



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.326 OF 2017

ZIPPORAH WANJIKU KARIUKI.....PLAINTIFF/APPLICANT

-VERSUS-

PROGRESSIVE CREDIT LTD.....1ST DEFENDANT/RESPONDENT

CARNELIAN ENTERPRISES

AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

GEORGE NJUGUNA NJOROGE.....3RD DEFENDANT/RESPONDENT

RULING

By a *Notice of Motion* application dated **13th March 2017**, the Plaintiff herein **Zipporah Wanjiku Kariuki**, has sought for various orders against the Defendants herein. The application is premised upon the various provisions of law and the orders sought are:-

1) Spent.

2) Spent.

3) That an order restraining the 1st and 2nd Defendants, their agents, servants, employees, officers and or any other person acting on their instructions, control and directions from auctioning, selling, transferring, alienating or in any other manner whatsoever from disposing parcel of land No. Muguga/Gitaru/3112, until this case is heard and determined.

4) That the cost of this application be borne by the Defendants.

The application is based on the following grounds:-

i. A Notification for sale by the 3rd Defendant has been served upon the Plaintiff stating that the Plaintiff's matrimonial home on land parcel No.Muguga/Gitaru/3112, is up for sale by Public Auction on 3rd April 2017 as a result of money owed to the 1st Defendant by the 3rd Defendant.

ii. The Plaintiff avers that if at all a charge/mortgage was created over parcel of land No.Muguga/Gitaru/3112, then such a charge is unlawful and invalid as the Plaintiff has never transferred and or offered the title to the property as security to the 3rd Defendant.

iii. The Plaintiff further avers that before advancing any money to the 3rd Defendant, the 1st Defendant ought to have done due diligence on the property which would have revealed that:-

a) The said property is and has always been occupied by her and her children.

b) The 3rd Defendant does not reside in the said property.

c) The Plaintiff's consent was a pre-requisite before a charge could be created over the said property.

iv. **The charge that was created over the parcel No.Muguga/ Gitaru/3112, was created in breach of the law and the 1st Defendant cannot therefore exercise its Statutory Power of Sale.**

v. **The Plaintiff avers that she has never been served with Statutory Notices as required by the Land Act.**

vi. **It is only fair and just that the orders of injunction restraining the Defendants, their agents, officers, and/or servants from interfering in any manner with land parcel No.Muguga/Gitaru/3112.**

Further the application is supported by the *Affidavit of Zipporah Wanjiku Kariuki*, the Applicant herein who averred that she is the registered proprietor of the land parcel **No.Muguga/Gitaru/3112**, which is situated in Kiambu County. She further averred that in the **year 2015**, she took a loan from the 3rd Defendant who advanced her a friendly loan of **Kshs.320,000/=** on **12th November 2015**, and she surrendered her title deed **No.Muguga/Gitaru/3112** as security. That they signed an **Agreement** to that effect and 3rd Defendant was to retain the title deed until completion of repayment of the amount of money advanced. She also averred that on diverse dates between **December 2015** and **April 2016**, she received a further loan of **Kshs.480,000/=** again from the 3rd Defendant and secured it with the same title deed for the suit property.

It was her contention that she repaid the said loan advanced to her by the 3rd Defendant which was adding up to **Kshs.800,000/=** which she paid totally. Further that after paying up, she requested the 3rd Defendant to return the title documents but he demanded payment of **interest** to the tune of **Kshs.100,000/=**. However, after she completed paying even the demanded interest, the 3rd Defendant disappeared and has been avoiding and evading her.

The Applicant further averred that the 1st Defendant illegally and irregularly allowed their matrimonial home to be used as collateral for a loan allegedly advanced to the 3rd Defendant herein. That she was surprised to learn that their matrimonial property was offered as security to the said loan. She also alleged that she was further surprised to learn that the 3rd Defendant transferred the suit property to his name on **18th November 2015**, just a week after the signing of the loan agreement, which she had taken from him and that the said transfer was done without her knowledge and consent.

It was her further contention that the speed at which the transfer was effected to the 3rd Defendant clearly indicates perpetuation of fraud since there was no **consent** from the **Land Control Board** and she did not execute the transfer thereof. She also contended that she has constructed a residential house on the subject property which is their matrimonial home wherein she resides with their children. To her, if the 1st Defendant had done due diligence on the suit property, it would have noted that the property was occupied by her and her children, the 3rd Defendant does not reside on the said property and that the Applicant was the legally registered proprietor of the suit property.

It was therefore her contention that if at all a charge was created over parcel **No.Muguga/Gitaru/3112**, then such a charge was created in breach of the law and the 1st Defendant cannot therefore exercise its **Statutory Power of Sale**. She urged the Court to allow her application.

The application is contested by the 1st Defendant/Respondent who filed a **Replying Affidavit** through **Betty Mwangera** and averred that in **January 2015**, the 3rd Defendant applied for a loan facility of **Kshs.5,000,000/=** from the 1st Defendant. She further averred that the said application was considered and on **11th June 2015**, the 3rd Defendant was offered the said loan and in turn the 3rd Defendant offered some properties as securities for the said loan facility. However, in **January 2016**, the 3rd Defendant substituted the said securities with title for **LR.No.Muguga/Gitaru/3112**, which is the suit property. She also stated that they did due diligence over the suit property and confirmed that the said land **Muguga/Gitaru/3112**, was duly registered in the name of the 3rd Defendant. That upon being satisfied that the property belonged to the 3rd Defendant, the 1st Defendant proceeded to prepare a charge in their favour. Further that the Green-card and a copy of post registration of charge showed the 1st Defendant was the registered proprietor of the suit property as at **13th November 2015**.

However, the 3rd Defendant reneged and defaulted on payment of the loan as stipulated in the charge. That the 1st Defendant notified the 3rd Defendant about the arrears and after he continued with the default, the 1st Defendant issued him with a **Notice** and thereafter instructed 2nd Defendant to proceed with the process of realizing of security. Further a **Notification of Sale** was issued and the outstanding balance was **Kshs.3,283,658.60**.

It was her contention that the 1st Defendant conducted due diligence before the charge and noted that the property was registered in favour of the 3rd Defendant and there was no evidence that the same was a matrimonial property for the Plaintiff. Therefore it was her contention that the 1st Defendant's action of charging the property was well within the law and the creation of the charge over the title was regular. She urged the Court to dismiss the instant application.

The Applicant filed a further affidavit and averred that the transfer of the property from her name to that of 3rd Defendant was tainted with **fraud** and **irregularities**, since the Consent to transfer the property from herself to 3rd Defendant seemed to have been obtained prior to the date of the Sale Agreement. Further that the 1st Defendant has not complied with the law as it has failed to issue the **Mandatory Statutory Notice** for Sale over the subject property. It was her contention that the whole process of using her title as security over the loan amount is a scheme by the Respondents to take away her property without any colour of right and fraud.

Though the 2nd and 3rd Defendants entered appearance through different advocates, they did not file any response to the instant **Notice of Motion**. Therefore the Court directed the Applicant and the 1st Defendant to file their **rival written submissions** in response to the instant application. The parties did comply with the said directions and filed their respective written submissions.

The Court has now carefully considered the instant **Notice of Motion** application and the annexures thereto. The Court has also considered the written submissions, cited authorities and the relevant provisions of law and makes the following renditions:-

There is no doubt that the suit property herein **Muguga/Gitaru/ 3112**, is charged to 1st Defendant by the 3rd Defendant for a loan facility of **Kshs.5,000,000/=**. There is no doubt that the suit property is registered in the name of 3rd Defendant as from **18th November 2015**. As a registered proprietor and as provided by **Section 26(1) of the Land Registration Act**, then the 3rd Defendant is deemed to be an **absolute and indefeasible** owner of the said registered property.

However as provided by exception **1(a)&(b)** of the said **Section 26(1)** of the above stated Act, the said Certificate of title can be challenged if the same was acquired through **fraud, through misrepresentation, illegally, unprocedurally** or through **corrupt scheme**. The said **Section 26(1)** provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

It is also evident that initially the suit property was registered in the name of the Plaintiff, **Zipporah Wanjiku Kariuki** on **29th September 2015**, and a title deed was issued in her favour. This is evident from the copy of the Green-card attached to the affidavit of the Applicant.

It is also evident that the Plaintiff/Applicant had borrowed a loan of **Kshs.320,000/=** from **George Njuguna Njoroge**, the 3rd Defendant on **12th November 2015**. As security for the said loan, the Plaintiff gave the 3rd Defendant the title deed of the suit property **Muguga/Gitaru/3112**. It is also evident that the loan agreement entered between the Plaintiff and 3rd Defendant stated that if the borrower failed to repay the loan, the 3rd Defendant was at liberty to sell the suit property. Further, the Applicant had signed a transfer form in favour of the 3rd Defendant and had even obtained Consent to transfer. It is also not in doubt that the 3rd Defendant did transfer the suit property to his name and used it as security to obtain a loan of **Kshs.5,000,000/=** from the 1st Defendant.

It is also evident that after the 3rd Defendant borrowed the loan from 1st Defendant, he defaulted in repayment of the loan facility and the 1st Defendant is now attempting to realize the security by exercising its **Statutory Power of Sale**.

The Applicant has now come to court urging the Court to restrain the 1st Defendant from exercising its Statutory Power of Sale, pending the hearing and determination of the main suit. However the 1st Defendant has alleged that it is justified in exercising its Statutory Power of Sale and it has asked the Court to dismiss the instant application.

The above background comprises of the undisputed facts. The issue for determination is whether the Applicant is deserving of the orders sought.

The orders sought herein are injunctive orders, which are equitable reliefs granted at the discretion of the court. However, the said discretion as always, has to be exercised judicially. See the case of **Nyutu & Others..Vs..Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Further as the Court embarks on determination of the instant application, it will take into account that it is not entitled to determine the issues in dispute with a finality. All that the court is entitled to is to determine whether the Applicant is deserving of the injunctive orders based on the usual criteria. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

The criteria that the Court will consider in determining this application is the one laid down in the case of **Giella....Vs...Cassman Brown & Co. Ltd 1973 E.A 358** . These criterias are:-

- a) The Applicant must establish that he has a prima facie case with probability of success.**
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) When the Court is in doubt, to decide the case on a balance of convenience.**

So has the Applicant herein established that she has a *prima-facie* case with probability of success at the trial?

In the case of *Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR 123*, the Court held that:-

“A *prima-facie* case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Applicant’s case at the trial”.

The Applicant has alleged that she borrowed a friendly loan from the 3rd Defendant of **Kshs.320,000/=** and later **Kshs.480,000/=** and offered the title deed for **Muguga/Gitaru/3112** as security for the said loan. She further stated that she repaid the full loan and demanded back her title deed. That she was surprised when she later learnt that the 2nd Defendant was preparing to sell the suit property via Public Auction upon the instructions of the 1st Defendant for a loan facility that was taken by 3rd Defendant and the suit property was charged over the said loan in favour of the 1st Defendant.

The Plaintiff has alleged that she did not transfer the suit land to the 3rd Defendant but 3rd Defendant transferred the same fraudulently in his favour. The 3rd Defendant did not file any response to the instant application and therefore did not controvert the Applicant’s allegation. However, the 1st Defendant did aver that it conducted due diligence and noted the suit land was registered in favour of 3rd Defendant and thus substituted it as security for loan facility of **Kshs.5,000,000/=** advanced to the 3rd Defendant. Though the suit property is in the name of the 3rd Defendant, the Applicant has alleged that the said transfer was illegal as it was done fraudulently without her consent.

As the Court observed earlier, it is not mandated to make a finding of disputed issues with a finality. The Court cannot at this juncture find and hold that the transfer of the suit property to the 3rd Defendant was fraudulently done or not as evidence must be tendered. However, it is evident that the Applicant only borrowed a friendly loan from the 3rd Defendant and did not sell the suit property to him. The 3rd Defendant was supposed to return the title deed to the Applicant after she was through with repayment of the loan which she alleges that she did so in full. If the Plaintiff had not sold the suit property to 3rd Defendant, then the 3rd Defendant had no business transferring the same to his name.

Further, the 1st Defendant is attempting to realize the security held by exercising its **Statutory Power of Sale**. The 1st Defendant was therefore bound to follow the laid down procedures of issuing out **Statutory Notices** in accordance with **Section 90(1) of the Land Act** which provides as follows:-

90. (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

Further, the 1st Defendant did not issue a **Notice** to sell as provided by **Section 96(2)** of the **Land Act**.

The 1st Defendant is in breach of the clear provision of law. In the case of *Elizabeth Wambui Njuguna...Vs...Housing Finance Co. Ltd (2006) eKLR*, the Court held that:-

“The omission to serve a valid Statutory Notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the Statute which derogates from the Chargor’s equity of redemption”.

Therefore the Court finds that the 1st Defendant has breached the law by failing to issue proper **Notices**. Further, the Court finds that the transfer of the suit property to 3rd Defendant is challenged by the Applicant herein. The said controversy can only be resolved through calling of evidence and before the said evidence is called, the suit property then should not be transferred to any other party or parties. Therefore the Court finds that the Plaintiff/Applicant has established that she has a *prima-facie* case with probability of success at the trial.

On the second limb of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the Applicant lives on the suit property with her family. If the suit property is sold to third party/parties through Public Auction, then she will have to be kicked out of the suit property. It would then mean looking for an alternative residence or shelter. If the suit herein would be decided in her favour at the final analysis, then the Applicant would have suffered irreparable loss which cannot be compensated by an award of damages. See the case of *Olympic Sport House Ltd...Vs...School Equipment Centre Ltd HCC No.190 of 2012*, where the court held that:

“Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction”.

The Court finds that if order of injunction is not granted herein and the Applicant loses her home through the sale of the same through Public Auction, then if she becomes the successful litigant in the final determination of the suit, the loss she will have undergone will be irreparable which cannot be adequately compensated by an award of damages.

On the third limb of if the court is in doubt to decide on the balance of convenience, the Court finds that it is not in doubt. However, even if the court is to decide on the balance of convenience, the same tilts in favour of preserving the suit property and the suit property can only be preserved by maintaining the obtaining *status quo*. See the case of *Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojjo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence, the Court finds and holds that the Applicant’s ***Notice of Motion*** dated ***13th March 2017*** is ***merited***. The same is allowed entirely in terms of ***prayer No.3 with costs being in the cause***.

The injunctive orders to last for a period of ***12 months*** unless extended by an Order of this Court.

The parties are directed to prepare the main suit for hearing expeditiously so that the issues in controversy can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of April 2018.

L. GACHERU

JUDGE

In the presence of

(Plaintiff present in person) for Plaintiff/Applicant

M/S Wangeshi for 1st Defendant/Respondent

for 2nd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court.

L. GACHERU

JUDGE

27/4/2018