property known as **L.R. No. 10871/2 Muthuri Location**; and if the facility was secured by a charge over that property whether the deceased's spouse gave a spousal consent and if not whether the spousal consent was necessary.

3. The interlocutory application before me is the one dated **4th July 2019**. The plaintiffs by that application inter alia seek injunction order to restrain the defendant from selling the property by public auction. The plaintiffs in making the application also seek, in the alternative, that an order be made for payment into the deceased's account of Ksh 3 million every quarter to a total amount not exceeding Ksh 21,516,384.

4. The defendant does not deny that the deceased was gravely ill which illness led to his death on **21st July 2014**. The plaintiff deponed, and again the defendant did not deny, that the deceased was admitted in hospital on **10th March 2014** and was eventually taken to India for further treatment where he was discharged on **13th June 2014**. The charge instrument which the plaintiffs deny was signed by the deceased, shows the deceased executed it on **22nd April 2014**. It is partly because of the clashing of the dates when the deceased was admitted in hospital and the date reflected in the charge that the plaintiffs alleged the charge instrument was not executed by the deceased.

5. The defendant through the affidavit of **Felix Nganga Karanja**, of **25th September 2018**, deponed that the executed charge instrument was presented for registration on **30th July 2014**. The deponent further stated that the Land Registry required the deceased's spouse to give spousal consent. In the view of the defendant the spousal consent was unnecessary because the property is a commercial enterprise. Although the deponent stated that the defendant's advocate made verbal and written protests to the requirement of spousal consent at the Land Registry, such written protests were not provided to the court, by the defendant.

6. The deponent by his said affidavit stated thus:

· The Registry did not reject the Charge as presented nor return it to my firm the duly registered. The matter was kept in abeyance at the Registry, and at one stage we considered making an application to the Court for an Order of Mandamus compelling the registration of the charge;

· I continued making periodic inquiries at the registry and repeating my view that the charged property was a commercial enterprise. After the application herein was made by MEBK in June 2016, the issue of the charge being registered was put on the back burner;

· However, from time to time I still continued with my inquiries at the Registry. On 12th June 2018 whilst I was at the Registry for other work, I inquired about the charge from an officer called Onesmus, who after an inquiry, directed me to another person called Clara, who to my surprise, handed back to me the duly registered charge together with the certificate of Title relating to Kiriga Estate;

ANALYSIS

7. I am guided by the holding in the case **Devoter Okwach & 22 others v Board of Trustess - Telposta Pension Scheme & another [2015] eKLR** where the court had this to say:

*“What I have before me is an interlocutory injunction application. The correct approach of such an application was stated in the holding in the case **MBUTHIA –V- JIMBA CREDIT FINANCE & ANOTHER** (1988) KLR where the court of appeal stated:*

The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

8. I have, herein above, set out what I believe will be the main issues that will be in controversy at the full trial.

9. The court has an obligation to consider whether the plaintiffs have shown prima facie case with a probability of success and if they have an injunction will normally not be granted unless the plaintiffs applicants might otherwise suffer irreparable injury. If the court is doubtful on the above two principles it will decide the case on a balance of convenience. See **GIELLA V CASSMAN BROWN (1973) E.A**

10. Prima facie case was stated in the case **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125**, to mean **“more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial.”**

11. Having the principles set out in the above cases I am of the view that the plaintiffs have shown a prima facie case. As stated before the trial court will have to determine whether the deceased, who at the time was gravely ill, did indeed execute the charge instrument. If indeed he did the trial court will have to determine whether spousal consent was provided and if not whether it was necessary.

12. In regard to the spousal consent the defendant will need also to show, as required under section 93 (3) of the Land Registration Act, whether it carried out necessary inquiry whether the deceased’s spouse consented to the charge of the property. This is what that section provides:

“(3) Where a spouse who holds land or a 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, have consented to that charge;”

13. There is no evidence before court of the inquiry undertaken by the defendant as required under the above section.

14. In consideration of the second principle of granting an injunction, I am well persuaded by the discussion of Justice John M. Mativo in the case **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** where the learned judge stated:

“.....the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.....”

But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance,"[16] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

15. The subject property in this case is a coffee farm. It generates income, for the deceased’s family. It follows that although it can be valued today such valuation could not take into account the continuous income the property generates for the plaintiffs and will probably continue to do so for their generations to come. It is because of that I find the plaintiffs, if the injunction they seek is not granted, will suffer irreparable injury which cannot be compensated with damages.

16. Since I do not entertain doubt in respect to the first two principles of granting an injunction I will not proceed to consider the third principle.

17. Before concluding this Ruling I wish to state that it is my finding that the plaintiff's suit is not *res judicata*. The plaintiffs had filed an application for injunction in the succession cause being Succession Cause No. 1157 of 2015. The court in that matter granted the plaintiffs interlocutory injunction. On the defendant, in that cause, raising a preliminary objection to that injunction application the court held that it had no jurisdiction to hear the injunction application under the succession cause. It proceeded to dismiss that injunction application. The court in dismissing the application did not finally determine the matter. It dismissed the application on the ground it had no jurisdiction. It follows in keeping with the provisions of section 7 of the Civil Procedure Act I do find that the issues before this court were not finally determined in the succession cause. For clarity, I reproduce section 7 of the Civil Procedure Act as follows:

“Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

CONCLUSION

18. In the end and following the above findings I grant the following orders;

(a) Pending the hearing and determination of this case a temporary injunction is hereby issued restraining the defendant, its servants or agents or employees or any one claiming under it from offering for sale by public auction or private treaty, transferring and or in any other manner whatsoever alienating the Land Parcel No. L.R. No. 10871/2 (I.R. No. 19153/1) Muthuuri Location.

(b) The costs of the Notice of Motion dated 4th July 2019 are awarded to the plaintiffs.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFFS**

..... **FOR THE DEFENDANT**