



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 41 OF 2016**

**CAROLYNE MUTAMBI LUSALA.....PLAINTIFF / APPLICANT**

**-VERSUS -**

**NAPOLEON WAKUKHA MURENDE....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**MOLYN CREDIT LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The application is dated 13<sup>th</sup> February 2017 and is brought by way of Notice of Motion under order 42 Rule 6(1) of the Civil Procedure Rules 2010 and section 1A and 3A of the Civil Procedure Act. The Applicant seeks the following orders;

1. That this application be certified as urgent and be heard exparte in the first instance.
2. That this court do issue a temporary order of injunction against the 2<sup>nd</sup> Respondent it either by itself and or through its agents, servants and or employees from alienating, selling or advertising or offering for sale, transferring, laying claim to, trespassing onto and or in any manner dealing or interfering with the Applicant's peaceful occupation and use of land parcel No. Butso/ Shikoti/17887 pending the interparties hearing and determination of this application.
3. That this court do issue a temporary order of injunction against the 2<sup>nd</sup> Respondent it either by itself and or through its agents, servants and or employees from alienating, selling or advertising or offering for sale, transferring, laying claim to, trespassing onto and or in any manner dealing or interfering with the Applicant's peaceful occupation and use of land parcel No. Butso/ Shikoti/17887 pending the interparties hearing and determination of the Appeal therein.
4. That this Honorable Court be pleased to order a stay of execution of the orders of the subordinate court in Kakamega Chief Magistrate Court civil case No. 4 of 2016, Carolyne Mutambi Lusala Versus Napoleon Wakukha Murende & Molyn Credit Limited and issued on the 24<sup>th</sup> March 2016 pending the hearing and determination of this Appeal.
5. That costs be provided for.

The Applicant through her Lawyer (Mr. Nderitu) submitted that she is the plaintiff in the subordinate court in Kakamega Chief Magistrate Court Civil Case No. 4 of 2016, Carolyne Mutambi Lusala Versus Napoleon Wakukha Murende & Molyn Credit Limited, which suit seeks to safeguard the ownership of property No. Butso/ Shikoti/17887. The Applicant had applied for a temporary injunction in the above matter but the same was dismissed and the order dismissing the application is the subject of the present

civil appeal before the High Court and also before the Court of Appeal. The 2<sup>nd</sup> Respondent has instructed the firm of Eshikoni Auctioneers to sell the suit premises in a public auction to be held on the 23<sup>rd</sup> February 2016 at their offices in Kakamega Town. That the suit property is the Applicant's matrimonial home of which she has invested heavily in developing and she will therefore suffer substantial loss. Finally, that the applicant is willing to deposit reasonable security if required by the court pending the determination of the appeal. The application was supported by the Affidavit of the Applicant dated 13<sup>th</sup> February 2017 and the annexures therein.

Momanyi Advocate for the 1<sup>st</sup> Respondent submitted that the 1<sup>st</sup> Respondent was the one who took the loan from the 2<sup>nd</sup> Respondent and in his replying affidavit he states that if given two months he would be able to repay the same. He therefore supports the Applicant's application.

Kiveu Advocate for the 2<sup>nd</sup> Respondents relied on the replying affidavit of one Moses Namayi Anyangu who is the Financial Director of the 2<sup>nd</sup> Respondent. The ruling for the application for stay of execution was made on the 29<sup>th</sup> November 2016. The notice of appeal was lodged on the 2<sup>nd</sup> of December 2016 but since then no appeal has been filed in the Court of Appeal by the Applicant therefore the Applicant is guilty of laches and inordinate delay and the present application has been filed for the sole reason of stopping the auction due on 23<sup>rd</sup> February 2017. That meanwhile the applicant has not moved the court to finalize the case in the subordinate court in Kakamega Chief Magistrate Court Civil Case No. 4 of 2016, Carolyne Mutambi Lusala Versus Napoleon Wakukha Murende & Modyn Credit Limited or this appeal apart from the numerous application for stay made by her and her spouse who is the 1<sup>st</sup> Respondent. The application is therefore opposed by the 2<sup>nd</sup> Respondent.

This court has considered both the Applicant's and the Respondents' submissions. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358** and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial***
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
- 3. If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

It is a finding of fact the suit property in this matter, namely Butsotso/Shikoti/17887 was charged to secure a loan from the 2<sup>nd</sup> Respondent and the latter subsequently defaulted in payment. The Plaintiff filed suit in the subordinate court in Kakamega Chief Magistrate Court Civil Case No. 4 of 2016, Carolyne Mutambi Lusala Versus Napoleon Wakukha Murende & Modyn Credit Limited, which suit seeks to safeguard the ownership of the said suit property No. Butsotso/Shikoti/17887. The Applicant had applied for a temporary injunction in the above matter but the same was dismissed and the order dismissing the application is the subject of the present civil appeal before the High Court and also before the Court of Appeal. The 2<sup>nd</sup> Respondent has instructed the firm of Eshikoni Auctioneers to sell the suit premises in a public auction to be held on the 23<sup>rd</sup> February 2016 at their offices in Kakamega Town.

It is not disputed that the, ruling for the application for stay of execution was made on the 29<sup>th</sup> November 2016. The notice of appeal was lodged on the 2<sup>nd</sup> of December 2016 but since then no appeal has been filed in the Court of Appeal by the Applicant. I find that the Applicant is guilty of laches and inordinate delay in filing the present application. Furthermore the applicant has not taken any steps to finalize the case in the subordinate court in Kakamega Chief Magistrate Court Civil Case No. 4 of 2016, Carolyne Mutambi Lusala Versus Napoleon Wakukha Murende & Modyn Credit Limited. The Applicant and or the

1<sup>st</sup> Respondent have made no attempts to pay off the loan since filing the case. Looking at the entire case I am not satisfied that the Applicant has meet the principals of granting an injunction as mentioned above in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** . This application has no merit and I dismiss it with costs to the 2<sup>nd</sup> Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22<sup>ND</sup> DAY OF FEBRUARY 2017.

N.A. MATHEKA

JUDGE