



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 212 OF 2017

VIVIANNE NAIPANOI KUYA.....PLAINTIFF

VERSUS

PAUL SITEIYA LOORKIPONY.....1ST DEFENDANT

NAPOLEON WAKUKHA MURENDE.....2ND DEFENDANT

MOLYN CREDIT LIMITED.....3RD DEFENDANT

ERIC TIMOTHY BALONGO.....5TH DEFENDANT

RULING

The Application for determination is the Plaintiff's Notice of Motion dated the 11th April, 2017 brought pursuant to section 1A and 3A of the Civil Procedure Act, Order 1 Rule 10, Order 8 rule 3 and 5, Order 40 rule 1 & 4(1), Order 51 rule 1 of the Civil Procedure Rules. It is based on the following grounds which in summary is that the 1st Defendant is the beneficial owner of land parcel number KAJIADO/KISAJU/10733 hereinafter referred to as the 'suit property/lands' which is also the Plaintiff's Matrimonial property. The 1st Defendant has unlawfully charged the said property in favour of the 3rd Defendant as security for money advanced to the 2nd Defendant. The Charge was created in secrecy as the Plaintiff never consented to the creation of the instrument. The 3rd Defendant has unlawfully and fraudulently, transferred the suit property to ERIC TIMOTHY BALONGO in an attempt to frustrate the Plaintiff from justice and to remove the suit property from the court's jurisdiction. The said sale and transfer was tainted with illegality as well as fraud and could not vest legitimate title upon the purchaser. The Plaintiff is apprehensive the Defendants will transfer the land to a third party. It is imperative that the Plaintiff's possession of the property and the ensuing status quo be retained until the issues raised herein are determined.

The application is supported by the affidavit of VIVIANNE NAIPANOI KUYA the Plaintiff herein where she deposes that the 1st Defendant is her husband and they reside on the suit property which was registered in his name, with their three children and mother in law. She claims the 1st Defendant inherited the suit property from his father for the benefit of their children and is therefore a beneficial owner and she has gained an overriding interest by virtue of being his wife. She contends that the suit property is their single source of livelihood as she undertakes subsistence farming and has constructed permanent buildings therein which has increased its value. She avers that on 14th January, 2015, the 1st Defendant purportedly Charged the suit property to the 3rd Defendant for a sum of Kshs. 7.2 million which was advanced to the 2nd Defendant. Further that the Charge was created in secret and neither of the family members consulted and she was surprised that at page 32 of the said document, that Spousal Consent had purportedly been executed in her name.

The application is opposed by the 1st Defendant whose Director LYDIA NYAMBURA ANYANGU swore a replying affidavit where she deposed that the 3rd and 1st Respondent executed a charge over the suit land to secure a loan of kshs. 7.2 million which was advanced by the 3rd Respondent to the 1st and 2nd Respondents. She claims the spousal consent was duly executed by the Applicant herein before the charge was registered, and the same was duly witnessed by an Advocate of the High Court of Kenya. She denies the creation of the Charge was done under secrecy and that the 1st and 2nd Respondents executed the Charge. She confirms the 1st and 2nd Respondents defaulted in repaying the loan culminating in the issuance of various statutory notices. She contends the Sale of the suit land was scheduled on 18th November, 2015 but the same did not proceed as the 1st and 2nd Respondents rushed to Milimani and obtained a temporary injunction but the application was heard *inter partes* and dismissed on 8th July, 2016. Further that the 1st and 2nd Respondents later made an application for stay of execution pending appeal but no orders were issued, and the 3rd Respondent instructed *messrs* Regent Auctioneers to proceed with the auction. She reiterates that the 1st Respondent was informed of the intended sale, which was also advertised in the newspaper. Further that the sale proceeded on 2nd August, 2016 vide a public auction and the suit land was sold to the highest bidder at Kshs. 33 million. She reiterates that the Plaintiff was well aware of the Charge as she had issued spousal consent and if she indeed learned of the sale in July, 2016 why did she wait till February, 2017 to file the application after the suit land was sold. She insists the application has been overtaken by events has the suit land was sold by public auction with the buyer paying the full purchase value and parties executing a transfer to have the

charged property registered in the name of the buyer, and this was duly done. Further that the non appearance of the 1st and 2nd Defendants in this suit is suspect and the instant application is merely set out as a collateral action intended to frustrate the 3rd Respondent and should be dismissed with costs.

The Plaintiff filed a further affidavit where she reiterated the claim and stated that there was no notice given to her before the suit land was sold, as the spouse of the chargor. She insists the 3rd Respondent did not follow the prescribed law to effect the sale by public auction. She contends that the notice of sale produced as annexure 'LNA07' only granted 1st Respondent 21 days to redeem the property. She reaffirms no auction took place and the 3rd Respondent merely effected a transfer to defeat the legitimate claim over the suit land. She states that the Advocate did not confirm her Identification through asking for her Identity Card during the creation of the Charge. She denies meeting David Kiarie let alone executing a document in his presence.

The 3rd Defendant filed a further affidavit sworn by DAVID KARANJA KIARIE who is an Advocate of the High Court of Kenya where he deposed that their firm charged the suit land on behalf of the 3rd Defendant for a loan advanced to PAUL SITEIYA LOORKIPONY registered owner of the said land, jointly with NAPOLEON WAKUKHA MURENDE. He confirms on 10th January, 2015 he went to the suit land situated in Kisaju where PAUL SITEIYA LOORKIPONY introduced him to the Plaintiff herein, as his wife. Further that she spoke to the Plaintiff seeking to know whether she had knowledge as to why they visited the suit land. He claims the Plaintiff confirmed that she has been briefed by husband PAUL SITEIYA LOORKIPONY that the suit land where their home was, was being offered as security for the loan being advanced to her husband and NAPOLEON WAKUKHA MURENDE. He reiterates that the Plaintiff had no objection to the charging of the suit land and confirmed no one had coerced her to provide her consent. He avers that on 14th January, 2015 he met the Plaintiff including PAUL SITEIYA LOORKIPONY and NAPOLEON WAKUKHA MURENDE, and after explaining to them the nature of the transaction and the remedies for the chargee, the Plaintiff understood she was giving spousal consent for the charge, thereafter the Plaintiff granted her spousal consent after which the husband as well as NAPOLEON WAKUKHA MURENDE executed the Charge Document. As directed, the plaintiff and the 3rd defendant filed their submissions which I have considered, however, the 1st and 2nd defendants did not.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 11th April, 2017 including the supporting and replying and further affidavits, as well as the annexures thereon plus the submissions, I find that the only issue in contention at this juncture is whether the Plaintiff is entitled to interim injunction pending the outcome of the suit.

Plaintiff contends there was no spousal consent during the execution of the charge, hence the sale of the suit land by public auction was illegal. She claims the suit land is her matrimonial home and she has nowhere to go as she resides thereon with her children as well as her mother in law.

In the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** the Court established the principles for granting an injunction as follows:

"First, an 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 would 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."

As to whether the Plaintiff has established a prima facie case with a probability of success, I note in the Charge Document marked as annexure 'LN AO1' the Plaintiff indeed signed the spousal consent. Annexure 'LNA03' contain the statutory notices which I note were duly sent to the 1st and 2nd Defendant. I note by a ruling dated the 8th July, 2016 vide Milimani HCCC No 563 of 2015, **Justice E Ogola** dismissed the 1st and 2nd Defendants' application for injunction stopping the 3rd Defendant herein from selling the suit land where he noted that the statutory notices were duly served. I note the sell proceeded on 2nd August, 2016 where the suit land was sold to the 4th Defendant herein. Further that the Plaintiff has filed this application on 11th April, 2017 eight (8) months after the suit land was sold and passed to a third party.

Section 79(3) of the Land Act provides that **'A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.'**

Further in the case of **MILIMANI ELC No. 240/2012: ENW Vs. PWM & 2 Others**, Mutungi J observed that: **'I would like to state that where a property that would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter, such property becomes a commercial commodity available in the market and liable to be sold by the Charge under the Chargee's statutory power of sale and the exercise of that power of sale cannot be defeated by a claim that such property constitutes matrimonial property.'** In the current scenario, I note the Plaintiff indeed signed the spousal consent. I note that the 1st and 2nd Defendants have not filed any response to this application and yet there are the ones who took the loan and secured it with a charge over the suit land. Further that the suit land has already been sold to a third party. It is against the circumstances that I find that the Plaintiff has not established a prima facie case at this juncture to warrant the grant of orders of injunction sought.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the suit land had already been sold to the 4th Defendant who purchased it for value at an auction. There was already an application for injunction dismissed vide Nairobi HCC No.563 of 2015 where the 1st and 2nd Defendants wanted to restrain the 3rd Defendant from selling the suit land. 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 at this juncture even if the Plaintiff claims the suit land was a matrimonial home, it has already passed to the third party and the application as it is has been overtaken by events. I hence find that the alleged injuries are speculative as she has failed to demonstrate the harm she will suffer if the injunctive orders are denied.

On the question of balance of convenience, I note the 3rd Defendant already exercised its statutory power of sale and sold the suit land to the 4th Defendant. The Plaintiff is seeking an injunction to stop the Sale which has already taken place. I find that the application has been overtaken by events and hence the balance of convenience tilts in favour of the 3rd Defendant.

In relying on the above case, and facts as presented, I find that the Plaintiff has not established a prima facie case with the probability of success since at the time of charging the suit land, she granted spousal consent before the Charge was registered and took too long to file the instant application.

It is against the foregoing that I find the Plaintiff’s Notice of Motion dated the 11th April, 2017 unmerited and dismiss it with costs.

Dated signed and delivered in open court at NGONG this 20th day of February, 2018

CHRISTINE OCHIENG

JUDGE