



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC CASE NO.700 OF 2017**

**ASUNTAH WAMWIRUA NJOROGE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**HOUSING FINANCE CORPORATION LTD....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LEAKEY'S AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* application brought by the Plaintiff/Applicant under various provisions of law and has sought for the following orders:-

- 1. That an injunction do issue restraining the Respondents, either by themselves or through their authorized agents from selling, either by way of auction and/or private treaty, and/or re-advertising for sale and/or parting possession, transferring and/or interfering with properties being LR.No. Ruiru Kiu Block 3/434-Kahawa Sukari and LR.No.28736 House No.118 Ole Ngai Town House Bahati Ridge, Thika pending the hearing and determination of this matter.**
- 2. That an injunction do issue against the 2<sup>nd</sup> Respondent, either by themselves or through their authorized agents, from re-advertising the two properties being LR.No.Ruiru/Kiu Block 3/434-Kahawa Sukari and LR.No.28736 House No.118 Ole Ngai Town House Bahati Ridge, Thika for sale pending the hearing and determination of this matter.**
- 3. That the charge against the said properties in favour of the 1<sup>st</sup> Respondent be rendered null and void and the entries on the titles to the properties in respect to the charge be cancelled.**
- 4. That the OCS Kahawa Sukari Police Station and Thika Police Station to enforce these orders.**
- 5. That the costs of this application be provided for.**

The application is supported by the following grounds:-

- a. That the Applicant is the legal wife of one John Njoroge Mburu who is the Chargor of the suit properties having charged them with the 1<sup>st</sup> Defendant .**
- b. That the charged properties comprise of matrimonial homes.**
- c. That the Applicant's consent was never sought during the charging of the said properties. She did not execute any Spousal Affidavits as per law required. The charge against the two properties is therefore invalid.**
- d. That the Applicant has overriding interest in the properties subject of this suit.**
- e. That the Applicant only got to know of the charge against the properties when the same was advertised in the Daily Nation Newspaper on the 1<sup>st</sup> August 2017.**
- f. That the other property being LR.No.28736 House No.118 Ole Ngai Town House, Bahati Ridge, Thika was bought with the joint contribution of the Plaintiff/Applicant and the Chargor during the subsistence of their marriage.**

**g. That should the Respondents sell the said properties as intended, the Applicant and her children shall be rendered homeless destitute.**

Further it is supported by the *Supporting* and *Further Affidavits* of *Asuntah Wamwirua Njoroge*, the Applicant herein, who reiterated most of the contents of the grounds in support of the application and emphasized that the suit properties herein are matrimonial properties and her consent was never sought when they were charged by her husband *John Njoroge Mburu*. Further that she was apprehensive that the Respondent might go ahead and sell the properties to her detriment yet her consent was never sought at the time of registering the charge in favour of the 1<sup>st</sup> Respondent. She urged the Court to allow her application as it was just and equitable to do so and avert any injustice likely to be occasioned to herself and her family.

The application is vehemently contested by the 1<sup>st</sup> Respondent through *Eunice Kamau*, the *Assistant Legal Manager* who swore a *Replying Affidavit* on 27<sup>th</sup> September 2017 and averred as follows;

That indeed on 19<sup>th</sup> September 2014, *Housing Finance Corporation of Kenya Ltd* offered to *John Njoroge Mburu* and *Loice Wairimu Ndiba* a credit facility in the form of *Mortgage loan* for *Kshs.27,598,000/=*. That the said *John Njoroge Mburu* offered two properties as security for the said mortgage loans. In that regard, the said borrowers *John Njoroge Mburu* and *Loice Wairimu Ndiba* charged the suit properties *Ruiru/Kiu Block 3/434* for *Kshs.17,398,000/=* and *LR.No.28736 Thika*, for a sum of *Kshs.10,200,000/=* and a legal charge was registered.

Further that the said Chargor, *John Njoroge Mburu* had confirmed to the lender under oath that his *co-borrower Loice Wairimu Ndiba* was his spouse and the said *Loice Wairimu Ndiba* had signed the *Spousal Consent*. She also averred that the Chargor defaulted in repayment of the loan and as a consequence thereof, *HFC Ltd*, the Chargee exercised its *Statutory Power of Sale* over the two titles held as security for the mortgage loan.

In furtherance to the said right, the Chargee issued the relevant Notices which were not complied with and as a consequence of the said failure to comply, the Chargee instructed the 2<sup>nd</sup> Defendant to serve the Chargor with *45 days Redemption Notice* together with *Notification for Sale*. The said *Notices* were served on 9<sup>th</sup> June 2017 and the said auction was advertised on 31<sup>st</sup> July 2017 which *Public Auction* was scheduled for 16<sup>th</sup> August 2017. However, the said *Public Auction* was not successful. Therefore the action taken by the *HFC Ltd* in relation to charged properties was legitimate and proper exercise of exercise of Chargee's *Statutory Power of Sale* which had already accrued and no basis to stay the sale as the secured facility remains unpaid.

It was her contention that *Section 79* of the *Land Act 2012* on *Spousal Consent* only applies to legal charges created in respect of matrimonial homes but not matrimonial property. Further that since the Chargor, *John Njoroge Mburu* disclosed to the lender that his spouse was his *co-borrower Loice Wairimu Ndiba*, the Plaintiff's involvement in the transaction relating to creation of the security by way of legal charges could not have been contemplated by the said lender.

It was also contended that the proceedings herein have been commenced against a non-existent entity *HFC Ltd* which is unknown in law and is a stranger to the lending transaction giving rise to the dispute herein. Further that the 2<sup>nd</sup> Defendant is an agent of a disclosed principal and therefore the proceedings against it jointly with another party are untenable in law and that the claim herein is not justifiable as the Chargor who is the registered proprietor of the charged property (*John Njoroge Mburu*) has not been made a party to the suit. The Court was urged to dismiss the instant application as it does not meet the test upon which the reliefs sought may be granted.

In her further affidavit, the Applicant averred that the 1<sup>st</sup> Defendant/Respondent did not do its due diligence as far as perfecting the charge on the requirement of execution by the borrower's spouse and therefore she is a stranger to all the terms of the charge entered between the 1<sup>st</sup> Respondent and the borrower. She also reiterated that she lives with her children on the property *Ruiru/Kiu Block 3/434*, which is situated in *Kahawa Sukari* and the other property in *Bahati Ridge* was a joint investment for the family.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. Further the Court has considered the cited authorities and the relevant provisions of law and makes the following findings;

The Applicant has sought for injunctive reliefs which are equitable in nature and are always granted at the discretion of the Court. However, the said discretion must 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”.**

Further, the Court will take note that at this stage, it is not called upon to make final determination of the issues in dispute based on affidavit evidence. The Court is only supposed to determine whether the Applicant is deserving of the injunctive orders sought. See the case of *Edwin Kamau Munuu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002*, where the court held that:

**“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”**

As the Court determines the issues herein, it will be guided by the principles laid down in the case *Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358*. These principles 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.

The Applicant needed to establish that she has a *prima-facie* case with probability of success. The definition of '*prima-facie* case' was given in the case of *Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, to mean:-

**“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 a explanation or rebuttal from the latter”**

Has the Applicant herein established that she has a prima-facie case with probability of success?

The Applicant alleged that she got married to *John Njoroge Mburu* in 1998 and established their matrimonial home at *Kahawa Sukari*. She alleged that the said matrimonial home is situated on suit property *Ruiru/Kiu Block 3/434*, which was charged to 1<sup>st</sup> Defendant/Respondent without her knowledge and consent. The Applicant attached a *Marriage Certificate* to the application which shows that she got married to *John Njoroge Mburu* on 21<sup>st</sup> November 1998. However the 1<sup>st</sup> Respondent alleged that *John Njoroge Mburu* obtained a loan facility from *HFC Ltd* on 19<sup>th</sup> September 2014 and charged his two properties which were in his name to the lender. Further that the said *John Njoroge Mburu* introduced *Loice Wairimu Ndiba* his co-borrower as his spouse and she signed the *Spousal Consent*. Indeed the Court has seen the *Spousal Consent* which is an annexure herein.

It is not in doubt that the suit properties were registered in the name of *John Njoroge Mburu* as a sole proprietor. The borrowing was done by the said *John Njoroge Mburu*. Though the Plaintiff alleged that the said *John Njoroge Mburu* is her husband who is now the Chargor, she did not enjoin him in the suit. It is not clear to this Court whether the two are still married or not. As was held in the case of *Susan Anne Karanja...Vs... Lenana Towers Ltd (2014) eKLR*, it was necessary to enjoin the spouse against which an allegation of failure to procure consent from his or her spouse is made. The Court held as follows:-

**“I do deem it right to express the view that in such cases, the Plaintiff should always give serious consideration to the course of joining the alleged errant spouse to the proceedings before the court. ...such spouse is not only a necessary party but also a proper party to the proceedings”.**

The Court finds that the Chargor was not made a party to this proceedings and the Court would not be certain at this juncture whether the marriage between the Applicant and the Chargor *John Njoroge Mburu* is in existence or was dissolved and Chargor got married to the said *Loice Wairimu Ndiba* who gave a *Spousal Consent*.

Further, the Applicant has alleged that she lives on the suit property *Ruiru/Kiu Block 3/434*, which is her matrimonial home. Apart from that allegation, she did not avail any other evidence to prove that she lives on the said suit property together with her husband *John Njoroge Mburu*. Section 2 of the *Land Act 2012* describes 'Matrimonial Home' as thus:-

**“Any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”**

It was incumbent upon the Applicant to demonstrate that she occupies the suit property *Ruiru/Kiu Block 3/434* together with the registered proprietor *John Njoroge Mburu*. The Court will be persuaded by the findings in the case of *Esther Njeri Mwangi...Vs...Equity Bank Ltd & Another (2017) eKLR*, where the Court held that:

**“She also urged that the suit property is her matrimonial home; that she resides there with her children and stands to be rendered destitute if the suit property is sold. The Plaintiff has led no evidence to prove that her matrimonial home is situated on the said property. It is her duty and responsibility to bring herself under the ambit of Section 2 of the Matrimonial Act which defines a Matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property. It was her duty to lay evidence before the court that the Plaintiff and 2<sup>nd</sup> Defendant occupy the suit property as their family house and that there is a home on the suit property and that the Plaintiff and 1<sup>st</sup> Defendant occupy the home as their formerly home/Matrimonial home. I hold and find that the Plaintiff has not established that she is a spouse for which consent was required and secondly that the suit property is a matrimonial property”**

The Court therefore finds that the Plaintiff/Applicant has failed to establish that the two suit properties are matrimonial properties/homes.

It is also evident that the Chargor borrowed and charged the suit properties to secure the said loan. The said borrowers allegedly defaulted in payment of the mortgaged loan and the 1<sup>st</sup> Defendant is thus exercising its *Statutory Power of Sale* as provided by the Charge and the law as its right has accrued. There is no good reason advanced as to why this Court should bar or restrain the 1<sup>st</sup> Defendant from exercising its remedies as provided by the law. The Plaintiff/Applicant has therefore failed to establish that she has a *prima-facie* case with probability of success at the trial.

On the second limb, though the Applicant alleged that the suit property was a matrimonial home, it is evident that the borrower charged it to

secure loan facility from the 1<sup>st</sup> Defendant. Once the suit property was charged, it became a commodity for sale and the Applicant cannot turn around and allege that she will suffer irreparable loss which cannot be compensated by an award of damages. See the case of **Paul Muhoro Kihara...Vs...Barclays Bank (K) Ltd, Milimani HCCC No.33 of 2002 (2001) 2EA 420**, where the Court held that:-

**“Once land has been given as security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful as there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages”.**

The Court will further concur with the findings in the case of **Davis Nyanjui t/a Davis Academy & Another....Vs... National Bank of Kenya Ltd (2015) eKLR**, where the Court held that:-

**“I fully agree with Mr. Kinuri Advocate’s submissions that sentimental attachment and value of a property cannot be a serious consideration to deny the chargee exercise of its statutory power of sale whether it be a family home, college, school or even a spiritual house as held in Nduati Kariuki t/a Johester Merchants..vs..National Bank of Kenya (supra). It is the court’s finding that arguments that the properties being matrimonial home, and educational institute are improperly and totally misplaced and cannot be used as a ground to deny a charge from exercising its charge power of sale”.**

It is also not in doubt that the suit property herein have a determined value. The 1<sup>st</sup> Respondent is a stable Bank and in the event after the trial it is found that the 1<sup>st</sup> Defendant was wrong in realization of its security, then it can compensate the Applicant by an award of damages. See the case of **Elizabeth Nthenya Wambua...Vs...Philip Masila & 3 Others (2012) eKLR**, where the Court held that:-

**“I am also minded that the suit property has a determinable value. If in the end the Plaintiff prevails in the declaration for ownership of a share of the property she can be compensated in damages”.**

See also the case of **Davis Nyanjui t/a Davies Academy & Another...Vs...National Bank of Kenya Ltd (2015)eKLR**.

**“The Applicants on the other hand would not suffer irreparable loss as the Respondent is a reasonably stable bank that would ordinarily have no difficulty in repaying whatever damages that the Applicants may suffer by denial of the injunctive orders sought”.**

Taking into account the facts of this case and the findings of the above stated cases, the Court finds that the Applicant herein has not established that she will suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb, the Court finds that it is not in doubt at all. However, if the Court was to decide on a balance of convenience, it would definitely decide in favour of the 1<sup>st</sup> Respondent who gave the borrowers a secured loan, which loan remains unpaid and it continues to escalate and there is imminent danger that the loan and interest thereon might outstrip the value of the properties used as securities making it difficult for the Chargee to recover the loan facility advanced. See the case of **Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others (supra)**, the Court held that:-

**“...if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off the suit property, 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. .... the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss”**

After careful consideration of the available evidence, the Court finds that the balance of convenience tilts in favour of the 1<sup>st</sup> Respondent herein and not the Plaintiff/Applicant.

Further the Applicant has sought for an order that the Charge against the properties be rendered **null** and **void** and the entries on the titles to the properties be cancelled. However, this is a mandatory order and/or final order which has also been sought for in the main suit. The principles to be considered in the grant of mandatory injunctive or order were laid down in the case of **Kenya Breweries Ltd & Ano....Vs....**

**Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109**, where the Court held that:

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”.** See **Volume 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948**.

From the available evidence, the Court finds that this is not a simple case that can easily be settled nor is there evidence that the Defendants are attempting to steal a march against the Applicant herein. Therefore the Court finds no special circumstances exist herein to warrant grant of mandatory and/or final orders as sought by the Applicant in prayer No.5 of the instant **Notice of Motion**.

Having now carefully considered the instant **Notice of Motion**, the

Court finds it not merited and consequently the said **Notice of Motion** is hereby dismissed entirely with costs to the Defendants/Respondents.

It is so ordered.

***Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of June 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Waweru holding brief for M/S Nganga for Plaintiff/Applicant

Mr. Juma holding brief for Mr. Mutua for 1<sup>st</sup> Defendant/Respondent

2<sup>nd</sup> Defendant/Applicant

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

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

**L. GACHERU**

**JUDGE**

**19/6/2018**