



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL CASE NO.5 OF 2018

JOHN SIMIYU KHAEMBA.....1ST PLAINTIFF/APPL

SUSAN KAVULUNZA.....2ND PLAINTIFF/APPL

VERSUS

COOPERATIVE BANK OF KENYA.....1ST DEFENDANT/RESP

R.M NGURU T/A NGURU AUCTIONEERS.....2ND DEFENDANT/RESP

RULING

This is a ruling on the Appellants application dated 17th April 2018. It seeks to restrain the Respondents from selling, advertising, disposing and or dealing in any manner with Land Reference Number 19952/287 pending hearing and determination of intended appeal.

Grounds on the face of the application re that the Applicants are dissatisfied with ruling delivered by Honorable D. A. Ocharo.

That the memorandum of appeal raises triable grounds worth ventilating on appeal.

That the Applicants risk being illegally and unfairly evicted from the suit property, which is their matrimonial home where they reside with their children.

That the Applicants stand to suffer irreparable loss if the intended sale is allowed to proceed.

The application is supported by affidavit sworn by the 1st Applicant. He confirmed that the Applicants guaranteed a loan of Kshs. 1,500,000 advanced by the 1st Defendant to Mateka Company Limited.

He also confirmed that the said borrower defaulted in repaying the loan, which now has an outstanding balance of Kshs. 1,088,333.30.

The 1st Applicant further averred that on learning of the default they mobilized fund and paid the outstanding arrears;

That despite arrears being made the 1st Defendant has declined to discharge them from the obligation on the ground that the borrower was granted an additional facility of Kshs. 4,592,002.05 on the strength of clause 12 of the said charge; and on that basis the 1st discharge has decided to exercise statutory power of sale.

The Applicants contend that the facility alleged to be due was illegally issued without their knowledge.

The Applicant stated that the trial Magistrate dismissed application for injunctive relief.

In response, the 1st Respondent file Replying Affidavit sworn by Debra Ajwang Ogada sworn on 3rd May 2018.

He averred that the Applicants are untruthful, are misleading the Court and are underserving of equitable orders sought. He averred that now the Applicants allege the property is matrimonial while by letter dated 25th October 2016 the Applicants requested to be allowed to sell the property. He attached the letter.

1st Defendant contend that sale of matrimonial property will not result in irreparable injury nor would render the suit nugatory.

That on the contrary if stay is granted, the 1st Defendant would be kept of Kshs. 6,868,366.57 deposited by other citizens.

I have considered rival submissions by the parties herein.

I note from the pleadings that Applicant's contention is that additional facility was advanced without their knowledge and consent. As to whether the property is matrimonial, that cannot hold water as the Applicants herein had proposed to sell it as evidenced by correspondence to 1st Defendant and supplementary affidavit.

The Applicants having indicated that payment that the arrears in respect of amount admitted has been done, it would be in the interest of justice to preserve the property awaiting hearing and disposal of intended appeal.

FINAL ORDERS

1. Stay of execution do issue pending hearing and determination of intending appeal.
2. The Applicant to deposit in Court Kshs. 3,000,000 within 45 days from today's date.
3. Costs of this application in the cause.
4. Failure to comply with order 2 above the stay order to stand discharged.

Ruling Delivered, Dated and Signed at Nairobi this 19th day of November, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

Jasmine: **COURT ASSISTANT**

Ms. Adunga: **COUNSEL FOR APPELLANTS/APPLICANTS**

Ms. Muriranca: **COUNSEL FOR RESPONDENTS**