



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**CIVIL SUIT NO. 83 OF 2018**

**JANE JEPTANUI ROTICH.....PLAINTIFF/APPLICANT**

**VERSUS**

**NIC BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**STEPHEN KIPKIYENY TARUS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The plaintiff/applicant claims to be the wife of Stephen Kipkiyeny Tarus who is the 2<sup>nd</sup> defendant. She claims to have gotten married to the 2<sup>nd</sup> defendant in 1994 and later on, formalized the marriage through a church wedding on 23.11.2003. She further states that they have three children from their union namely:-

- (a) Martin Kipchumba Kiyeny aged 22 years.
- (b) Getrude Jeptoo Tarus aged 20 years.
- (c) Ariel Jepchirchir Tarus aged 12 years.

That she purchased the parcel of land known as L. R. NO. 2259/463 (IR NO. 86846) (hereinafter referred to as the suit property) jointly with her husband and constructed thereon their residential house where they currently reside with their children. That she participated in the construction of their family house situated on the suit property. That her entire family currently resides on the suit property which has been their home since 2005. She states that at no single time did she give her husband and/or any of the other defendants herein spousal consent to charge the suit property.

That she further avers that she was never aware that the above suit property had been charged. That she has now learnt that the suit property was charged and the borrower defaulted hence the same is up for sale by way of public auction. That she has never been served with statutory notices and only became aware of the sale from a family friend.

That she is informed by her Advocates on record which information she verily believes that the failure to obtain her spousal consent renders the whole charge defective. That in any event, her matrimonial rights over the properties overrides those of the bank.

That it is her passionate appeal that if the orders sought are not granted forthwith, the 1<sup>st</sup> and 2<sup>nd</sup> defendants will proceed with the sale of the above-mentioned property rendering this application and subsequent suit nugatory and a mere academic exercise yet he has made out a prima facie case with a probability of success at trial.

That the 1<sup>st</sup> defendant does not stand to suffer any prejudice since the suit properties are charged in their favour and is still holding the title document and in the event that it does, the same can be adequately compensated by an award of damages. That it is in the interest of justice that the orders sought are granted.

That she is informed by her Advocates, which information she verily believes based on the foregoing she has established a prima facie case with a probability of success. The suit properties are of an enormous value as opposed to the alleged indebtedness thus if the court is in doubt it is wiser to maintain the status quo.

She prays for an order of injunction against the 1<sup>st</sup> defendant by itself, servants, agents from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any sale concluded by public

auction or private treaty taking possession, appointing receivers or exercising any power conferred by section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known as L. R. NO. 2259/463 (IR. No. 86846) pending hearing and determination of the suit.

The 1<sup>st</sup> defendant through Kenneth Mawira, the Manager, Legal Services states that the 2<sup>nd</sup> defendant/respondent herein voluntarily offered a parcel of land known as L. R. No. 2259/463 (IR NO. 86846) (hereinafter referred to as the suit property), situate in the City of Nairobi as security to be charged in favor of the bank securing an amount of Kshs. 75,000,000 in respect of a loan to Prayosha Ventures Limited (hereinafter referred to as the borrower). The security was perfected by registration of the charge over the suit premises.

That in order to effect the registration of this charge, the plaintiff/applicant herein freely and voluntarily executed a spousal consent on 24<sup>th</sup> June, 2015 which was verified and certified by an Advocate of the High Court of Kenya.

That contrary to the provisions of the charge, the 2<sup>nd</sup> defendant and the borrower subsequently defaulted on repaying the facility forcing the bank to commence the process of realization of the security to safeguard its own interests as well as those of other depositors.

That on 7<sup>th</sup> March, 2017, the bank subsequently issued and served a three (3) month notice through the 2<sup>nd</sup> respondent's and applicant's joint address of P. O. Box 654 – 30100 and demanded payment of the arrears together with the accrued interest.

That the statutory notice indicated the nature and extend of default and the period within which the default could be rectified. The consequences of failing to comply with the provisions of the notice were given in the notice.

That despite the foregoing, the Chargor still refused and/or neglected to make payments as advised. That consequently, the bank issued a forty (40) days' notice of sale dated 16<sup>th</sup> June, 2017 through the 2<sup>nd</sup> respondent's and applicant's joint address.

That upon lapse of the 40-day notice of sale, the bank instructed an auctioneer to give the appropriate notices as required by law to which she is aware that the auctioneer issued the relevant notice. That she is aware that the applicant was at all material times fully aware of the charge registered against the suit property and the subsequent default and the consequences thereof.

That it is further not denied that there was default on the repayment of the facility.

The she believes this suit has only been brought as a ploy to delay and/or deny the bank its right to exercise statutory power of sale after the said default.

That in view of the foregoing, the applicant has not demonstrated a prima facie case with any probability of success. The application ought therefore to be dismissed in its entirety of course with costs.

Kiplagat W. Kalya swore a further affidavit to the effect that he prepared a spousal consent that was executed by the plaintiff. The plaintiff filed a supplementary affidavit denying having signed any spousal consent. She claims that the signature is not hers.

I have considered the submissions of rival parties and the affidavits on record and do find that the plaintiff has a prima facie case as it is not clear whether she signed the spousal consent annexed in the affidavit of the respondent. The signatures on the spousal consent and the supporting affidavit of the plaintiff and the supplementary affidavit of the plaintiff raise very serious issues as to whether the plaintiff actually signed the spousal consent.

If the property is sold, the plaintiff is likely to suffer irreparably as the property is alleged to be a matrimonial home. I have seen the photographs and it is not denied that the property is a matrimonial home.

Lastly, the balance of convenience tilts towards granting an injunction as the plaintiff will be more inconvenient if the property is sold as she is in possession being her matrimonial home.

The upshot of the above is that the application is allowed and I do grant orders an order of injunction against the 1<sup>st</sup> defendant by itself, servants, agents from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any sale concluded by public auction or private treaty taking possession, appointing receivers or exercising any power conferred by section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known as L. R. NO. 2259/463 (IR. No. 86846) pending hearing and determination of the suit. Costs to the plaintiff. Orders accordingly.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of February, 2019.**

**A. OMBWAYO**

**JUDGE**