



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 55 OF 2017**

**CHRISTINE MUTILE MWANGI.....1<sup>ST</sup> PLAINTIFF**

**CRISSAM ACRES LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RAFIKI MICROFINANCE BANK LIMITED.....DEFENDANT**

**RULING**

1. By a notice of motion dated 16<sup>th</sup> March 2017 brought purportedly under the provisions of **Order 10 Rule 11 Order 20 Rule 1, sections 1A, 1B and 3A** and **all other enabling provisions of the law**, the Plaintiffs sought the following orders;

- a. *That this matter be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.*
- b. *That the Defendant/Respondent be restrained by way of an injunction either by itself, its servants, employees and/or its agents from selling, auctioning, alienating, transferring or interfering in any manner with the 1<sup>st</sup> Plaintiff's land being Mbeti/Gachuriri/430 and the auction slated for 17<sup>th</sup> March, 2017 be cancelled until the hearing of this application.*
- c. *That the Defendant/Respondent be restrained by way of an injunction either by itself, its servants, employees and/or its agents from selling, auctioning, alienating, transferring or interfering in any manner with the 1<sup>st</sup> Plaintiff's land being Mbeti/Gachuriri/430 and the auction slated for 17<sup>th</sup> March, 2017 be cancelled until the hearing of this suit.*
- d. *That by an order of this court, the Plaintiff be granted three months to settle the advanced facility to the Defendant.*
- e. *That costs of this application be awarded to the Plaintiff/Applicant.*

2. The said application was based upon the following grounds;

- a. *That the Defendant has attached the 1<sup>st</sup> Plaintiff's land reference number Mbeti/Gachuriri/430 and if not restrained will proceed to sell the same.*
- b. *That the Plaintiff is capable of repaying the facility but has not been given sufficient time to repay the same.*
- c. *That the Plaintiff gave a reasonable proposal but the Defendant failed to respond in writing to the proposal.*
- d. *That the Defendant duped the 1<sup>st</sup> Plaintiff that they were going to finance Kilimambogo Highways and Technology Limited to purchase her property along Kagundo Highways to redeem land reference number Mbeti/Gachuriri/430 without stopping the auction.*
- e. *That the Defendants' threats and actions are illegal, unlawful, null and void considering the circumstances surrounding this case.*
- f. *That is in the interest of justice to allow this application.*
- g. *That no prejudice shall be caused to the Defendant and on other grounds and reasons to be adduced at the time of hearing hereof.*

3. The said application was supported by a supporting affidavit sworn by the 1<sup>st</sup> Plaintiff on 16<sup>th</sup> March 2017 in which she reiterated and

expounded upon the grounds set out in the motion.

4. The said application was opposed by the Defendant which filed grounds of opposition dated 22<sup>nd</sup> March 2017. It was contended that the Plaintiffs had not made out a case for the grant of an injunction; that the Plaintiffs had not come to court with clean hands; and that the suit was filed in bad faith merely to defeat the Defendant's statutory power of sale which had already crystallized.

5. The Defendant also filed a replying affidavit sworn on 14<sup>th</sup> April 2017 by Jane Warau who described herself as the Head of Debt Recovery Department of the Defendant. It was contended that the Plaintiffs were truly indebted to the Defendant on account of a revolving credit LPO/Invoice Discounting Facility of Kshs 10 million which was to be paid back in 12 months.

6. It was further contended on behalf of the Defendant that the Plaintiffs had failed to file a written undertaking as to damages as ordered by the court on 16<sup>th</sup> March 2017 when they obtained some *ex-parte* interim orders. It was further contended that the Plaintiffs had failed to demonstrate what irreparable loss or damage they may suffer unless the injunction was granted. The court was, therefore, urged to dismiss the application for injunction.

7. When the said application was listed for mention before the Deputy Registrar on 23<sup>rd</sup> May 2018, the parties consented to canvass the said application through written submissions. The records show that the Plaintiffs filed their submissions on 24<sup>th</sup> August 2017 whereas the Defendant filed its submissions on 2<sup>nd</sup> October 2017.

8. The court has considered the Plaintiffs' said application as well as the grounds of opposition and replying affidavit in opposition thereto. The court has also considered the respective written submissions of the parties.

9. The court has noted that the existence of the credit facility is not denied. The default in servicing the facility is not denied by the Plaintiffs. There are basically two grounds upon which the Plaintiffs are seeking the interim orders. First, they are asking for indulgence of at least three (3) months to enable them service their obligations. Second, they are contending that the charge over the suit property (which was said to be trust property) was not valid since it was without the consent of the beneficiaries or a court order.

10. It is obvious that the first ground has no basis in law. It is merely based on indulgence. The Plaintiffs are asking for a grace period of 3 months to service the credit facility. That ground cannot succeed since the court has no jurisdiction to adjust or re-write contractual agreements between and amongst the parties. Such a favour can only be granted by the Defendant on its own terms.

11. The second ground is based on the contention that the suit property was irregularly or unlawfully charged by the 1<sup>st</sup> Plaintiff who was registered as owner in trust for her children. It was submitted by the Plaintiffs that those children were minors hence they had no capacity to consent to the registration of the charge. It was further submitted that in the absence of a court sanction under **section 56 of the Trustee Act (Cap 167)** the charge was a nullity and unenforceable.

12. The provisions of **section 56 of the Trustee Act** state as hereunder;

**“56. (1) Where, in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but cannot be effected by reason of the absence of a power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees either generally or in any particular instance the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.**

13. The court's understanding is that the section merely empowers the court to sanction a mortgage where the trustees have no power to charge under the instrument of appointment or by virtue of any other law. The court's sanction would not, therefore, be necessary where such power is vested in the trustee by either of the two ways mentioned in **section 56 of the Trustee Act**.

14. The 1<sup>st</sup> Plaintiff did not exhibit a copy of the instrument pursuant to which she was registered as proprietor of the suit property on behalf of her children. The court was not informed of the circumstances under which she was so registered. In the premises, it cannot be concluded with certainty that there was no power vested in her to deal with the suit property as she did. The court has also noted that the copy of the title deed exhibited does not indicate that the children were minors at the time the suit property was charged to the Defendant or at the time of registration of the charge.

15. The court has also noted that under **section 18 of the Trustee Act**, a mortgagee or lender giving out money in good faith is protected whilst dealing with trustees of trust property. In those circumstances, it is difficult to see how the Defendant can be deprived of its statutory power of sale merely because the trustee is doubtful whether or not she had the authority to charge or mortgage the suit property.

16. For the foregoing reasons, the court is not satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial as enunciated in the case of **Giella Vs Cassman Brown & Co. Ltd [1973] EA 358**. The court is further not satisfied that the Plaintiffs might otherwise suffer irreparable loss or damage which cannot be remedied by an award of monetary damages. It was not contended by the Plaintiffs that the Defendant may not meet an award of damages should the Plaintiffs ultimately succeed at the trial.

17. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 16<sup>th</sup> March 2017. The same is consequently dismissed with costs to the Defendant. For the avoidance of doubt, any interim orders in place are hereby vacated.

18. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **31St** day of **JANUARY, 2019**.

In the presence of Mr. Mosongo holding brief for Mr. Were for the Plaintiffs and Ms. Ikethe holding brief for Mr. Mwaura for the Defendant.

Court clerk Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**31.01.19**