



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO.1043 OF 2012

ESTHER NJERI KOMUPLAINTIFF/APPLICANT

VERSUS

CONSOLIDATED BANK LTD.....1ST DEFENDANT/RESPONDENT

LEAKEYS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

By a Plaint dated 21st December, 2012, the Plaintiff/Applicant herein sought for various Orders against the Defendants herein. These Orders are:-

- a. Permanent Injunction restraining the Defendants/and or their servants from selling by Public Auction or by any other way properties Titles numbers **Kiambaa/Kanunga/T215** and **Ngong/Ngong/23478** .
- b. An order for accounts to be taken on the subject loan account concerning the suit premises herein.
- c. An Order authorizing the Plaintiff as the spouse of **Francis Komu Gitau** to be granted reasonable time to redeem in the loan account concerning the suit premises with the Consolidated Bank.
- d. Costs of the suit be met by the Defendants. Simultaneously, the applicant filed a Notice of Motion even dated where the applicant sought for Orders ;
- i. That the Defendant, servants and or agents be restrained from disposing by way of public auction , private sale or in any other way, property known as Parcel No. **Kiambaa/Kanunga/T 215** Kiambu and **Parcel No. Ngong /Ngong 23478** registered in the names of **Francis Komu Gitau** who is the husband of the applicant herein and which parcels of land are matrimonial property for the applicant and the family, pending the full hearing and determination of the case,
- ii. That the applicant be given leave to take over the repayment of any monies due to the 1st Defendant under legal charge created on property No. **Kiambaa/Kanunga/T 215** and **Ngong/Ngong ./23478**.

(iii) Costs of the application be provided for:-

The Application was premised on various grounds notably; that the applicant, **Esther Njeri Komu** is the wife of **Francis Komu Gitau** having married him in the year 1988. That the said **Francis Komu Gitau** is the registered proprietor of **LR No. Kiambaa/Kanunga/T 215 & Ngong/Ngong 23478** which parcels

of land the applicant substantively contributed in acquiring and developing; that the applicant has now learnt that the bank wishes to sell the two parcels of Land to recover a loan arrears by **Francis Komu Gitau**, which now stands at **Kshs. 12.7 Million** . Further that the applicant as a spouse of **Francis Komu Gitau**, the charger, ought to redeem the charge amount if given reasonable time to do so. The application was also supported by the affidavit of **Esther Njeri Komu** the applicant herein. The Defendants filed grounds of opposition opposing this application. 1st Defendant averred that the application seeks orders that have also been sought and declined in HCC 899 of 2010 over the same subject matter. Further the two suit properties were registered under the Registered Land Acts and the provisions of the Land Act 2012, are not applicable , the 1st Defendant also alleged that the sale having been concluded, the suit and application are overtaken by events. One **Julius Gikonyo** , a remedial officer of the Defendant bank deposed a Replying Affidavit in which he acknowledged that indeed plaintiff is the wife of **Francis Komu Gitau** who had entered into a legal charge over his two properties , **Kiambaa/Kanunga/215** and **Ngong/Ngong 23478** and offered the two titles as security.

That the said **Francis Komu Gitau** defaulted in the payment of the loan and the Bank notified him of their intention to exercise their Statutory Power of Sale. However, the said **Francis Komu Gitau** filed **Civil Suit No. 899 /2010** which was dismissed on 24/2/2012 by the Court vide Ruling annexed as JGS.

Another suit civil case No. 281 of 2012 was also filed by one **Stephen Gitari Githu and Kangethe Wainaina Bernard**, challenging the said Statutory Power of Sale alleging that the two plaintiffs had bought the suit properties Once again the said suit was dismissed on 4th May, 2012.

The applicant filed a second Notice of Motion dated 12th April, 2013 and sought for these Orders:-

- I. An order restraining the Defendants/Respondents from disposing by way of Public Auction , private sale or any other way *LR No. Kiambaa/Kanunga/T215 Kiambu* pending the hearing of the main suit and Notice of Motion dated 21st December, 2012.
- II. That the purported Notice of the 1st Defendant to the Plaintiff be declared null and void.
- III.Costs of the suit be provided for .

The applicant alleged that the defendants had already advertised to sell by auction the matrimonial property of the applicant on the 16th day of April 2013. The said application (dated 12/4/2013) was opposed by the Defendants . **Julius Gikonyo** , the Remedial Officer once more deposed a Replying Affidavit . He reiterated the contents of his earlier Replying Affidavit and further averred that applicant is not candid as she failed to acknowledge the existence of other suits that ruled in favour of the 1st Defendant herein. That this suit is a third attempt by the Plaintiffs' husband to frustrate the banks efforts of recovering the amount owed to Bank.

The parties herein consented to dispose of the two applications simultaneously. The parties also canvassed the two applications through written submissions which I have carefully considered. I have also considered the pleadings and the rival submissions and in find that the issues for determination are:-

- i. Does the Law allow the Plaintiff herein to take over the servicing of the debt?
- ii. Are the provisions of Land Act 2012 applicable in this case?
- iii. Can the court interfere with a Statutory Power of Sale.
- iv. Has the applicant satisfied the Principles laid down in the case of **Giella vs Cassman Brown (1973) EA 358?**

Basically, the two applications seeks for injunction or restraining Order against the Defendants from depositing off the two parcels of land which were used as security by one **Francis Komu Gitau** in acquisition of Change facility. The 1st Defendant had attempted to exercise its Statutory Power of Sale after the said **Francis Komu Gitau** the husband to the Plaintiff herein defaulted in the loan repayment.

In addressing the issues, I find that what is not in doubt or dispute is that indeed **Francis Komu Gitau** is the registered owner of the two parcels of Land-**Ngong/Ngong/23478** and **Kimabaa/Kanunga/**

T215 as evidenced from annexures **ENK1 & ENK2**. There is doubt that **Esther Njeri Komu** is the wife of one **Francis Komu Gitau** the charger herein as per *annexture ENK1*.

There is also no doubt that the said **Francis Komu Gitau** entered into legal charges where he offered the two properties as security. The 1st charge is dated 26th June, 2007 over property **No. Kiambaa/Kanunga T 215[ENK 3]**. The second charge is dated 6th October, 2008. Over **Title No.LR Ngong/Ngong/23478 . Annexture ENK 3 .**

The applicant herein has admitted that the said **Francis Komu Gitau** is in default of payment of the said debt and the Bank has threatened to exercise its Statutory Power of Sale as evidenced by **annexture EWK 4**.

There is no doubt that the said **Francis Komu Gitau** filed civil case **No. 899 /2010**, seeking Order to restrain the bank from advertising for sale the two suit properties. However, the court dismissed the said application on 25/2/2012 as per **JG6**.

Once more, another civil suit No. 281/2012 was filed by **Stephen Gitahi Githu and Kangethe Wainaina Edward** against the 1st Defendant herein. They sought for orders of Injunction to restrain the bank from selling or disposing the two suit properties. The court also dismissed the interlocutory application as per **annexture JG 7** . This Court is certain that these two suits are still pending in court. There is however, no evidence that there was any appeal lodged against the two Rulings by any of the applicants in the two dismissed applications.

The applicant herein has sought for similar Orders in the instant suit. In determining the first issue, the court has noted that the applicant premised her Notice of Motion dated 21/12/2012 under Section 103(1) of the Land Act. The Section reads as follows:-

*“ An application for relief against the exercise by the chargor of any of the remedies referred to in section 85(3) (a) and (b) may be made by a **Spouse of the charger**.*

It is instructive to note that the Charges herein were executed under Chapter 300 of the Laws of Kenya (Registered Land Act). The Charge that was executed by the chargor and chargee did not include the Plaintiff herein as a party to the said charge. Section 162 (1) of the Land Act which is the **Saving and transitional provisions** with respect to **rights, action disposition** provides that:-

“ Unless the contrary is specifically provided in this Act, any right , interest, title , power or obligation acquired accrued , established, coming into force or exercisable before commencement of this Act shall continue to be governed by the Law applicable to it immediately prior to commencement of this Act”.

From the above provision, it is evident that the said **Francis Komu Gitau** executed the two Charges under Cap 300. The said Charges created **rights** and **obligations**. The said rights and obligations shall therefore continue to be governed by that Law applicable prior to commencement of Land Act which is Registered Land Act Cap 300. The said Chapter 300 does not provide for takeover of Chargor's obligations by the spouse as provided by Section 103 (1) (C) of Land Act . It is my humble view now that the applicant herein has no capacity to take over the chargor's obligations.

In answer to the second issues, the Court finds **that Francis Komu Gitau** executed the charges vide the provisions of Cap 300 Laws of Kenya and therefore the provisions of Land Act cannot apply in the instant case.

The chargor **Francis Komu Gitau** executed the two charges which stipulated his duties and obligations and also what would happen in the event of default- Statutory Power of Sale was one of the right reserved for the chargee (Bank) in the event of default. The Court finds that there is no reason given by the applicant that would warrant this court to interfere with the bank's Statutory power of sale. This was the findings in the case of **Muhani & Another Vs National Bank of Kenya Ltd, Civil case No. 2280/1988**

where the court held that:-

“An injunction will not issue to restrain a mortgagee from exercising his Statutory Power of Sale merely because the amount is in dispute”

The same principles was applied in the case of **Joseph Okoth Waudi Vs National bank of Kenya, Civil Ap. No. 77 of 2004**, where the Court of appeal in dismissing an appeal quoted from **Halsbury’s Laws of England Vol. 32 , 4th Edition Page 752**, stated that it is trite law that court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in Court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage , the claim is excessive “.

In the instant case, the Plaintiff acknowledges that there is an amount owing but does not state how much she can pay and over which period. She has not deposited any amount in Court. The court cannot therefore interfere with the banks Statutory Power of Sale.

Finally on the issue of whether the applicant has satisfied the principles laid down for grant of injunction, the court having found that the applicant cannot take over the changors’ obligations and the fact that applicant is not a party to the two charges which create contractual obligations and the fact that the court has dismissed two similar application in favour of the 1st Defendant, this court finds that applicant has not established a **prima-facie case** with probability of success.

For the above reasons, the court finds that the applicant’s two Notices of Motion dated 21/12/2012 and 12/4/2013 must fail. Consequently, the Court dismisses the applicants’ two applications with costs to the Defendants.

It is so ordered.

Dated, signed and delivered this 4th day of October, 2013

L.N. GACHERU

JUDGE

4/10/2013

Before Gacheru Kudge

Court Clerk Muna

Mr Karuga holding brief Mr. Nyanja for Plaintiff/Applicant.

None attendance for Defendant

Court.

Ruling read in open Court in the presence of Mr Karuga holding brief for Mr.Nyanja for applicant and none attendance for the Defendants.

L N GACHEERU

JUDGE

4/10/2013

Kaunga: I seek for certified copy of the proceedings and Ruling and leave to appeal.

L N GACHEERU

JUDGE

4/10/2013

Court:

Leave to appeal is granted. Proceedings and Ruling to be supplied to the applicant subject to payment of requisite fees.

L N GACHEERU

JUDGE

4/10/2013