



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO. 80 OF 2019

JONATHAN KALELI MALANDI.....1ST PLAINTIFF/APPLICANT

TERESIA MWELU KYALO.....2ND PLAINTIFF/APPLICANT

-VERSUS-

BENSON MALANDI KALELI.....1ST DEFENDANT/RESPONDENT

REAL PEOPLE KENYA LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. The application for determination is dated 01/11/2019 and was filed under certificate of urgency. It is brought under Order 40 Rules 1(a), 2(1) & 3 of the Civil Procedure Rules and Sections 1, 1A, 3 & 3A of the Civil Procedure Act and all other enabling provisions of the Law. It seeks;

a. Spent.

b. Spent.

c. THAT a temporary injunction be granted in favour of the plaintiffs against the defendants/respondents jointly and severally either by themselves, their agents/or servants to be restrained from charging alienating, disposing any interest in selling, entering, encroaching, advertising for auction or dealing in any manner detrimental to the interests of the plaintiffs on land parcel No. Makueni/Ngulu/72 pending the hearing and determination of this suit.

d. THAT a mandatory injunction be granted against the defendants either by themselves, their agents/or servants, both jointly and severally, to release the original title document for land parcel No. Makueni/Ngulu/72 or in the alternative, the same be deposited for safe custody with the deputy registrar, High Court Makueni, pending the hearing and determination of application inter partes.

e. THAT costs of this application be provided for.

2. The application is supported by the grounds on its face, the supporting affidavits sworn by both Applicants on the same day and a supplementary affidavit sworn by the 1st Applicant on 25/11/2019. The Applicants are husband and wife, the 1st Respondent is their son and the 2nd Respondent is a financial institution (*Micro Finance Institution*). They deposed that they were hoodwinked into releasing the title document of the suit property to the 1st Respondent who secured a loan with it from the 2nd Respondent but has now defaulted. They have exhibited the title deed as **JKM-1**. The 1st Applicant admitted being informed that the title document would be used by the 1st Respondent to secure funding for his (*1st Respondent's*) business but denied being informed that the suit property would be charged in favor of a financial institution.

3. They deposed that their matrimonial home is on the suit property and their children have also settled there with their families. It was also their deposition that the Micro Finance Institution has threatened to auction the suit property to their detriment. The foreclosure notice is exhibited as **JKM-2**. Further, they deposed that the 2nd Applicant's spousal consent was not sought and the consent of the Land Control Board (LCB) was never obtained.

4. The application is opposed through the replying affidavit sworn on 25/11/2019 by the 2nd Respondent's Recovery Manager, Simon Wangithi. The gist of the opposition is that due process was followed and the Applicants were fully aware of what they were getting into.

Copies of the application form for the LCB consent are exhibited as **SW-1**, the LCB consent, **SW-2**, the loan agreement, **SW-3**, a deed of indemnity signed by the 1st applicant, **SW-4**, The charge document, **SW-5**, another deed of indemnity signed by the 1st applicant, **SW-6**, a loan statement, **SW-7**, statutory notices, **SW-8** and a copy of official search, **SW-9**.

5. He further deposed that the 2nd Respondent recognized the 2nd Applicant's stake in the suitland and complied with the Land Act by obtaining her spousal consent which is contained in page 43 of the charge document. He deposed that the Applicants have never reported any theft of their title deed and that their allegations are meant to assist their son to avoid meeting his financial obligations to the 2nd Respondent. Further, he deposed that the property is still charged and any search purporting the contrary is a forgery.

6. The 1st Respondent did not file any response.

7. In his supplementary affidavit, the 1st Applicant deposed that the Micro Finance Institution is still harassing, intimidating and threatening to auction the land. He has exhibited documents sent to them by auctioneers as JKM 1a, b & c.

8. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

9. The Applicants submitted that the purported charge is tainted with illegalities for non compliance with mandatory provisions of the law and forgeries in regard to its preparation, execution and registration. They submitted that they have clearly demonstrated and established the conditions precedent for the grant of equitable orders of injunction as set out in the celebrated case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358**.

10. They further submitted that they face the risk of losing their matrimonial home based on a doubtful charge. It is also their submission that the spousal consent relied on by the applicants was illegally obtained.

11. The submissions by the 2nd Respondent were that in the Applicants' supplementary affidavit, they did not disown the signatures in the application for LCB consent and the consent itself. It contended that the Applicants should have used the opportunity to address Court on the documents exhibited in the replying affidavit. It relied on the case of **Mwangi Kirigwi vs. National Bank of Kenya (2006) eKLR** where the Court observed that the Plaintiff had failed to produce more evidence in form of a valuation report when he was granted leave to file a supplementary affidavit.

12. The Micro Finance Institution submitted that the Applicants have not made any complaint to the Land Control Board on how the consent was granted without the 1st Plaintiff's signature on the application. It contends that it is a matter of judicial notice that LCB consents are not given in the absence of the property owner. The Micro Finance Institution also submitted that upon providing the consent and application forms, it was the Applicants' burden to prove that the documents were not properly obtained.

13. The Micro Finance Institution also submitted that it has not been shown a letter of protest to Advocate Denis. O. Ogal before whom the 1st Applicant signed a loan agreement, a Deed of Indemnity and Guarantee. Further, it submitted that the 2nd Applicant has not written a protest letter to the same Advocate denying having appeared before him. Accordingly, it contends that the only safe conclusion is that the Applicants executed the respective documents.

14. The Micro Finance Institution submitted that the search exhibited by the Applicants is not genuine as it has so many glaring irregularities with regard to acreage, date of land registration and execution.

15. Referring to the loan statement account, the Micro Finance Institution submitted that the 1st Applicant started paying on 08/02/2019 and wonders why he had to wait until 04/11/2019 to file this suit. The Micro Finance Institution contends that the 1st Applicant's conduct betrays his allegation of being unaware of the loan. The Micro Finance Institution also wonders how the Applicant knew where to make the deposit yet the loan was not in his name.

16. The Micro Finance Institution also submitted that the Applicants have made sweeping statements about the irreparable damage they will suffer and contends that the fact of living on the charged property does not constitute irreparable damage. It relied on the case of **Henry Wanyama Khaemba vs. Standard Chattered Bank Ltd (2005) eKLR** where the Court stated thus;

“A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question.”

17. The Micro Finance Institution also submitted that it is engaged in the business of granting loans to people and institutions throughout the country and stopping it from realizing the security will be an interference with its core business. The Micro Finance Institution submitted that it is capable of paying damages to the Applicants if their case succeeds. Accordingly, it submitted that the balance of convenience dictates that the application be dismissed.

18. Having considered the application, the response and the rival submissions, the only issue for determination is whether the application is merited.

19. I have carefully looked at all the annexures and especially those of the Micro Finance Institution and it is clear that all the documents necessary to create a valid charge have been obtained and executed. The documents show that the 1st Applicant affixed his signature in the

presence of an Advocate known as Dennis O. Ogal and it is indeed true that the 1st Applicant has not exhibited anything to show the action (*if any*) he has taken against the said Advocate. One would expect such a party to be aggrieved to the extent of reporting such indiscretion to relevant authorities including the Advocates professional body. I am also in agreement with the Micro Finance Institution that LCB consents are never given in the absence of the property owner. It is also curious that despite the very detailed replying affidavit, all what the 1st Applicant did in his supplementary affidavit was to insist that the Micro Finance Institution had not ceased to threaten them with eviction. That is a rather casual way of responding to such weighty matters.

20. The 1st Applicant agreed being informed that the title document would be used to secure funding for his son's business and I find it contradictory for him to also claim that he was hoodwinked into releasing the title document to him. He claims not to know that the property would be charged in favour of a financial institution. As correctly submitted by the Micro Finance Institution, the loan statement account (SW7) shows that the first loan repayment, of Kshs 60,025/=, was done by the 1st Applicant himself on 21/01/2019. Subsequent repayments (*some of which bounced*) were done by both the 1st Applicant and 1st Respondent.

21. This suit was filed on 04/11/2019 hence evident that the 1st Applicant was aware of the existence of the loan way before he filed the suit. It is also true that the loan account is not in the 1st Applicant's name hence the question as to how he knew the exact place to make the deposits. I am inclined to agree with the Micro Finance Institution that the Applicants are working in cahoots with their son in what is most likely a '*time buying*' mission.

22. I have looked at page 24 of the charge document (SW5) and it reveals that the 2nd Applicant's spousal consent was obtained in the presence of Dennis O. Ogal Advocate, in certifying that the 2nd Applicant appeared before him, the Advocate indicates that the 2nd Applicant was identified to him by her husband, the 1st Applicant. Again, this Court has not been informed about the action taken (*if any*) against the said Advocate.

23. The Applicants exhibited a search certificate (JKM-3) showing that the property was not encumbered as at 20/06/2019. On the other hand, search certificate exhibited by the Micro Finance Institution (SW9) shows that a charge had been registered in its favor as at 19/12/2018.

24. The Applicants' search shows the acreage of the suit land as 10.59Ha while the acreage in the title deed is 10.89Ha. Further, it shows that the 1st Plaintiff was registered as the owner on 15/08/2015 while the title deed shows that he was registered on 24/08/2015. On the other hand, a comparison of the Micro Finance Institution's search and the title deed shows that all the details are in agreement. Accordingly, I agree with the Micro Finance Institution that the search exhibited by the Applicants is questionable.

25. From the foregoing and in line with the principles enunciated in the *locus classicus* of **Giella –vs-Cassman Brown (supra)**, I am not convinced that the Applicants have demonstrated the existence of a *prima facie* case with a probability of success. Further, it has been demonstrated that the applicants were fully aware of what they were getting themselves into and cannot be heard to be clutching on the sale of matrimonial property as an irreparable damage. As earlier stated, the Applicants' and 1st Respondent's conduct 'reeks' of people who are on a mission to buy time and it borders on abuse of Court process.

26. The upshot is that the application has no merit and is hereby dismissed with costs.

Signed, dated and delivered at Makueni via email this 8th day of October, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka