



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 269 OF 2016

JANE WEKESA ANDEA.....PLAINTIFF

VERSUS

EZEKIEL BESA MAGE.....1ST DEFENDANT

THE LAND REGISTRAR KILIFI.....2ND DEFENDANT

CREDIT BANK LIMITED.....3RD DEFENDANT

RULING

1. By A notice of Motion application dated and filed herein on 11th October 2016, Jane Wekesa Andea, the Plaintiff herein prays for an order that the Defendants/Respondents herein, Ezekiel Besa Mage, the Land Registrar Kilifi and Credit Bank Ltd be restrained by way of a temporary injunction from auctioning, selling, charging, mortgaging, subdividing, pledging, disposing, alienating or dealing with all that property known as Kilifi/Kijipwa/198 in any other manner that will affect the Plaintiff's title to the said property.

2. The application is supported by an affidavit sworn by the Plaintiff and is premised on the grounds:-

- i) That the Plaintiff is the registered owner of the said parcel of land having been issued with a title deed on 6th March 1998;***
- ii) That a Search carried out on 30th September 2016 revealed that the 3rd Defendant had registered a charge on the property;***
- iii) That the Plaintiff realised that the 1st Defendant had used a fake title deed and other false documents to secure a loan of Kshs 6,500,000/- from the 3rd Defendant in December 2014;***
- iv) That the title deed used to secure the loan had the Plaintiff's name and her identity particulars;***
- v) That the 1st Defendant is not known to the Plaintiff and the Plaintiff has never given out her title to anybody to secure a loan;***
- vi) That the 1st Defendant has not been servicing the said loan and the Plaintiff's property is under threat of being auctioned by the 3rd Defendant.***

3. In a detailed Replying Affidavit sworn by its Legal Counsel Wainaina F. Ngaruiya and filed herein on 9th February 2017, the 3rd Defendant Bank avers that the Plaintiff and the 1st Defendant approached the Bank to offer the 1st Defendant an overdraft facility to be secured by the title of all that parcel of land known as Kilifi/Kijipwa/198 which is registered in the Plaintiff's name.

4. That subsequently the Bank approved the overdraft facility to the 1st Defendant for a period of 12 months with a security of individual guarantee by the Plaintiff and the 1st Defendant and by a legal Charge over the suit property. The 3rd Defendant further avers that all required documents were tendered to the advocates by the Plaintiff and the 1st Defendant after which the legal charge was prepared and registered in the 2nd Defendant's offices as against the title for the suit property.

5. The 3rd Defendant states that during the process the Plaintiff fraudulently misrepresented her signatures to the 3rd Defendant in all documents that she executed and/or that she is currently faking her signature with a view to bring a claim that the signature specimens and

copies of her identity card issued during the preparation for the Charge were not hers for purposes of defrauding the 3rd Defendant of the sum charged.

6. The 1st and 2nd Defendants have neither entered appearance nor filed any pleadings herein.

7. I have considered the Plaintiff's application and the 3rd Defendant's response thereto. I have also considered both the written and oral submissions made before me by the Learned Advocates for the parties; Ms Oweya for the Plaintiff and Ms Kaguru for the 3rd Defendant.

8. In granting injunctive relief, Courts are guided by the principles laid down in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*. The said principle provide that:-

i) The applicant must demonstrate a prima facie case with a probability of success;

ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage which cannot be adequately compensated in any way or by an award of damages; and

iii) If the Court is in doubt, it will decide an application on a balance of convenience.

9. Accordingly, the first inquiry that this Court must make is whether on the material placed before me, the Applicant herein has demonstrated that she has a prima facie case with a probability of success. The definition of a prima facie case was fashioned by the Court of Appeal in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others(2003)KLR 125*, as follows:-

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

10. Expounding on the definition of prima facie case as given in *Mrao Ltd Supra* in the case of *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others(2014)eKLR*, the Appellant Court further observed as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

11. In the matter before me, it is not disputed that the Plaintiff is the registered proprietor of the suit property. It is the Plaintiff's case that on or about 15th September 2016, she received a phone call while at her Kitale home from the 3rd Defendant's security officer who informed her that he was investigating a possible fraud case involving the use of a forged title deed to secure a loan from the Bank.

12. Subsequently, on or about 21st September 2016 she visited the 3rd Defendant's office in Nairobi and was shown documents including a title deed that had been presented to the Bank by the 1st Defendant in the process of securing a loan. According to the Plaintiff, she compared the documents presented by the Bank with her own and she was able to detect some discrepancies on the title that was presented to the Bank as follows:-

i) The said title did not have the edition number; and

ii) It had no opening entry date.

13. The Plaintiff further states that she was shown a copy of an identity card that was presented to the Bank and she noted a number of anomalies as follows:-

i) The photograph affixed to the identity card was not the Plaintiff's but was of another woman;

ii) The date of the issue of the said identity card was different to the one belonging to the Plaintiff;

iii) Her date of birth was incorrectly stated; and

iv) The signature thereon was not the Plaintiff's.

14. The 3rd Defendant however insists that it is the Plaintiff and the 1st Defendant who approached them for the loan facility which they approved in the sum of Kshs 6,500,000/-. It is the Bank's case that the approval followed the scrutiny of the documents which were presented to them including a Valuation Report of the land in question. It is further the 3rd Defendant Bank's case that the Plaintiff fraudulently misrepresented her signature in all the documents she executed for purposes of defrauding the Bank.

15. I note however that the Bank is silent on the Plaintiff's assertion that it is the Bank Security Officer who first alerted her of the possible fraud when he called and informed her that he was investigating a possible fraud involving the use of her title. The Bank is equally silent on

the Plaintiff's claim that the photograph in the identity card that was used to secure the loan is not that of the Plaintiff. If indeed the Plaintiff is the one who secured the loan it would be difficult to understand how the Bank's officers did not notice such an anomaly during the scrutiny which they claim to have subjected her documents to.

16. As it were, there is a major probability that someone else other than the Plaintiff may have used falsified documents to get the loan from the 3rd Defendant. It is also apparent from the material placed before me that the 1st Defendant who was granted the loan has since vanished into thin air without settling the same. As it is there is every possibility that the 3rd Defendant will want to exercise its statutory power of sale any time from now, a process which may lead to the alienation of the suit property to a third party.

17. In the circumstances, I am satisfied and I do find that the Plaintiff has established a prima facie case with a probability of success during the trial. If the suit is alienated before trial the Plaintiff stands to suffer irreparable loss. The application dated 11th October 2016 is accordingly allowed with costs to the Plaintiff/Applicant.

Dated, signed and delivered at Malindi this 28th day of September, 2018.

J.O. OLOLA

JUDGE