



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.629 OF 2017

BENSON KINUTHIA MWAURA (Suing as the Legal Representative of the Estate of

JOHN MWAURA KINUTHIA (Deceased).....1ST PLAINTIFF/APPLICANT

FELISTA NJOKI MWAURA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

DIAMOND TRUST BANK LTD.....1ST DEFENDANT/RESPONDENT

STEPHEN KARANJA KANGETHE T/A DALALI TRADERS....2ND DEFENDANT/RESPONDENT

AND BY WAY OF COUNTER CLAIM

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ELC NO.629 OF 2017 'MULTI-TRACK'

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF TO COUNTER-CLAIM

-VERSUS-

BENSON KINUTHIA MWAURA (Suing as the Legal Representative of the estate

of JOHN MWAURA KINUTHIA (Deceased).....1ST DEFENDANT TO COUNTER-CLAIM

FELISTA NJOKI MWAURA.....2ND DEFENDANT TO COUNTER-CLAIM

MAGANN PHAMACEUTICALS LTD.....3RD DEFENDANT TO COUNTER-CLAIM

BONIFACE KABATAA MURAYA.....4TH DEFENDANT TO COUNTER-CLAIM

ANN WAMBUI KIARIE.....5TH DEFENDANT TO COUNTER-CLAIM

MAGDALINE WANJIKU MBUGUA.....6TH DEFENDANT TO COUNTER-CLAIM

ERICK KINGORI MACHARIA.....7TH DEFENDANT TO COUNTER-CLAIM

RULING

The matter for determination is the *Notice of Motion* application dated **29th June 2017**, wherein the Plaintiffs/Applicants have sought for temporary Orders of injunction to restrain the 1st & 2nd Defendants/Respondents herein by themselves, employees, agents and/or servants

from advertising for sale, selling whether by public auction or private treaty, taking possession, trespassing, disposing of, selling or transferring or interfering with the Plaintiffs'/Applicants' occupation and ownership of land parcel **No.Githunguri/Kanjai** pending the hearing and determination of the suit and that costs of the application be provided for. The application is premised on the grounds stated on the face of the application and on **Affidavit of Benson Kinuthia Mwaura**. These grounds are:-

a) The 1st Defendant instructed the 2nd Defendant to dispose of the property known as LR.No.Githunguri/Kanjai/608 by Public Auction in a purported exercise of the 1st Defendant's

Statutory Power of Sale and the 2nd Defendant intends to sell the property known as title LR.No.Githunguri/Kanjai/608 in an impugned Public Auction purportedly to be held on 5th July 2017.

c) The late John Mwaura Kinuthia was at all material times relevant to this suit the registered proprietor of the parcel of land known as title No.LR.Githunguri/Kanjai/608 hereinafter 'the suit properties'.

d) That during the death, the deceased has purportedly guaranteed a loan facility in favour of a Company known as Magann Pharmaceuticals Ltd.

e) That the said guarantee is impugned as it is fraudulent and was never supported by a Spousal Consent by the 2nd Applicant herein.

f) That the 1st Defendant failed to comply with the law and procedure in its execution of the loan guaranteed for failing to secure the execution of the 2nd Applicant herein as provided for under the Land Act, and therefore the said guarantee is null and void ab initio as particularized in the Plaint and the Supporting Affidavit.

g) That the Estate of the deceased has never received a

Statutory notification from the 1st Respondent and has only learnt about the intended sale from the Newspaper advertisement in the Daily Nation of 20th June 2017.

l) The unlawful actions of the Defendants have caused loss and damage to the Plaintiff and unless restrained by an Order of this court, the suit properties will be taken out of the Plaintiff's reach thereby depriving the deceased's estate of its asserts.

m) That it is in the interest of justice that the orders sought be granted.

In his **Supporting Affidavit**, the deponent **Benson Kinuthia Mwaura** averred that he has brought the suit as the Legal Representative of the Estate of the late **John Mwaura Kinuthia** who died on **2nd September 2014** and that the said deceased was his father. He further averred that the suit and application herein have been prompted by the unlawful action of the 1st Defendant o purporting to dispose of the asset of the deceased through the 2nd Defendant. Further that the suit property **Githunguri/Kanjai/608** is one of such property for the deceased. He also averred that he only learnt of the purported sale through a **Newspaper advert of 20th & 26th June (Daily Nation)** which sale was scheduled for **5th July 2017**. That when he carried out a search at **Kiambu Land Registry**, he realized that the property had allegedly been charged to the 1st Defendant as evident by **BKM-3**.

That the 1st Defendant refused to divulge any details on the charge but 2nd Defendant gave him a **Notification of Sale** dated **20th April 2017**. He thereafter obtained a copy of Charge from **Mohammed Madhan Advocates** which showed that 2nd Applicant who is his mother had signed a **Spousal Consent**. However, upon consulting her, the 2nd Applicant denied having given such **Consent** or having been privy to the charge. Upon perusal of the charge document, he noted the **Memorandum of Acceptance** converting the draft facility to a loan was purportedly done on **21st July 2015**, long after his father was deceased. Further that the Notice of Intended Sale was never sent to the 2nd Applicant nor the **Notification for Sale**. Therefore he sought advice from his advocate who informed him that the charge over the suit property was null and **void ab initio** and legally unsustainable for flouting the Land Act. He also contended that the Bank has refused, neglected and/or failed to supply the estate of the deceased with any statements of account on the repayment of the loan and any further transaction involving the security or loan account and therefore he urged the Court to allow the instant application. That the suit property forms part of their home which is a peculiar location and of great sentimental value to the Dependants of the deceased. Further, that the property reflect the crystallization of the deceased labour during his lifetime and should be preserved until the disputed issues herein are resolved.

The application is contested and **Francis Kariuki**, the **Legal Officer** with the 1st Defendant swore a **Replying Affidavit** and averred that the 1st

Defendant extended various banking facilities to **Magann Pharmaceuticals Ltd**, specifically an overdraft facility of **Kshs.12 million** which was made of initial overdraft facility of **Kshs.5,000,000/=** pursuant to a **Letter of Offer** dated **26th October 2013** and a renewal and enhancement of the overdraft facility for **Kshs.5,000,000/=** to **12 million** pursuant to a **Letter of Offer** dated **9th May 2014**. He also averred that the terms of the said facility were given in the **Letters of Offer** dated **26th October 2013** and **9th May 2014**. He further averred that the overdraft of **Kshs.7,000,000/=** was secured by among other securities the first legal charge dated **28th June 2014** over the suit property **Githunguri/Kanjai/ 608** owned by **John Mwaura Kinuthia** which was marked **LM-6**. Further that the charge over the suit property **Githunguri/Kanjai/608** was registered on **13th August 2014**, as per **LM-10**. It was his contention that the 1st Defendant possesses a valid charge over the suit property and it carried out due diligent in ascertaining the ownership of the suit property before extending financial

facilities to **Magann Pharmaceuticals**. Further that the charge was registered on **13th August 2014**, before the said demise of **John Mwaura Kinuthia**. He contended that the said **John Mwaura Kinuthia** executed the Charge and Deed of Guarantee and his wife executed a Consent to charge the suit property and this was done before an advocate. That under the provision of the first legal charge dated **28th June 2014**, the Bank reserved its rights under **Sections 82 & 83** of the **Land Act No.6 of 2012** and on **23rd June 2015**, the 1st Defendant received a letter from **Magann Pharmaceutical Ltd** requesting that the overdraft facility be converted into a Term Loan payable within a period of **7 years**. He contended that upon consideration, the Bank issued a Letter of Offer dated **30th June 2015**, and offered that the said Term Loan be repayable within **48 months** among other conditions. However, the said borrower (**Magann Pharmaceutical Ltd**) defaulted in repayment of the loan and a **Demand Letter** dated **5th May 2016** was issued to the borrower. Further the said borrower failed, refused and/or neglected to respond and the said default persisted. Therefore the 1st Defendant issued a **Statutory Notice** dated **26th May 2016** informing the borrower that it would exercise its **Statutory Power of Sale** over the charged property **Githunguri/Kanjai/608** if the default was not remedied in 3 months. The borrower still defaulted and a **Notification of Sale** under **Section 96(2)** of the **Land Act** was issued on **22nd November 2016** notifying the borrower and the Chargor of the Chargee's intention to dispose of the charged property by way of Public Auction.

After the expiry of the period stipulated in the **Notification of Sale**, the 1st Defendant instructed the 2nd Defendant to sell the suit property by way of **Public Auction** after issuing the borrower with **Redemption Notice** and the said Redemption Notice was issued on **3rd May 2017**. It was his contention that the Plaintiffs and the borrower have been issued with the relevant Statutory Notices and the Plaintiffs are in arrears of over **Kshs.6 Million** as at **12th July 2017**.

Therefore the 1st Defendant correctly proceeded to advertise the suit property on **20th June 2017** and **26th June 2017** due to the default on the part of the borrower. He contended that the Plaintiffs' application is not meritorious at all and should be dismissed with costs to the 1st Defendant.

The 1st Defendant also filed a statement of Defence and Counter-claim wherein it included the 3rd – 7th Defendants with the Plaintiffs herein being the 1st – 2nd Defendants. The 3rd – 7th Defendants filed their **Replying Affidavit** which was sworn by **Bonface Kabata Muraya**, the 4th Defendant herein who is a Director of 3rd Defendant with authority from the other Defendants to swear the affidavit. He confirmed that the 1st Defendant created a legal charge over the suit property and the requisite documentation were duly executed by himself and his Co-Directors as required by law. He also averred that he was unaware of the date that **John Mwaura Kinuthia**, died and he is also unaware of any irregularity in conduct or execution perpetrated by himself or any of the other Directors. Further that the Bank was notified as and when there was a delay in payment of the loan amount and the Bank would always accommodate the Company (3rd Defendant). He denied any privity or occasioning to any fraudulent or illegal dealing with the suit property with an interest in creating a charge. He also denied any collusion with the Plaintiffs to

frustrate the Bank in exercising of its **Statutory Power of Sale**. He therefore opposed the Plaintiffs' **Notice of Motion** application dated **29th June 2017**, and denied the 1st Defendant disposition in response to the said application.

The application was canvassed by way of written submissions wherein the Applicants through the **Law Firm of K. Macharia & Co. Advocates** filed their written submissions on **20th April 2018** and urged the Court to allow their application.

The 1st Defendant through the **Law Firm of Mohammed Madhani & Co. Advocates** filed their written submissions on **23rd April 2018** and urged the Court to dismiss the instant application. They relied on various decided cases.

The 3rd – 7th Defendants through the **Law Firm of Wokabi Mathenge & Co. Advocates** filed their submissions on **25th June 2018** and took a middle ground.

The Court has now carefully read and considered the instant **Notice of Motion** application and the annexures thereto. The Court too has considered the rival written submissions, the cited authorities and the relevant provisions of law and renders itself as follows:-

The application herein is for injunctive orders which are equitable remedies granted at the discretion of the court. However such discretion must be exercised judicially and based on evidence and the law. See the case of **Mrao....Vs...First American Bank of Kenya Ltd & 2 Others (2003) eKLR**, where the Court held that:-

“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is Judicial and as always the judicial discretion has to be exercised on the basis of law and evidence.”

Further, it is very clear that at this stage, the court is not called upon to delve into the real issues in controversy especially given that the available evidence is based on rival affidavits. See the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The Court is only called to determine whether the Applicants have established the usual criteria for grant of injunctive orders. These criterias are the ones set out in the case of **Giella...Vs...Cassman Brown** and later repeated in other judicial pronouncements. See the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be

granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

What is not in doubt is that there is an executed charge dated **28th June 2014** over land parcel **No.Githunguri/Kanjai/608**. It is also evident that the said land parcel is owned by **John Mwaura Kinuthia**, now deceased. It is also not in doubt that the said charge was over a loan borrowed by **Magann Pharmaceuticals Ltd**, the 3rd Defendant to the Counter-claim and **John Mwaura Kinuthia** was the guarantor and a Chargor. The 1st Defendant was the Chargee. It is also evident that among the other documents annexed to the charge is the Consent to create a charge allegedly signed by **Felistas Njoki Mwaura** the 2nd Plaintiff herein signed on **3rd June 2014**.

The Plaintiffs have alleged that the said **Felistas Njoki Mwaura** did not sign the said Consent to create a charge. They have also alleged that the charge is defective and *void ab initio* and should be declared so. What is also not in doubt is that the 1st Defendant has annexed various annexures to the **Replying Affidavit** in opposition to the instant **Notice of Motion**. Among the annexures are various Notices. There is also no doubt that the 1st Defendant did instruct the 2nd Defendant to advertise the suit property for sale by Public Auction. The said advertisement was done on **20th & 26th June 2017** and the intended sale was to take place on **12th July 2017**. However, the Plaintiffs came to court on **30th June 2016** and obtained interim orders restraining the said Public Auction.

The issue now for determination is whether the said temporary orders of injunction should be confirmed until the suit is heard and determined.

The 3rd and 7th Defendants have confirmed that indeed the charge document was executed legally and they have been repaying the advanced loan as scheduled and when there is any delay, they do inform the Bank and are accommodated accordingly. They denied that the charge herein is defective and/or void as alleged by the Plaintiffs/Applicants.

As stated earlier, the Applicants have a duty to establish that they have met the threshold set in the case of **Giella...Vs....Cassman Brown (supra)**.

Has the Applicants established that they have a prima-facie case with probability of success at the trial?

It is evident that the Charge herein was executed on **28th June 2014**. The Plaintiffs have alleged that the alleged Chargor **John Mwaura Kinuthia** died on **21st September 2014**. However, it is evident that by the time of the death of the said **John Mwaura Kinuthia**, he had already executed the Charge document and the Deed of guarantee date **28th June 2014**. The Plaintiffs also alleged that the said Charge or loan was insured and did not bind the Chargor’s personal representatives. However, the two documents are very clear that the ‘Chargor’ and ‘guarantor’ include the personal representatives and assigns of the first part.

Further, the Plaintiffs have alleged that the 2nd Plaintiff did not execute the **Spousal Consent** to Charge the suit property. The 1st Defendant have averred that the said **Felistas Njoki Mwaura** appeared before an advocate by the name of **Joel Kabaiku** and executed the said Consent. The **advocate Kabaiku** has not denied having witnessed the said execution. Since the 3rd – 7th Defendants have alleged that due process was followed in the execution of the Charge in dispute, then the Court finds that the allegations made by the Plaintiffs/Applicants can only be ascertained in a full trial by calling evidence. The Court cannot at this juncture find and hold that there was no Spousal Consent or the attached Consent was a forgery and therefore the Charge is *void*.

Though the Plaintiffs have alleged that they did not receive the necessary **Statutory Notices**, the 1st Defendant has annexed all the Notices sent to the borrower and the Chargor. The address used is the one given in the Charge document. The 3rd – 7th Defendants have confirmed that when they fell late in payment of the loan advanced to them, they would approach the 1st Defendant and in most cases they used to be accommodated and so there was no collusion between them and the Bank. The issues raised by the Plaintiffs/Applicants on whether they received Statutory Notices are not issues that this Court can decide now but only at the final stage after calling of evidence at the main trial. The Court finds

that since the Charge document has been admitted by the 3rd – 7th Defendants and it was executed by **John Mwaura Kinuthia** before his death, then the Plaintiffs cannot allude fraud and the Court finds that at

this juncture, the Applicants have not established that they have a prima-facie case with probability of success at the trial and that any of their rights have been infringed.

On the **second limb** of whether they will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that the suit property is quantifiable. It was offered for security and it is trite that once a property has been given over as security to secure a loan, it becomes a commodity for sale and the Chargor cannot be heard to say that in the event of default, he/she will suffer loss which cannot be compensated. The possibility of sale of such property was there once the property was offered as security. See the case of **Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others (supra)**, the Court held that:-

“...if the 1st and 2nd Defendants were restrained from selling off

the suit property, there is a very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss”

Further as submitted by the 1st Defendant ***Section 99(4)*** of the ***Land Act*** addresses such a situation and provides as follows:-

“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

It is the findings of this Court that in the event that the Plaintiffs/

Applicants would be successful litigant, then the loss occasioned can be adequately compensated by an award of damages by the 1st Defendant which is a Bank and capable of paying any award of damages.

On the ***third limb*** of if the Court in doubt to decide on the balance of convenience, the Court finds that it is not in doubt. However, even if it was in doubt, the balance of convenience would tilt in favour of the 1st Defendant, the Bank which is owed money by the borrower herein who have not offered how it would remedy the default. There is a danger that the outstanding loan might escalate and even outstrip the security held by the Bank. See the case of ***Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others (supra)***, the Court held that:-

“...if the 1st and 2nd Defendants were restrained from selling off

the suit property, there is a very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss”

Having now carefully considered the available evidence, the Court finds the Plaintiffs/Applicants ***Notice of Motion*** application dated ***29th June 2017*** is not merited. The said application is dismissed entirely with costs to the 1st Defendant/Respondent.

For avoidance of doubt, any interim orders in place are hereby

discharged and/or vacated.

It is so ordered.

Dated, Signed and Delivered at Thika this 24th day of May, 2019.

L. GACHERU

JUDGE

24/5/2019

In the presence of

Mr. Mwangi holding brief for Mr. Macharia for Plaintiffs/Applicants

M/S Nguu holding brief for Mr. Kisinga for 1st Defendant/Respondent & for 2nd Defendant

M/S Kanja holding brief for Mathenge for 3rd -7th Defendants/Respondents

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

24/5/2019