



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO.36 OF 2019

RAFIKI MICROFINANCE BANK LIMITED.....1ST PLAINTIFF/APPLICANT

NICHOLAS MUTUA NZIOKA2ND PLAINTIFF/APPLICANT

VERSUS

DANIEL KAKUKI KIOKO1ST DEFENDANT/RESPONDENT

WINFRED WAMBUA..... 2ND DEFENDANT/RESPONDENT

JACKSON WAMBUA.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR MAKUENI4TH DEFENDANT/RESPONDENT

RULING

1) What is before this court for ruling is the Plaintiffs'/Applicants' Notice of Motion application dated 28th May, 2019 and filed in court on even date for orders: -

1. THAT this Honourable Court do order the Land Registrar, Makueni County, the 4th Defendant herein to lift the Caution placed over the parcel of land known as MAKUENI/UNOA/2798 by the 1st, 2nd and 3rd Defendants/Respondents.

2. THAT this Honourable Court be pleased to order the Land Registrar, the 4th Defendant to sign all documents and instruments of transfer of land parcel known as MAKUENI/UNOA/2798 and to facilitate registration of land parcel known as Makueni/Unoa 2798 in favour of the 2nd Plaintiff and the production of the title deed thereof.

3. That costs be provided for.

2) The application is expressed to be brought under section 73(1) of the Land Registration Act, Section 98, Section 1A and 3A of the Civil Procedure Act, Order 51 Rule 1 and all enabling provisions of the Laws of Kenya and is predicated on the grounds on its face and is supported by the affidavit of Jane Warau, the 2nd Plaintiff/Applicant, (Head of Debt Recovery Department) sworn at Nairobi on 28th May, 2019.

3) The 1st, 2nd and 3rd Defendants/Respondents have opposed the application vide their grounds of opposition dated 18th June, 2019 and filed in court on even date. The grounds are: -

1. That the orders sought in the application are the same orders sought in the plaint dated 28th May, 2019 and granting the application would be determining the suit before the same is heard on its merits.

2. It is against the principle of the law to grant mandatory orders at in interim stage unless there are special circumstances therein which circumstances have neither been pleaded or demonstrated.

3. The matter herein touches on the same subject matter as Makueni High Court Civil Case No.4 of 2018 (formerly Makueni ELC o.331/17) which is yet to be determined.

4. Granting the orders sought herein would therefore not only determine the main suit herein but also determine Makueni High Court Civil Case No.4 of 2018 (formerly Makueni ELC No.331/17).

4) On the 18th June, 2019 the court directed that the application be disposed off by way of written submissions.

5) On the 22nd August, 2019 the Applicants filed their submissions dated the 14th August, 2019 while the 1st, 2nd and 3rd Respondents filed theirs on the 06th September, 2019 the same being dated 04th September, 2019.

6) It was submitted on behalf of the Applicants that they rely entirely on the supporting affidavit of Jane Warau, its head of Debt Recovery Department of the 1st Applicant. The 1st Applicant's Counsel submitted that sometime in November, 2014, one Caroline Ngina Mwangela, who was a Chargor made an application to the 1st Applicant for the advancement of a loan facility of Kshs.10,000,000/= which was granted. That the facility was secured by registering a charge over the properties identified as Makueni/Unoa/2790, 2798, 2808 and 2811 in favour of the 1st Applicant. That the Chargor defaulted and fell in arrears which necessitated the 1st Applicant to issue demand notices which were not honoured prompting it to commence recovery proceedings. That the suit properties were advertised for sale upon which people claiming purchasers interest filed a matter in court being ELC No.331 of 2017. That the Applicants' quest in the aforementioned suit to obtain injunctive orders was dismissed vide the court's ruling dated 01st March, 2018. That the Applicants in the said suit (which has since then been transferred to the High Court and registered as HCCC No.4 of 2018) sought for order of stay which was also dismissed on 30th July, 2018 by the High Court. The Counsel went on to submit that arising from the outcome of the two matters, the Chargee disposed off the suit property through public auction held on 06th September, 2018 where Makueni/Unoa/2798 was purchased by the 2nd Applicant. The Counsel went on to submit that when the 1st Applicant commenced the process of transferring and registration of the suit property in favour of the 2nd Respondent, the 4th Respondent refused to sign the transfer forms indicating that there was a caution registered in respect of the suit property. That a search by the 1st Applicant showed that the owner of the suit property was one Caroline Mwangela Ngina and there was an existing charge in favour of the 1st Applicant registered on 11th September, 2018 which was a few days after the public auction was held.

7) The Applicants' Counsel cited Section 96 of the Land Act which provides that:-

"96 (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land."

The Counsel further cited Section 99 which provides that:-

"99. (1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or nonapplication of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice."

The Counsel went on to submit that Section 99 of the Land Act offers protection to purchasers of properties sold in exercise of the Chargee's statutory power of sale and cited the case of **Stephen Kibowen vs. Agricultural Finance Corporation [2015] eKLR** where the court held thus: -

"It will be seen that under Section 99(2) (c) above, a purchaser is not obliged to inquire, inter alia, into whether the sale is necessary, proper or regular. Under Section 99(3), the purchaser is protected unless there is fraud, misrepresentation or dishonest conduct on the part of the charge of which the purchaser had actual or constructive notice. Section 99(4) provides that the remedy of a person affected by an unauthorized, improper or irregular exercise of the power of sale, shall have his remedy in damages against the chargee.

The protection offered to the purchaser is quite expansive. I have my own doubts as to the appropriateness of this expansive protection. It will be seen that protection is offered even where there has been no default, where no notice has been issued, where the sale is not necessary, proper or regular. I am not convinced that the principles of justice will still uphold a sale where no statutory notice is issued; or where there has not been default; or where the sale is out rightly fraudulent, only that the purchaser is unaware of such fraud. But that is not in issue here and remains to be the subject for another day; upheld in;

The Counsel pointed out that the 2nd Applicant is an innocent purchaser for value and whose rights are recognized by the law and protected.

8) On the issue of granting mandatory orders at interim stage, the Counsel submitted that the Constitution of Kenya, 2010 imposes upon the court wide jurisdiction to determine matters and make orders or grant remedies as it wishes so long as it has jurisdiction to do so. The Counsel submitted that this court has jurisdiction to grant the orders sought and cited the case of *DNM vs JK [2016] eKLR* where Onguto, J held thus: -

“Mandatory interim orders

The Respondent’s counsel raised it and it would be important to note that I take cognizance of the fact that the order sought by the Petitioner at this interlocutory stage is mandatory in nature. It is uniquely the sort of order that may not be undone once issued and observed even if the petitioner was to fail on the Petition proper. I also take cognizance of the fact that I must and indeed cannot at this interlocutory stage made definitive and final findings especially on any disputed factual or legal points.

I must however immediately state that contrary to the Respondent’s submissions that the court should not issue such mandatory orders at an interlocutory stage of the proceedings especially where the same or similar orders are sought in the main Petition, this court has under Article 23 of the Constitution an almost unlimited power to fashion orders or relief as may be appropriate. The jurisdiction is unlimited as to what and when orders may be issued. The court must however exercise caution especially when the orders sought are mandatory in nature and where they may also end up being an intrusion of another individual’s constitutionally guaranteed rights or freedoms.

The approach by the court when faced with an application for a mandatory interlocutory order ought to be that the court prior to granting such an order must be satisfied that there are special circumstances, which warrant such an order being issued.

Additionally, the court must be satisfied that the case is a clear and straight forward one, which ought to be dealt with at once and that at trial the court would be vindicated for having issued the order in the first place. Where there is any slight doubt then such an order sought not to be issued. The standard would therefore certainly not be the equivalent of a prima facie case being established. The rationale must be that acts performed pursuant to mandatory orders may not be easily remedied if the claimant’s case is ultimately a flop at trial.

I would consequently conclude that mandatory orders may be issued by this court at an interlocutory stage even where it appears to fragment the Petition and deal with or grant only one or some of the reliefs sought in the main.”

The Counsel further cited the case of *County Assembly of Machakos vs. Governor, Machakos County and 4 others [2018] eKLR* where P. Nyamweya, J stated thus: -

*“... the Petitioner urged that this Court has jurisdiction to hear and determine the Application and the Petition herein. Reliance was placed on the decisions in *Richard Bwogo Birir vs. Narok County Government & 3 Others [2014] eKLR*, *Judicial Service Commission vs. Speaker of the National Assembly & Anor [2013] eKLR* and *Michael Osundwa Sakwa vs. Chief Justice and President of Supreme Court of Kenya & Anor Constitutional Petition No.167 of 2016 (Nairobi)* for the position that the new Constitution gives the court wide and unrestricted powers and allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises under Article 165(3).”*

In the same authority, P. Nyamweya J further stated thus: -

*“The principles for the grant of mandatory injunctions are settled the principles were set out by the Court of Appeal in *Kenya Breweries Ltd and another vs. Washington Okeyo (2002) 1 E.A. 109* wherein it was held that there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. The court held as follows in this regard:*

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to stela a march on the plaintiff.”

*The first question I must answer is whether the Petitioner has established a prima facie case. A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR* as follows: -*

“A prima facie case in a civil application includes but is not confirmed to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will concluded that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Counsel concluded by urging the court to grant the orders sought.

9) On the other hand, the Counsel for the 1st, 2nd and 3rd Respondents submitted that there is Makueni High Court civil case No.4 of 2018 (formerly Makueni ELC No.331/17) which is still pending determination. That in the latter suit, amongst the issues to be determined relate to sale agreement dated 15th September, 1986, how the charge over Makueni/Unoa/2798 was created and that if this court were to grant the orders sought, in this application, Makueni HCCC No. 4 of 2018 will be rendered nugatory.

The Counsel was of the view that the ends of justice would require that the interim orders should be denied until the determination of the aforementioned case. The Counsel added that instead, the court should order for status quo to be maintained because of the competing and rival claims of the parties.

10) The Respondents' Counsel further submitted that it should be appreciated that the purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all the parties. The Counsel cited **Section 6 of the Civil Procedure Act** which provides that: -

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed.”

11) The Respondent's Counsel submitted that it is trite law that in an interlocutory application, one cannot seek mandatory orders unless one demonstrates that there are special circumstances that exist for the same. The Counsel added that in this application, the applicants have not demonstrated that they would be prejudiced if the orders sought are not issued. It was the Counsel's view that it would be against the rules of natural justice for the orders in the application and the plaint to be issued without parties being heard on merit.

The Counsel concluded by urging the court to dismiss the application with costs.

12) Having read the application together with its supporting affidavit as well as the grounds of opposition and having considered the submissions filed, it is common ground that Makueni HCCC no.4 of 2018 (formerly Makueni ELC No.331/17) is still pending hearing and determination of the substantive suit. In the aforementioned suit, the parties are Benjamin Ndula Ndaka & 4 others v. Caroline Mwangela & 2 others. Two applications by the Plaintiffs/Applicants therein were dismissed on 01st March, 2018 and 30th July, 2018 paving the way for the public auction that was held on 06th September, 2018. During the auction, the 2nd Applicant purchased land parcel number Makueni/Unoa/2798. On the 11th September, 2018 Daniel Kakui Kioko, Winfred Wambua and J. Wambua lodged a caution annexed as JW16 in paragraph 21 of Jane Warau's supporting affidavit to protect purchaser's interest. The three mentioned persons hereinabove are the 1st to the 3rd Defendants/Respondents. Prima facie, there was nothing to stop the 1st Applicant from conducting the auction of 06th September, 2018 and there was nothing to stop the 2nd Applicant from purchasing the suit property on the material day. There is no affidavit evidence to support the purchasers interest that the first three respondents were out to protect when they lodged the caution and as such, there is no basis for the said caution to remain in place.

13) As earlier on observed in my ruling, there is Makueni HCCC No.4 of 2018 which is pending hearing and determination. To grant the mandatory injunction is likely to compromise the said suit taking into consideration that the Applicants herein have not demonstrated the special circumstances that exist to warrant for its grant. As was correctly submitted by the 1st to the 3rd Respondents' Counsel the grant of the mandatory order will amount to determining the suit herein without the same being heard on merit.

14) Arising from the above, my finding is that the application partially succeeds and I will proceed to grant prayers 1 and 3 respectively. It is so ordered.

Signed, Dated and Delivered at Makueni this **13th** day of **November, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of: -

Ms. Kyalo for the 1st to 3rd Respondents

No appearance for the Applicant

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

13/11/2019.