



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 240 OF 2017

ISHA MOHAMED NOOR.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

1. By a Notice of Motion application dated and filed herein on 30th November 2017, Isha Mohamed Noor(the Plaintiff/Applicant) prays:-

3. That an interim injunction do issue against the Defendants by themselves, their servants and/or agents from selling, offering for sale, advertising, alienating, transferring by public auction or Private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that parcel of land known as Portion Number 10801 (CR 34037) and Portion Number 11215(CR 46603) pending the hearing and determination of this suit.

4. That an order be made under the doctrine of lis pendens and section 106 of the Land Registration Act(previously enshrined under Section 52 of the Indian Transfer of Property Act(1959) (repealed) pending the final determination of this suit in accordance with the law, all further registration or change in the registration and ownership, leasing, subleasing, allotment, user, occupation or possession of any kind of right, title or interest in the charged property in any land registry, Government Department and all other registering authorities be and is hereby prohibited in all that Parcel of land known as Portion Number 10801 (CR 34037) and Portion Number 11215(CR 46603); and

5. That the costs of the application be provided for.

2. The application is supported by the Plaintiff's Affidavit sworn on the same day and is based on the grounds that:-

i) That Plaintiff is the 1st Widow of the late Tahir Sheikh Said Ahmed who died on 10th January. 2017;

ii) The deceased was the majority shareholder of TSS Group of Companies which is a family business;

iii) That despite the TSS Group of Companies owning vast properties and investments, the deceased also had properties registered in his own name;

iv) The Plaintiff has now learnt that the deceased's properties known as Portion No. 10801 (CR 34037) and Portion No. 11215 (CR 46603) have been charged and the borrower defaulted hence the same are up for sale by way of public auction;

v) The Plaintiff avers that at no single time did she give spousal consent for her husband to charge the said properties which are registered in the deceased's name.

vi) The Plaintiff avers that she has never been served with Statutory Notices and only became aware of the sale when leaflets were being circulated advertising the same;

vii) The failure to obtain the Plaintiff's Spousal consent renders the whole charge defective. In any event, the Plaintiff's

matrimonial rights over the properties supersedes those of the Bank;

viii) It is the Plaintiff's case that if the orders sought are not granted forthwith, the Defendants will proceed with the sale of the suit properties rendering this application and subsequent suit nugatory and a mere academic exercise yet the Plaintiff has made out a prima facie case with a probability of success at the trial; and

ix) The 1st Respondent does not stand to suffer any prejudice since the suit properties are charged in their favour and (they are) still holding the title documents and they can adequately be compensated by an award of damages.

3. In a lengthy and detailed reply to the application filed herein on 19th February 2018 the 1st Defendant Bank through its Section Head Francis Kiranga, avers that the Plaintiff has not adduced any or any substantive evidence or grounds to entitle her to the orders sought herein. The 1st Defendant reckons that the primary purpose of the Plaintiff is to restrain the Bank from exercising its statutory right of sale in respect of the suit properties.

4. The 1st Defendant avers that it is not in dispute that the suit properties are registered in the name of the Tahir Sheikh Said Ahmed and that the same were charged to the Bank as security for various financial facilities advanced by the Bank to a borrower named KAAB Investment Ltd. The 1st Defendant states that the said borrower defaulted in its loan repayment obligations to the Bank thereby triggering the Bank to exercise its Statutory Power of sale.

5. The 1st Defendant asserts that the charges registered over the suit properties were created by Tahir Sheikh Said Ahmed in the years 2009 and 2010 respectively and the Land Act, 2012 upon which the Plaintiff bases her pleas and arguments for spousal consent does not apply in the circumstances herein.

6. The 1st Defendant further avers that as at the time the Bank commenced recovery proceedings, the aforementioned KAAB Investment had grossly defaulted on its loan repayment obligations and that as at 25th February 2016, the borrower was indebted to the Bank in the sum of Kshs 32,617,383.67/- and USD 2, 426,895.42.

7. It is further the 1st Defendant's case that initially when it commenced recovery proceedings by way of exercising its Statutory Power of sale over the suit properties, the borrower and the said Tahir Sheikh Said filed a suit being Malindi ELC No. 2 of 2016 which case remains pending before the Court. After the death of Tahir Sheik Said Ahmed, Plaintiff herein and her co-widow took over the said proceedings.

8. The 1st Defendant therefore avers that the Plaintiff has deliberately failed to make full and frank disclosure to the Court of the existence of the said Malindi ELC No. 2 of 2016 and these proceedings are hence a direct affront to the provisions of Sections 6 and 7 of the Civil Procedure Act and amounts to an abuse of the Court Process.

9. It is the Defendant's case that the 2nd Defendant is its agent duly instructed to conduct the sale of the suit properties by way of a public auction. The Defendant Bank is therefore a disclosed principal and the suit and Motion against the 2nd Defendant does not therefore lie. They therefore urge the Court to dismiss the application as it lacks both legal and factual merit.

10. I have considered the application and the response thereto. I have also taken into account the detailed submissions placed before me by the Learned Advocates for the parties. The crux of the Plaintiff's case is her contention that the two properties sought to be sold by the 1st Defendant Bank were their matrimonial home with one Tahir Sheikh Said Ahmed who passed away on 10th January 2017. It is the Plaintiff's case that she did not give spousal consent to her deceased husband to charge the two properties to the 1st Defendant and further that to-date she has neither been served with Statutory Notices in regard thereto by the 1st Defendant as by law required.

11. In the arguments canvassed before me, the Plaintiff submits that she was the 1st wife of the said Tahir Sheikh Said Ahmed with whom they lived and/or cohabited in the suit properties situated within Malindi. It is her case that since the 1st Defendant Bank failed to procure her consent before registering a charge over the suit properties, the resulting charges are defective and this Court should therefore restrain the Bank from exercising its Statutory Power of sale arising out of the defective charges.

12. From the material placed before me, it is not in dispute that both properties in dispute are registered in the name of the late Tahir Sheikh Ahmed. The deceased charged the suit properties in the years 2009 and 2010 to the Bank as security for various financial facilities advanced by the Bank to a borrower by the name KAAB Investment Ltd. Apparently, the said KAAB Investment Ltd has defaulted in its repayment of the loan and was at 25th February 2016 indebted to the Bank in the sum of Kshs 32,617,383.67/- and USD 2,426,893.42.

13. The circumstances warranting the grant of an interlocutory injunction were long enunciated in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd(1973)EA 358* where the Court stated that:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not 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.”

14. As to what constitutes a prima facie case, the Court of Appeal stated in *Mrao –vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125*, that it is one which:-

“includes but is not confined to a “ genuine and arguable case.” It is a case 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 an explanation or rebuttal from the latter.”

15. In the matter before me, the Plaintiff contends that as the spouse of the late Tahir Sheikh Said Ahmed, her consent was not obtained prior to the registration of the Charges upon the Suit Properties. She does not however deny that the said Charges were registered in the years 2009 and 2010. As Ohungo J stated in ***Gladys Wanjiku Waititu –vs- Housing Finance Company Ltd & Another (2017) eKLR:-***

“The requirement of spousal consent was introduced by Section 79(3) of the Land Act 2012. The Act came into force on 2nd May 2012. Prior to that date there was no requirement for spousal consent and the second defendant did not need to obtain spousal consent prior to registration of the Charge instruments dated 28th October 2009 and 1st September 2010. Simultaneously with the Land Act, 2012, Parliament also enacted the Land Registration Act 2012 which also came into operation on 2nd May 2012. Section 109 of the Land Registration Act 2012 repealed the Registered Land Act. I am not alone in holding the view that there was no requirement for spousal consent prior to 2nd May 2012. Mutungi J stated as follows in Barclays Bank of Kenya Ltd –vs- Attorney General & Another (2015) eKLR:-

“I further hold that Section 79(3) of the Land Act cannot apply to prior charges taken prior to the coming into force of the Land Act 2012 and a Chargee of a matrimonial property under a prior charge will be taken to have accrued a right over the charged property without the requirements of spousal consent and would in terms of Section 162 of the Land Act 2012 be entitled to have the benefit of the rights and interests conferred by the prior charge notwithstanding the absence/lack of spousal consent as envisaged under Section 79(3) of the Land Act 2012.”

16. I find no reason to deviate from the above finding that Charges registered before the enactment of the Land Registration Act 2012 cannot be invalidated on the basis that Spousal consent had not been obtained. It was not a requirement prior to the enactment and the Plaintiff's pursuit to invalidate the charges herein registered in the years 2009 and 2010 on similar grounds appears to me to be a very long shot which is by all standards unlikely to hit the target.

17. Indeed Section 60 of the Land Laws(Amendment) Act, 2016 has since amended Section 78(1) of the Land Act(2012) and brought in a proviso as follows:-

a) The provisions of this part shall not be contrived so as to effect the validity of any entry in the register of any charge, mortgage, (or) other security instrument which was valid immediately before the commencement of this Act and the entries in the register and the Charges, mortgages or other instruments shall continue to be valid in accordance with their terms notwithstanding their inconsistency with the provisions of this part;

b) The provisions relating to the realization of any charge, mortgage or other instrument created before the commencement of this Act shall apply save for the requirements to serve notices to spouses and other persons who were not required to be served under the repealed Acts of Parliament.

18. Arising from the foregoing, it is clear to me and I agree with the submissions of the 1st Defendant that the validity of the charges cannot be challenged on the grounds raised by the Plaintiff in the Application before me.

19. The second issue raised by the Plaintiff is her contention that she was not served with any statutory notice prior to the exercise of the 1st Defendant's Statutory Power of sale. From the record, it is apparent that the 1st Defendant Bank instructed Messrs Garam Investment Auctioneers (the 2nd Defendant) to conduct a sale of the suit properties by way of a public auction. Accordingly, the said Auctioneer prepared leaflets in which it advertised the sale which was scheduled for 4th December 2017. For some reasons, the sale did not take place. It is the Plaintiff's case that she was never served with any notice and that she only came to learn of the scheduled sale when she became aware of the leaflets which were being circulated around.

20. The 1st Defendant however refutes the Plaintiff's contentions. It is their case that as a result of the Banks recovery efforts, the said Tahir Sheikh Said and the borrower –KAAB Investments Ltd filed a suit being ***ELC Case No. 2 of 2016; Tahir Sheikh Said Ahmed & KAAB Investment Ltd –vs- Kenya Commercial Bank Ltd.*** After Tahir's death, the Plaintiff herein and her co-widow, one Hamude Ahmed Said took over the proceedings as Administrators of the Estate and the said suit remains pending before the court.

21. It was further the 1st Defendant's position that by a Ruling delivered by this Court on 12th May 2017, the Court held that the Bank was validly exercising its statutory power of sale and dismissed an application seeking injunctive orders against the Bank. It is therefore the 1st Defendant's case that the Plaintiff was all along aware of the attempts by the Bank to sell the suit properties and the allegations that it came to learn of the same through the leaflets is not true.

22. From the material placed before me, it is not denied that the Plaintiff and the said Hamude Ahmed Said were married to the late Tahir Sheikh Said Ahmed. Tahir passed away on 10th January 2017 and the Plaintiff and her co-wife were issued with Limited Letters of Administration to enable them substitute the deceased in the said Malindi ELC No. 2 of 2016 on 5th June 2017. That was about a month after the Ruling delivered by this Court on 12th May 2017.

23. As it were, the Plaintiff contends that she lived and/or cohabited with the late Tahir Sheikh Said Ahmed on the suit properties which she considered her matrimonial home. In support of this contention, she has annexed a number of photos of buildings which she avers are her matrimonial home.

24. In law, a spouse would have an equal even though unregistered interest over the matrimonial home. Thus if the Plaintiff is to be believed she ought to have been given a chance to redeem the properties where her husband was unable to. Indeed while the absence of the spousal consent does not vitiate a charge registered prior to the commencement of the Land Act 2012, it is my view that the same does not absolve the Chargee from giving notice to a spouse who has interest in such matrimonial property.

25. Such notice must be given in the required form and the mere fact that the Plaintiff became aware of the case filed by her deceased husband against the 1st Defendant does not in my considered opinion absolve the 1st defendant from the requirement to give notice. That in my view must be the reason why Section 78(1) (b) of the Land Act 2012 (as amended by Section 60 of the Land Laws(Amendment) Act aforesaid imports the requirements to serve notices to spouses and other persons who were not required to be served under the repealed Acts of Parliament into the present law.

26. In the circumstances of this case therefor I find and hold that the 1st Defendant was under an obligation to serve the Plaintiff with a Statutory Notice. No such notice was issued as by law required. Accordingly I hereby grant an injunction as sought at Prayer 3 of the application,

27. As it is not denied however that the borrower is in default, the 1st Defendant shall be free to exercise its Statutory Power of sale once proper notices are issued to the Plaintiff, if thereupon, the debt shall remain outstanding.

28. Each party shall bear their own costs.

Orders accordingly.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE