



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 4 OF 2018

REGINA MUMBUA MUTHAMA.....PLAINTIFF/APPLICANT

VERSUS

JOHN MUTHAMA KATOLO.....1ST DEFENDANT/RESPONDENT

SAUTI TRANSPORTERS CO. LTD.....2ND DEFENDANT/RESPONDENT

STANDARD CHARTERED BANK (K) LTD.....3RD DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 10th January, 2018, the Plaintiff is seeking for the following orders:

a. That an order of temporary injunction do issue restraining the 3rd Defendant/Respondent from advertising for sale, selling, taking possession of, alienating, disposing either by private treaty or public auction or in any other manner interfering with the title to and land parcel no. Iveti/Kiandani/3427 pending the hearing and determination of the suit herein.

b. Costs be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that she is the wife of the 1st Defendant and also a Director of the 2nd Defendant; that the 1st Defendant is the registered owner of land parcel number Iveti/Kiandani/3427 (*the suit land*) and that on the suit land, they have constructed their matrimonial home.

3. According to the Applicant, although the suit land is registered in the name of the 1st Defendant, the 1st Defendant is holding it in trust for her; that she has an equal share in the suit land under the matrimonial Property Act and that her consent was required before any dealing affecting the title to the suit land is registered.

4. The Applicant deponed that she has never given her consent either as a spouse or as a Director of the 2nd Defendant to the securing of a loan of Kshs. 13,600,000 by the 1st and 2nd Defendants from the 3rd Defendant and that in January, 2018, she came across notices dated 4th April, 2017, 26th July, 2017 and 17th October, 2017 addressed to the 1st and 2nd Defendants revealing that the 3rd Defendant had loaned to the 1st and 2nd Defendants Kshs. 13,600,000.

5. The Plaintiff finally averred that the said loan was obtained irregularly and illegally; that the demand notices were never copied to her contrary to the provision of the law and that the notices sent by the 3rd Defendant are illegal and in contravention of Section 90(2) (b) of the Land Act because they seek for the repayment of the entire outstanding loan amount.

6. In response, the 3rd Defendant's Credit Manager deponed that the 2nd Respondent, through its Directors, the Plaintiff and the 1st Defendant, approached the bank for a loan facility of Kshs. 13,595,930; that all the parties executed the charge documents and that the 1st and 2nd Defendants have not adhered to the terms of repayment of the loan facility.

7. The 3rd Defendant's Credit Manager deponed that as a result of default in repaying the loan, the 3rd Defendant, through its lawyer, issued notices to the Plaintiff and the 1st and 2nd Defendants; that the Plaintiff gave her spousal consent to the acquisition of the financial facility and that the 2nd Defendant resolved to borrow money from the 3rd Defendant.

8. The 3rd Defendant's Manager finally deponed that the Plaintiff is working in cahoots with the 1st and 2nd Defendants to deny the 3rd Defendant the opportunity to recover the debt which is due and owing and that the Application should be dismissed.
9. The Plaintiff's advocate submitted that the Applicant did not give spousal consent to the charge and that the Applicant is likely to suffer unquantified loss and damage unless the orders of injunction are granted.
10. The 3rd Defendant's advocate submitted that when the 1st and 2nd Defendants defaulted in repaying the loaned amount, the statutory notices were issued; that the Applicant executed the spousal consent that is attached on the charge document; that the Plaintiff signed the resolution by the 2nd Defendant to borrow the money from the 3rd Defendant and that the current Application is frivolous and vexatious. The Plaintiff's and the 3rd Defendant's advocates relied on numerous authorities which I have considered.
11. The evidence before me shows that the 3rd Defendant registered a charge against a parcel of land known as Iveti/Kiandani/3427 (*the suit land*) for a loan facility. It is not clear from the charge document when the document was registered against the suit land, if at all.
12. The consent of the Plaintiff to the charging of the suit land forms part of the charge document. According to the said document, the Plaintiff signed the certificate certifying that she had given her spousal consent to the charging of the suit land on 28th November, 2015.
13. The bank statement annexed on the 3rd Defendant's Affidavit shows that after charging the suit land, Kshs. 13,595,930 was credited on the 2nd Defendant's account. According to the Memorandum and Articles of Association, the Directors of the 2nd Defendant are the 1st Defendant and the Plaintiff respectively.
14. The Plaintiff has alleged that as a Director of the 2nd Defendant, she was entitled to be served with the statutory notices before any attempt to sell the suit land by way of public auction could be undertaken by the 3rd Defendant. However, in her own Affidavit, the Plaintiff annexed the letter dated 4th April, 2017 which was addressed to the 2nd Defendant. Another letter dated 26th July, 2017 addressed to the 2nd Defendant has also been exhibited on the Plaintiff's Affidavit. The two notices gave the 2nd Defendant the statutory notice of three (3) months and forty five (45) days respectively pursuant to the provisions of Section 96(2) of the Land Act.
15. Having admitted that she came across the said notices which were in her house, and having not denied that the postal address shown on the said notices actually belong to the 2nd Defendant, then the notices were not only received by her husband, but also by her in her capacity as a Director of the 2nd Defendant. She cannot now depone that the requisite statutory notices were never served on the borrower.
16. Section 96(2) (c) of the Land Act requires the 3rd Defendant to serve a copy of the notice on "*a spouse of the chargor who had given the consent*" before exercising the power of sale. This is more so considering that the suit land is matrimonial property where the consent to charge it was sought and obtained from the Plaintiff as the spouse of the registered owner. It does not matter that the Plaintiff was also a Director of the 2nd Defendant and that she was served as such. She was also entitled to be served with notices in her capacity as a spouse as well.
17. Having found that the provision of Section 96(2) (c) of the Land Act was not complied with, I find that the Plaintiff has established a prima facie case with chances of success. I therefore allow the Application dated 10th January, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE