



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.559 OF 2017

GEOFFREY KINUTHIA MUNGAL.....1ST PLAINTIFF/APPLICANT

LENAH WANJIKU KINUTHIA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

PROGRESSIVE CREDIT LIMITED.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated 25th May 2017, brought by the Plaintiffs/Applicants herein under various provisions of law and have sought for the following orders:-

1) Spent.

2) Spent.

3) That pending hearing and determination of this suit, a temporary injunction does hereby issue against the Defendant/Respondent restraining them from selling, letting, leasing or in any other way whatsoever from interfering with land Title No.LR.No.Kabete/L. Kabete/3396 Lower Kabete, Kiambu County.

4) That the Defendant/Respondent do bear costs of this application.

The application is premised on the following grounds:-

1) That the 1st Plaintiff is the registered proprietor of land Title No.Kabete/L.Kabete/3396 Lower Kabete, Kiambu County.

2) That the Plaintiffs are a married couple living as such on their matrimonial property being the suit property.

3) That sometime in January 2015, the 1st Plaintiff entered into an agreement with the Defendant after the Defendant offered the Plaintiff a loan facility of Kshs.662,246/= which amount was secured by household items and a charge over the suit property.

4) That the said charge was never signed nor consented to by the 2nd Plaintiff/Applicant herein despite spousal consent being a requirement for the charge instrument to be valid.

5) That the Defendant sent to the Plaintiff a Statement of Account dated 20th March 2017, in which it alleged that there was an outstanding sum of Kshs.1,142,392.05 owed to themselves by the 1st Plaintiff.

6) That the 1st Plaintiff/Applicant being aggrieved by the turn of events as he had settled all the monies owed to the Defendant requested for a detailed statement of account from the date of disbursement.

7) That the Defendant has failed, neglected and/or refused to avail the documents as requested to prove all alleged amount owed to themselves but instead instructed an auctioneer to issue a 45 days notification of sale by public auction of the suit property.

8) That the rate of interest claimed by the Defendant is not only usurious but way above the in du plum rule.

9) That the creation of the charge was illegal and unlawful.

The application is also supported by the **Supporting Affidavit of Geoffrey Kinuthia Mungai**, the 1st Plaintiff/Applicant herein who reiterated that he is the registered owner of **LR.No.Kabete/L. Kabete/3396**, Lower Kabete in Kiambu County. He also confirmed that the Defendant offered him a **loan of Kshs.662,246/=** and secured the said loan using his household items and charge over the suit property as is evident from **GKM-2**. It was his further contention that though the 2nd Plaintiff is his wife living with him on the suit property, the said charge was never consented to by the 2nd Plaintiff/Applicant herein despite **spousal consent** being a requirement for the charge instrument to be valid. It was his contention that the statement of account dated **20th March 2017**, sent to him by the Defendant alleging that the outstanding amount was **Kshs.1,142,392.05** was exaggerated. Even after he requested for detailed statement of account from the Defendant, it failed and/or refused to avail the same to him but instead instructed **Carnelian Enterprises Auctioneers** to issue a **45 days Notification of Sale by Public Auction** of the suit property as is evident from **annexture GKM-5**. He also contended that the Defendant's conduct is malicious and bad in faith and he urged the Court to allow their application.

The application was opposed by the Defendant who filed a **Replying Affidavit** through **Kenneth Mbaabu Muchiri**, a Director of the Defendant and who confirmed that indeed the 1st Plaintiff/Applicant applied and was granted loan facility of **Kshs.662,246/=** on **23rd December 2014**, which he was to repay in **18 monthly instalments** as is evident from **annexture KMM-1**. He further confirmed that the 1st Plaintiff secured the said loan by creating a charge over the suit property **Kabete/L. Kabete/3396** as per **annexture KMM-2**. It was his contention that the charge was fully consented by the 2nd Plaintiff who gave the **Spousal Consent KMM-3**. However, the 1st Plaintiff defaulted in payment of the agreed instalments and even after the Defendant demanded payment of the arrears, the 1st Applicant persisted in default. Therefore the Defendant gave the Plaintiff the **Statutory Notice** and after expiry of the **Statutory Notice period**, the Defendant instructed **Carnelian Enterprises Auctioneers** to advertise and sell the said charged property. It was his contention that the said Auctioneers issued a **Notice** to the 1st Applicant who failed to honour the demand and the property was advertised for sale and the same was sold on **5th June 2017** and therefore this application has been overtaken by events. He urged the Court to dismiss the same.

The 2nd Applicant filed a **Supplementary Affidavit** and averred that the 1st Plaintiff is her husband and they cohabit on the suit property **LR.No.Kabete/L.Kabete/3396**, which is their matrimonial property having gotten married in **1998**. However, during the time of drawing the charge document, the deponent had separated with the 1st Plaintiff/Applicant and she did not give her spousal consent nor appear before the said advocate, **Ngugi Waitihiki**, or at all to give any form of consent to charge their matrimonial home. She contended that the said charge was never signed nor consented to by herself despite spousal consent being a requirement for the charge instrument to be valid. It was her allegations that she learnt of the charge of their matrimonial property when the notification for sale was dropped off at their matrimonial home by the Defendant's representatives. She urged the Court to allow their application.

The Court directed the parties to canvass the instant application by way of **written submissions**. Consequently, the Plaintiffs/Applicants filed their submissions on **6th September 2017** and urged the Court to allow their instant application. The Applicants relied on various decided cases among them the case of **Giella...Vs...Cassman Brown & Co. Ltd (1973) EA 358**, on the conditions for grant of injunctive orders which are:-

First, an Applicant must show a prima-facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not be 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 (E.A Industries...Vs...Trufoods (1972) EA 420)

The Plaintiffs also relied on **Sections 1A & 1B** of the **Civil Procedure Act** which deals with the overriding objective of the Act and States:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

Further the Plaintiffs also submitted and relied on **Section 3A** of the **Civil Procedure Act** which states as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

The Applicants also relied on **Section 79(3)** of the **Land Act** which 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”.

And also **Section 93(3)** of the **Land Registration Act, 2012** which provides:-

Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or

spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

It was further submitted that the penalties and interest on the principal amount was disputed and in excess. Further, the Applicants submitted that they have established a *prima-facie* case with probability of success and for this they relied on the case of Wanyoike Ng'ang'a...Vs... Jamii Bora Bank Ltd & Another (2017) eKLR, where the Court held:-

“And in the case of Mrao – vs – First American Bank (K) Ltd, the Court of Appeal has this to say with regard to what amounts to a prima-facie case. “So what is a prima-facie case” I would say that in civil cases it 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 a rebuttal from the latter..... Indeed, in the case of Nguruman Limited...Vs...Jan Bonde Nielson & 2 Others, Court of Appeal No.77 of 2012, the Court of Appeal set out the standard of proof in such matters thus:

“We reiterate that in considering whether or not a prima-facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima-facie case”.

It was the Applicants' submissions that they stand to suffer irreparable loss if the application is dismissed as the charged property is their matrimonial property and if sold through public auction, they would be rendered destitute. They relied on the case of Lilian Mercy Mutua T/A Lilian M. Gems...Vs...Elizabeth Wangechi Olonginda & 3 Others, Civil Case No.36 of 2013 (2013) eKLR;

“The status quo is that the Applicant has occupation of the disputed land and is in actual occupation of the mine. Truly the balance of convenience favours the Applicant”.

On the balance of convenience, the Applicants relied on the case of Alice Awino Okello...Vs...Trust Bank Ltd & Another LLR No.625 (CCK), which was quoted in the case of Kisimani Holdings Ltd & Another....Vs...Fidelity Bank HCCC No.744 of 2012 (2013) eKLR, where the Court of Appeal held that:-

“...the balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances”.

In the end, the Applicants submitted that they have satisfied the threshold for grant of injunctive orders sought and urged the Court to allow their instant application.

The Defendant did not file its written submissions despite having been served with mention **Notices** and several opportunities to file the same. The Court reserved the matter for Ruling without the Defendant's written submissions.

The Court has now carefully considered the pleadings herein and the annexures thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

There is no doubt that the 1st Plaintiff/Applicant herein is the registered owner of the suit property **Kabete/L. Kabete/3396**. There is also no doubt that the 1st Plaintiff secured a loan facility of **Kshs.662,246/=** from the Defendant and secured the said loan by his household items and a title deed for **Kabete/L. Kabete/3396**, the suit property. The 1st Applicant has alleged that he only discovered about the charge when he carried a search on the suit property. However the Defendant alleged that the 1st Plaintiff created a charge over the suit property as can be discerned by **annexture KMM-2**. The Defendant further alleged that the 2nd Plaintiff gave her **Spousal Consent KMM-2**. However, the Plaintiffs have alleged that despite being a spouse of the 1st Plaintiff and were cohabiting together, the 2nd Plaintiff did not give her spousal consent and therefore the charge herein is invalid and unenforceable.

The issue now for determination is whether;-

i) The 1st Plaintiff/Applicant entered into a legal charge with the Defendant and whether the same is enforceable.

ii) Whether the Plaintiffs have met the threshold for grant of injunctive orders.

On whether the 1st Applicant entered into a legal charge over the suit property in favour of the Defendant, it is evident that by a **Letter of Offer** dated **9th January 2015**, the Defendant herein offered the 1st Plaintiff a loan facility of **Kshs.662,246/=** which was to be repaid within a period of 18 months. Further in **Clause No.6**, the security for the said loan was household items and a title deed for land **Reg.No.Kabete/L. Kabete/3396**. The said Letter of Offer did not state expressly that the borrower was to create a legal charge over the suit property in favour of the Defendant. Further, the alleged charge states that the alleged borrower charged his property to secure a **loan of Kshs.600,000/=** as the principal sum. The said charge did not state that the money borrowed was **Kshs.662,246/=** as per the **letter of offer** dated **9th February 2015**. The said charge is also not signed. The 2nd Plaintiff has alleged that though she is married to the 1st Plaintiff, she did not sign the spousal consent produced in court by the Defendant. Though the Defendant has alleged that indeed the 2nd Plaintiff signed the alleged spousal

consent, that allegation is disputed and the said dispute can only be resolved by calling of evidence in the main trial. However the said spousal consent is not dated and that tends to give credence to the Plaintiffs allegations.

Spousal Consent is a requirement of law and Section 79(3) of the Land Act provides:-

“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 on the matrimonial home, or there is evidence from the document that it has been assented to by all such persons”.

With the discrepancies on the amount of money borrowed by the 1st Plaintiff, undated charge and spousal consent which is disputed, the Court finds that it is doubtful on the face of it whether the 1st Plaintiff and Defendant created a legal charge capable of being enforceable or realized as per the relevant provisions of law.

On whether the Applicant has met the threshold for grant of injunctive orders as was stated in the case of Giella...Vs...Cassman Brown Co. Ltd(supra), the Court finds that the Applicants first needed to establish that they have a *prima-facie* case with probability of success. *Prima-facie* case was described in the case of Mrao Ltd...Vs...First American Bank Ltd & 2 Others (2003) eKLR 125, to mean:-

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

The Plaintiffs herein have shown that there are discrepancies on the letter of offer and the alleged charge which is allegedly due for realization. Further the Applicants have cast doubt on the validity of the charge in the absence of spousal consent. In a *prima-facie* case, all that the Applicants needed to show was genuine grievances in a form of right which has been infringed. In the case of Nguruman Ltd...Vs...Jan Bonde Nielson & 2 Others, C.A No.77 of 2012, the Court held that:-

“We reiterate that in considering whether or not a prima-facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima-facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima-facie case in on a balance or, as otherwise put, on a preponderance of probabilities”.

The Plaintiffs have alleged that though the 1st Plaintiff has paid substantial amount of money towards payment of the loan, the Defendant has exaggerated the interest accrued. Further the 1st Plaintiff has alleged that he was not served with *Statutory Notice* as provided by Section 90(1) of the Land Act which provides:-

“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”.

The Court has indeed not seen the *Statutory Notice* that was allegedly served on the 1st Plaintiff/Applicant herein. In the case of Elizabeth Wambui Njuguna...Vs...HFCK 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”

Having found that the charge in issue is not dated, the spousal consent is doubtful and that there is no evidence of service of *Statutory Notice*, the Court finds that the Applicants have established that they have a *prima-facie* case with probability of success at the trial.

On the second limb, the suit property herein is allegedly the matrimonial home of the Plaintiffs herein. If it is sold before the underlying issues are resolved, then the Applicants will indeed suffer irreparable loss which cannot be compensated by an award of damages. See the case of Joseph Siro Mosioma...Vs...HFCK & 3 Others[...] eKLR:-

“On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law..... a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

On the balance of convenience, the Court finds that the same tilts in favour of maintaining the *status quo*. The *status quo* herein is what persisted before the wrongful act herein. The wrongful act is the alleged Advertisement and Sale of the suit property by the Defendant without following the procedure laid down by the Statutes. 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?.

The Defendant has alleged that the application herein has been overtaken by events as the suit property was alleged sold by **public auction** on **5th June 2017**. However no evidence of such sale was attached to the **Replying Affidavit**.

Having now carefully considered the available evidence, the Court finds the **Notice of Motion** application dated **25th May 2017** **is merited and is allowed entirely in terms of prayer No.3 with costs to the Applicants herein**.

It is so ordered.

Dated, Signed and Delivered at Thika this 20th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Mbugua holding brief for Mr. Simiyu for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocate.

L. GACHERU

JUDGE

20/4/2018