



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 197 OF 2016

RODAH KOLIL.....PLAINTIFF

VERSUS

M. ORIENTAL BANK.....1ST DEFENDANT

JEREMIAH KOSGEI.....2ND DEFENDANT

NOAH KIPCHUMBA.....3RD DEFENDANT

RULING

Rhodah Kolil, (*hereinafter referred to as the plaintiff*) has come to court against the defendants including her husband Noah Kipchumba claiming that she jointly built their matrimonial home with her husband in her father in law's land then known as parcel **Kapsaret/Simat Block 3 (Mokombet) 9** before the same was subsequently transferred by transmission to the 3rd defendant upon demise of his father. A portion of the said land was later sold and the remainder was registered as land parcel No. Kapsaret/Simat Block 3 (Mokombet) 21, the suit land herein. According to the plaintiff, the suit land is registered in the names of the 3rd defendant who holds it in trust for himself, the plaintiff and their children.

On the 27.6.2016, the plaintiff read in the Daily Newspaper that the 1st defendant agent had advertised a notice of sale of the suit land by public auction on 15.7.2016. She conducted a search and found that the property was charged to the 1st defendant in respect of a loan of Kshs.10,000,000. She claims that no spousal consent was sought or obtained from herself despite the fact that the land was matrimonial property. She claims that the transaction was shrouded in illegality.

The suit is accompanying with a Notice of Motion wherein she seeks a temporary injunction restraining the 1st defendant, either by herself, servants, agents from selling or making any other disposition on land parcel No. Kapsaret/Simat Block 3 (Mokombet) 21, pending hearing and determination of the suit. The application is based on grounds that in December 2013, the 3rd defendant/respondent agreed to guarantee a loan/overdraft facility that the 1st respondent advanced the 2nd respondent. The 3rd respondent offered the suit land as security pursuant to which a charge was registered over it on 10th April, 2013. The disposition herein relates to matrimonial property but the respondents did not seek her consent. Should the said sale proceed as per notice, then the applicant stands to suffer irreparable loss and damage for the reasons that the suit land is matrimonial property and hosts her only home. The disposition in issue herein was without spousal consent as contemplated under section 28(a) and 94 of the Land Registration Act, 2012. In any event, no prejudice will be occasioned to the 1st respondent if the order of temporary injunction is granted because the suit land will still be charged in its favour.

The application is opposed by the 1st defendant who states that on 10th April, 2013, a charge over Kapsaret/Simat Block 3 (Mokombet)/21 for Kshs.10,000,000/= was registered in favour of the 1st defendant to secure overdraft/loan facilities to 2nd defendant and which facility was guaranteed by the 3rd defendant. That the plaintiff gave her consent to charge the property on 28th March, 2013 and duly swore an affidavit to that effect on the same day. That the 3rd defendant freely executed the charge having understood the rights of the bank in the event of default by the principal debtor/borrower, that is, that the property would be sold in pursuance of the banks power of sale. The 2nd and 3rd defendants have failed to repay the overdraft/loan facility and the sum due as at 30th June, 2012 was Kshs.116,808,301.40. The loan was not repaid on 28th August, 2012 as alleged by the plaintiff. She has clearly misapprehended the nature of an overdraft facility. The 2nd and 3rd defendants have completely failed to regularize the debit conditions of the account. That in the light of the default of repayment of the loan, the bank is perfectly within its rights of statutory power of sale. The intended sale of the security is grounded on default of payment by the 2nd and 3rd defendants.

That the plaintiff's application for injunction as per advice of his counsel on record, does not meet the conditions as follows:

- (a) She has failed to prove a prima facie case with probable chances of success.***
- (b) She has failed to demonstrate that damages would not be adequate remedy.***
- (c) That balance of convenience tilts in her favour.***
- (d) No suggestion of her willingness to give undertaking as to damages or security for costs.***

The fact that suit properties houses the matrimonial home of the plaintiff is immaterial and inconsequential as the same became a commodity for sale when it was offered as security for repayment of the overdraft/loan facility and further when she gave her spousal consent to the charge. The application is clear case of an attempt to abuse the provisions of section 94 of Land Registration Act. The suit and application are frivolous and indeed an abuse of the process of court. That the plaintiff's application is without merit and ought to fail.

I have considered the pleadings, application, replying affidavit and do find that the plaintiff has demonstrated that her consent was not obtained before the charge herein was registered and therefore has established a prima facie case with the probability of success as failure to obtain spousal consent made the whole transaction voidable. I do further find that if the property is sold, the plaintiff will suffer irreparable loss as the property is matrimonial home and yet he is not privy to the transaction. Further, the balance of convenience tilts towards maintained status quo.

Ultimately, the application is allowed thus; I do grant a temporary injunction restraining the 1st defendant, either by herself, servants, agents from selling or making any other disposition on land parcel No. Kapsaret/Simat Block 3 (Mokombet) 21, pending hearing and determination of the suit. Costs in the cause.

Dated and delivered at Eldoret this 26th day of January, 2018.

A. OMBWAYO

JUDGE