



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 113 OF 2019**

**CONSOLIDATED BANK OF KENYA LTD.....APPELLANT**

**VERSUS**

**MONICA WANGARI NDUNGU.....1<sup>ST</sup> RESPONDENT**

**JOEL K. NJERU.....2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR MERU CENTRAL DISTRICT.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**FINA BANK LTD.....5<sup>TH</sup> RESPONDENT**

**GUARANTY TRUST BANK LIMITED.....6<sup>TH</sup> RESPONDENT**

*(An appeal from the Ruling of Hon. T.M.Mwangi (S.P.M))*

*dated 10<sup>th</sup> September 2019 in Meru C.M. Elc No. 30 of 2018.)*

**RULING**

1. **Consolidated Bank of Kenya** (*the applicant herein*) filed a Notice of Motion dated 26<sup>th</sup> September 2019 seeking an order of inhibition to be issued and registered on **L.R. NO. NTIMA/IGOKI/7408** (*the suit premises herein*), an order of injunction to issue restraining the respondents and or their representatives and or employees from in any way selling by auction or private treaty or in any other way interfering with the ownership of the parcel of land in Ntima/Igoki/7408, and lastly an order of stay of further proceedings in Meru C.M.ELC No. 30 of 2018 pending the hearing and determination of this appeal.

2. The application was supported by the sworn affidavit of **Earnest Kubania Manyara** who is the Meru branch manager of the applicant. He has narrated the dispute between the applicant and the Respondents. He averred that at the request and instance of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the applicant granted a loan facility of Kshs. 13,600,000/= to which the 1<sup>st</sup> Respondent charged her parcel of Land Ntima/Igoki/7408 to the applicant. That the charge was dully registered at the Meru Central Registry on 5<sup>th</sup> September 2012. The 1<sup>st</sup> Respondent dully surrendered the original title to the applicant to which title deed the applicant still has custody.

3. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to service the loan facility. That it was when the applicant contracted valuers that it realized that the applicant's charge had been discharged on 14<sup>th</sup> May 2013 and a charge in favour of the 5<sup>th</sup> Respondent (now bought by the 6<sup>th</sup> Respondent) for Kshs 8,000,000/= had been created on 22<sup>nd</sup> July 2013.

4. The applicant avers that they were able to trace the purported discharge dated 6<sup>th</sup> May 2013 executed by John Munge Mwaniki who at the time was not an attorney of the applicant. That for such discharge to have been registered by the 3<sup>rd</sup> Respondent, there must have been collusion between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

5. That it was until 29<sup>th</sup> April 2019 that the applicant got wind that the suit property was being auctioned by **Garam Investments Auctioneers** agents of the 5<sup>th</sup> and 6<sup>th</sup> Respondents through a notice in the Daily Nation. That the applicants through its advocates filed an application for injunction, inhibition orders and joinder of the 5<sup>th</sup> and 6<sup>th</sup> Respondent which application was dismissed by the trial court on 10<sup>th</sup> September 2019.

6. The applicant is in great fear that the suit land shall be alienated by the 6<sup>th</sup> Respondent which action will render the appellant to suffer irreparable loss and damage as it will not have other avenues to recover the advanced amount of Kshs. 13,600,000/= plus accrued interest and other bank charges.

7. The 6<sup>th</sup> Respondent opposed the application vide grounds of opposition dated 22<sup>nd</sup> November 2019 and Replying affidavit dated 17<sup>th</sup> December 2019 sworn by Vivian Kirina their legal officer. The 6<sup>th</sup> respondent contends that it cannot be dragged in the appeal having not been a party in the trial court and that the issues being raised herein were canvassed in the trial court's application dated 1/5/2019.

8. In the replying affidavit of the 6<sup>th</sup> respondent, Vivian Kirina averred that indeed the 5<sup>th</sup> Respondent who has since been succeeded by the 6<sup>th</sup> Respondent granted the 1<sup>st</sup> and 2<sup>nd</sup> Respondents a banking facility in the sum of Kshs. 8,000,000/= which was secured by a legal charge over Parcel No. Ntima/Igoki/7408. That the 1<sup>st</sup> and 2<sup>ND</sup> Respondent defaulted in their repayments hence the 6<sup>th</sup> Respondent commenced the process of realization of the security.

9. That the same was temporarily stopped by an injunction placed by the trial court. That the application was however dully considered by the trial court and the same was dismissed on 10/9/2019. That in its application to the trial court the applicant had also sought to enjoin the 6<sup>th</sup> Respondent to which the trial court held that the said action was statute barred hence discharging the temporary injunctive orders which had been granted earlier. That the applicant has not bothered to move the court appropriately for leave to bring the alleged action out of time as required by law.

10. The applicant filed a further affidavit protesting that the 6<sup>th</sup> Respondent had disobeyed the court orders by proceeding to advertise for sale the suit land by public auction.

11. On 29/1/2020, parties agreed and the court directed that the Ruling for the application dated 26/9/2019 be delivered based on the filed affidavits and the grounds of opposition.

### **Analysis and Determination**

12. I have dully considered the affidavits and the grounds of opposition filed by the respective parties. The main issues for determination is whether temporary orders of injunction and inhibitory orders should issue against the Respondents from transferring or in any way interfering with the suit premises pending the hearing and determination of this appeal and whether there ought to be a stay of the trial courts proceedings in Meru C.M.ELC No. 30 of 2018.

13. In **Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012; [2014] eKLR**, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

***a. establish his case only at a prima facie level,***

***b. demonstrate irreparable injury if a temporary injunction is not granted, and***

***c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”***

14. In the trial court's decision the court was of the opinion that the applicant herein was well aware of the alleged fraud against the 5<sup>th</sup> and 6<sup>th</sup> Respondent from the year 2014 and having not brought the cause of action within three (3) years the same was statute barred.

15. In the application dated 1/5/2019 the applicant herein raised the particulars of fraud against the 5<sup>th</sup> and 6<sup>th</sup> Respondents as follows;

***a) Creating a charge juxtaposed on the plaintiff's charge***

***b) Registering a charge without an original title deed.***

***c) Failing to procure an original title deed before causing their/its charge to be registered.***

***d) Dealing with the land parcel No. Ntima/Igoki/7408 against the interest of the plaintiff.***

16. This court cannot purport to determine the issue of fraud at this stage of the trail. The main concern of the court is to ensure that the substratum of the suit is preserved during the subsistence of the trial/appeal.

17. In the case of **Jan Bolden Nielsen vs. Herman Philliipus Steya Also Known As Hermannus Phillipus Steyn & 2 Others (2012) eKLR**, Mabeya J cited Ojwang J (as he then was ) in the case of **Suleiman vs, Amboseli Resort Ltd. (2004) eKLR 589** as follows:-

***“I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law”.***

18. I note that the 5<sup>th</sup> and 6<sup>th</sup> respondents are not parties in these proceedings. However, they are aware of the same. But apparently they are in haste to dispose off the suit property. If the suit premises is sold by the 5<sup>th</sup> and 6<sup>th</sup> Respondents, the appeal shall be rendered nugatory since the main issue for determination is whether or not the trial magistrate erred in dismissing the prayer for interlocutory injunction sought by the applicant.

19. With regard to the stay of the proceedings, I wish to reiterate the decision of Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where it was stated as follows;

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”***

20. Weighing the pros and cons in the present application, I do find that this is a justifiable case to issue an order staying the proceedings of the trial court. In any event, the lower court file has already been transmitted to this court for the purposes of the appeal. I therefore find that the appellant’s application dated 26/9/2019 has merits. In order to expedite the prosecution of the appeal, I proceed to give orders as follows;

- 1) The application dated 26.9.2019 is allowed where the orders shall last for a period of 8 (eight) months or until further orders are given by the court.**
- 2) The appellant shall file and serve the Record of appeal upon all the parties herein within 30 days from the date of delivery of this ruling failure to which the orders granted in point 1) above shall lapse.**
- 3) For purposes of this appeal, the 5<sup>th</sup> and 6<sup>th</sup> intended defendants are at liberty to participate in the appeal.**
- 4) Directions on the hearing of the appeal shall be given on 22.6.2020 either virtually or in open court depending on the prevailing directives regarding covid-19 pandemic.**
- 5) The costs of this application shall be determined in the appeal.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF MAY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**