



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 511 OF 2017**

**SOKONO ENE YONKO.....PLAINTIFF**

**VERSUS**

**MOSES SHONKO.....1<sup>ST</sup> DEFENDANT**

**SPEED CAPITAL LTD.....2<sup>ND</sup> DEFENDANT**

**JOHN M. MURAGURI.....3<sup>RD</sup> DEFENDANT**

**KIMERIA OLE SILANTOI.....4<sup>TH</sup> DEFENDANT**

**RULING**

The application before me for determination is the Plaintiff's Notice of Motion dated the 1<sup>st</sup> October, 2019 brought pursuant to section 1, 1A, 1B and 3A of the Civil Procedure Act as well as Order 40 Rules 1(a), 2, 4 & 8 of the Civil Procedure Rules. The Applicant seeks orders of temporary injunction restraining the Defendants from selling land parcel number KJD/ OLCHORO ONYORE/ 19863, BIRIKA AREA KAJIADO COUNTY hereinafter referred to as the 'suit land' pending the outcome of the suit. The application is premised on the summarized grounds that the Plaintiff is the registered proprietor of the suit land. The 1<sup>st</sup> Defendant has conspired with his friend SILANTOI OLE KIMERIA to defraud the Plaintiff's title. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have now issued a 45 days redemption notice dated 17<sup>th</sup> September, 2019 to the Plaintiff over the suit land for a loan taken by the 1<sup>st</sup> Defendant which loan she never guaranteed. The acts of the 1<sup>st</sup> Defendant of using the Plaintiff's title as security over a loan is unlawful, improper and against mutual understanding the Plaintiff had with the 1<sup>st</sup> Defendant. The Plaintiff risks losing the only family property she owns which is due for inheritance. The temporary injunction order issued by the Court at Kajiado on 11<sup>th</sup> April, 2017 has since lapsed due to the transfer of the file to Ngong and retransfer back to Kajiado. The Plaintiff's property risks being auctioned and she has established a prima facie case with high probability of success.

The Plaintiff SOKONO ENE YONKO filed a supporting affidavit where she reiterates her claim above. She explains that in the year 2014 the 1<sup>st</sup> Defendant purchased two (2) acres of land from the suit land and they entered into a hand written agreement. Further, they had agreed that during the period of payment of the purchase price, he would hold the said title. She confirms that the 1<sup>st</sup> Defendant finalized the payment of the purchase price and she signed some documents in the advocates' office which she later realized were bank loan documents for which she signed a guarantee of Kshs. 4,000,000/=. She explains that the 1<sup>st</sup> Defendant defaulted in the repayment of the loan and on 3<sup>rd</sup> February, 2017, she received the 45 days' redemption notice and notification of sale by Cleverline Auctioneers. Further, she filed a suit and obtained temporary injunction by consent restraining the defendants from disposing of the suit land, which orders have since expired. She contends that she has now been issued with a 45 days' redemption notice dated the 17<sup>th</sup> September, 2019 and a notification of Sale by Meaps Auctioneers. She reiterates that the Respondents should be restrained from illegally disposing of her property, as she will suffer embarrassment, irreparable loss and damage.

The 1<sup>st</sup> Defendant in opposition to the Application filed Grounds of Opposition dated the 11<sup>th</sup> November, 2019 where he rebuts the Plaintiff's assertions and insists he is a stranger to the transaction between the Plaintiff, 2<sup>nd</sup> Defendant and one Kimeria Ole Silantoi. He contends that the assertions of conspiracy to defraud are criminal matters, which this court does not have jurisdiction to entertain. He denies using the suit land as collateral to obtain a loan and dragging his name in this case is highly irregular. He refers to the agreement dated the 5<sup>th</sup> October, 2015 and contends that he is not a party therein nor did he witness it.

In opposition to the application, the 2<sup>nd</sup> Defendant filed a replying affidavit sworn by JIMMY KAREBE the Recoveries Manager where he deposes that the application dated 1<sup>st</sup> October, 2019 is similar to the one dated 3<sup>rd</sup> March, 2017 where the Plaintiff had sought for orders restraining it from exercising its statutory power of sale in respect to the suit land. He fully relies on the affidavit of James Ouma, which was filed in court on 3<sup>rd</sup> April, 2017. He avers that on 3<sup>rd</sup> October, 2015 one Kimeria Ole Silantoi secured a loan of Kshs. 4,000,000/= and the

said borrower was accompanied by the Plaintiff who identified herself as the cousin wherein she expressed her intention to guarantee the said loan. Further, the Applicant willfully executed the guarantor's undertaking using the suit land which title she surrendered to the 2<sup>nd</sup> Respondent for formalization of Charge. He confirms that after registration of the Charge, a sum of Kshs. 4,000,000/= was disbursed to the borrower. Further, the borrower made some repayments and later defaulted. He explains that despite several requests to the borrower and the guarantor to repay the outstanding balance, they failed to do so culminating in the 2<sup>nd</sup> Defendant issuing them with a statutory notice dated the 28<sup>th</sup> June, 2016 calling for the repayment of the outstanding amount within 90 days. They were further issued with the 40 days and 45 days' redemption notices. He insists the Applicant had already obtained orders of temporary injunction on 11<sup>th</sup> April, 2017 which have since lapsed. Further, on 17<sup>th</sup> September, 2019, the Auctioneer issued a Courteous 45 days redemption notice together with notification of sale to the Applicant with the intent to recover Kshs. 25, 719, 999/= owed to the 2<sup>nd</sup> Defendant as the outstanding loan. He reiterates that the Plaintiff has not taken any meaningful steps to prosecute this suit or attempted to repay the loan.

The Plaintiff and the 2<sup>nd</sup> Defendant filed their respective submissions.

### **Analysis and Determination**

Upon consideration of the materials presented by the Plaintiff and the Defendants in respect to the Notice of Motion dated the 1<sup>st</sup> October, 2019 I find that the only issue for determination is whether the Plaintiff is entitled to the orders of temporary injunction sought.

The Plaintiff in her submissions contend that there is an illegal charge over the suit land hence the Environment and Land Court has jurisdiction to handle the dispute herein. She further contended that she has established a prima facie case and relied on the following cases: **Lydia Nyambura Mbugua V Diamond Trust Bank Kenya Limited & Another (2018) eKLR; Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358; Mrao Limited vs First American Bank of Kenya limited and 2 others 2003 eKLR and Olympic Sports House Limited V School Equipment Centre Limited** to buttress her arguments.

The 2<sup>nd</sup> Defendant in its submissions relied on the cases of **Francis J.K Ichatha v Housing Finance Company of Kenya Civil Application No. 108 of 2005; Showind Industries V Guardian Bank Limited & Another (2002) IEA 284; Andrew M. Wanjohi V Equity Building Society & Another (2006) eKLR; Maithya V Housing Finance Co. Of Kenya & Another (2003) 1 EA at 139; Sammy Japheth Kavuku V Equity Bank Limited & Another (2014) eKLR and Nsubuga and Another V Mutawe (1974) EA 487** to oppose the application for injunction.

The principles of granting interlocutory injunction are well established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358.**

As to whether the Plaintiff has established a prima facie case with a probability of success. It is not in dispute that the Plaintiff was served with the requisite statutory notices. The Plaintiff has raised an issue on the authenticity of the Charge, claiming that she did not know what she was signing at the Advocates' office. Further, in her submissions she claims there was no consent of the Land Control Board before the Charge was perfected, hence the same is invalid.

**In the case of Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.*'

Section 79 (5) of the Land Act states that '*a formal charge shall take effect only when it is registered in a prescribed register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.*'

In the instant case, I note that the Charge was duly registered at the Kajiado Land Registry on 12<sup>th</sup> November, 2015 as evident in the Certificate of Official Search marked as annexure "SEY 1". The Court notes that the Plaintiff initially obtained an interlocutory injunction herein for 14 days on 11<sup>th</sup> April, 2017 but never proceeded to prosecute the Notice of Motion dated the 3<sup>rd</sup> April, 2017. She filed this application when she was served with fresh statutory notices. The Plaintiff claimed it is the 1<sup>st</sup> Defendant who fraudulently used her title but on perusal of the Charge document, it is clear she was guarantor to the 4<sup>th</sup> Defendant for a loan which he has failed to repay. Further, as per the Charge Documents, she had accepted that her land would be sold in the event of default.

Section 96(1) of the Land Act provides that a chargee shall proceed to exercise its statutory power of sale 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 instant case, the Court notes that after the various notices issued to the Plaintiff as the guarantor, the loan is yet to be paid in full. Further, despite obtaining injunctive reliefs in 2017, the Plaintiff has not explained to court what steps she undertook to ensure the principal debtor repays the loan so as to safeguard the suit land. She claims that it is the 1<sup>st</sup> Defendant who conspired with the 4<sup>th</sup> Defendant to defraud her. However, I note in one of the documents she signed, it indicates the 4<sup>th</sup> Defendant is actually her cousin. In the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002** it was established that "*. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.*" It is hence the Court's finding that in the instant case the 2<sup>nd</sup> Defendant cannot be restrained from realizing the security since from the documents annexed to the supporting affidavit, it is clear the Plaintiff indeed guaranteed the 4<sup>th</sup> Defendant for a loan which is yet to be repaid in full. Based on my findings above and in relying on the legal provisions as well as the cases cited, I find that the Plaintiff has not established a prima facie case to warrant the grant of an injunction pending the outcome of the suit.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages. I note the suit land was used as security to guarantee a loan of KShs. 4 million with the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant has issued all the requisite notices as required by law. The Plaintiff admitted signing certain documents in an advocates' office but claims she did not know it was a Charge Document. I opine that these are facts which can only be ascertained when the matter is set down for hearing and not at this interlocutory stage. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that ‘...the applicant must establish that he ‘might otherwise’ suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. ‘

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are speculative as she signed the Charge and Guarantee documents to charge the suit land. Further that once she charged the suit land, it became a security, which could be sold by the 2<sup>nd</sup> Defendant in the event of default.

On the question of balance of convenience, the Plaintiff is claiming fraud but I note in the agreement with the 2<sup>nd</sup> Defendant, there is a document which confirms she is the borrower's cousin. This in essence means there existed a relationship between herself and the 4<sup>th</sup> Defendant.. In the case of **Andrew M. Wanjohi – Vs- Equity Building Society & 2 other [2006] eKLR** it was expressed that ‘ **In my considered view if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are restrained from selling off until the suit was heard and determined, 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 for more than three years. That fact, coupled with the status of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would be able to compensate the Plaintiff. ...**

In relying on the above case, and facts as presented, I find the balance tilts in favour of the 2<sup>nd</sup> Defendant whose statutory power of sale in respect to the suit land, has crystallized.

From the above, it is clear that Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently proceed to dismiss the Plaintiff's Notice of Motion dated the 1<sup>st</sup> October, 2019 with costs.

**Dated signed and delivered in open court at Kajiado this 17th day of December, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Atieno holding brief for Wesonga for plaintiff/applicant

No appearance for the defendant

Court Assistant- Mpoye