



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 107 OF 2013**

**LEAH MWERU WAIGWA.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT/RESPONDENT**

**RULING**

The notice of motion dated 27/11/2013, is filed by the plaintiff who seeks an order of injunction to restrain the defendant from selling or disposing of land title number Nakuru Municipality Block 7/65 until this suit is heard and determined. The application is premised on grounds found on the face of the application and an affidavit sworn by the plaintiff on 27/11/2013 and a further affidavit dated 29/1/2014. The application was opposed and a replying affidavit was sworn by Damaris Wanjiku Gitonga, the defendant's head of Remedial Services on 13/1/2014.

The plaintiff's case is that the suit property was registered in the name of her late husband, Jimmy Naftali Waigwa Githinji; that the deceased took a loan with the defendant bank and used the title as security; that the deceased died in 2007 and she is a beneficiary to the said estate; that she first started dealing with the defendant in 2010 vide the letter dated 19/2/2010 (DWG 12) and entered into negotiations with the defendant but the negotiations did not materialise because of interference by imposters who purported to act on her behalf as evidenced by defence exhibits DGW 17(a) to (f), letters that she denies writing and the suit filed by one Cyrus Ndungu P & A 2606/2013, who purported to be the deceased's son. The plaintiff denies that she has ever been issued with letters of administration of the deceased's estate and was not an administrator of the estate when the statutory notice of sale was issued. Mr. Muhia, counsel for the plaintiff, submitted that the plaintiff has since filed Succession Cause 332/2014 on 15/5/2014 but so far letters of administration have not been issued; that the process of sale of the suit property is premature. Counsel also submitted that the defendant did not serve the two notices required to be served on a chargor under **Section 90** of the **Land Act**.

In opposing the application it was deposed that since 2010 when the plaintiff wrote to the bank, there were various correspondences with the plaintiff seeking indulgence to be allowed to sell the suit land by private treaty; that the plaintiff was asked for letters of administration because there were other co-wives and she purported to avail grant issued in P&A 1836/2012, but upon the defendant doing due diligence, discovered that it was a forgery (DWG 22); that it is then the bank decided to abandon the arrangement to sell by private treaty and instructed Legacy Auctioneers to proceed with the sale and the plaintiff then rushed to court to file this suit. Mr. Kiburi urged that having presented herself as the legal representative of the deceased's estate she can not turn round and deny having capacity. Counsel also urged that it is 8

months since the plaintiff came to court and if she was diligent, she would have obtained letters of administration.

Having considered the rival arguments, I find that there is no evidence before the court that the plaintiff is the legal representative of the deceased's estate. The fact that the plaintiff approached the defendant and held out herself as the legal representative does not make her one. In my view, the bank was just being considerate in attempting to resolve this matter in order to sell the suit land by private treaty, the matter having been outstanding for some time. The bottom line is that the plaintiff does not have capacity to act as the deceased's legal representative without letters of administration.

Whether the plaintiff is properly before the court: At paragraph 1 of the plaint the plaintiff pleaded that she is the administrator ad colligenda bona of the deceased's estate pursuant to the order made on 22/11/2013 in NKU Succession 319/2013. Mr. Muhia, counsel for the plaintiff also alluded to the plaintiff having filed a succession cause in respect of the deceased's estate. Mr. Kiburi did not object to the said averments. Although there is no evidence on record to show that the plaintiff has received the said temporary grant for purposes of filing this suit, I believe the defence is aware of it and that is why they had no objection to the plaintiff proceeding with this case and the court will hold that the plaintiff is therefore properly before this court.

It has been admitted by the defendant that the plaintiff only came to the fore when she wrote to the bank on 19/1/2010 claiming to have been away in Scotland and had learnt of the issue over the suit property. The deceased had passed away in 2007 and the plaintiff has not explained where she had been all this time and why, since 2010, she has not bothered to get letters of administration in respect of the deceased's estate. The court was told that she had just filed succession cause 332/2014 on 15/5/2012, but why the delay. The long delay has not been explained. The applicant is seeking an equitable remedy and equity does not aid the indolent. The fact that there were negotiations was not a bar to the plaintiff legalising her capacity as administrator of the deceased husband's estate. The only conclusion that the court can draw is that the delay in obtaining capacity was intentional and in bad faith.

From the documents exhibited by the defendant DWG9, written by one Julia Nyambura and DWG11 written by Esther Wangui, who all claimed to be widows of the plaintiff's deceased husband and annexure LMW(a) to the plaintiff's further affidavit, documents indicating that one Cyrus Ndungu filed petition 2606/2013 claiming to be the only beneficiary to the deceased's estate, it is clear that there are many people interested in the said estate whether genuine or not. The plaintiff denies having written some of the letters exhibited as (DWG 17a-f) but yet she had earlier sought indulgence from the defendant to sell the land by private treaty. She cannot deny that fact and try to differentiate between asking for indulgence and asking for time to sell the property. It is one and the same.

The **Land Act** came into force in 2012. **Section 90** thereof provides for remedies of the charge and the notice to be issued upon a chargor before a chargee can move to realize the remedies. The **Section** reads as follows:-

**“S.90 (1) If a charger is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.”**

**(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters –**

**(a) the nature and extent of the default by the charger;**

**(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being**

**not less than three months, by the end of which the payment in default must have been completed;**

**(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**

**(d) the consequence that if the default is not rectified within the time specified in the notice, the charge will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

**(e) the right of the charger in respect of certain remedies to apply to the court for relief against those remedies.**

**(3) If the charger does not comply within two months after the date of service of the notice under subsection (1), the charge may –**

**(a)...**;

**(b)...**;

**(c)...**;

**(d)...**;

**(e) sell the charged land.”**

The plaintiff denies that any notice was ever served on her nor did the defendant exhibit the notice purportedly served on the plaintiff. The said notice should have complied with **Section 90** of the **Lands Act**. Apart from the fact that the plaintiff had no capacity to hold herself as the legal representative of the deceased, the defendant seems not to have complied with the provision of the **Land Act** in respect of the notice which renders the whole process of sale a nullity.

This court having found that the plaintiff is playing delaying tactics in not seeking to be appointed administrator of her deceased husband's estate and the court having also found that the defendant did not issue a proper notice under **Section 90** of the **Land Act** on the plaintiff, I will grant the plaintiff's application for an injunction but on condition that she must ensure she obtains letters of administration within 90 days hereof for purposes of administering the estate of her late husband so that the defendant can proceed with the exercise of their rights of sale under the charge if the plaintiff will not have paid off the loan. This matter will therefore be mentioned before the judge that will be handling this matter to find out if the plaintiff has obtained the letters of administration.

Costs to be in the cause.

**DATED and DELIVERED this 1<sup>st</sup> day of October, 2014.**

**R.P.V. WENDOHO**

**JUDGE**

**PRESENT:**

Mr. Mongeri holding brief for Mr. Muhia for the plaintiff/applicant

N/A for the defendant/respondent

Kennedy – Court Assistant