



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ENVIRONMENT AND LAND CASE No. 461 OF 2017

E N M N.....PLAINTIFF

VERSUS

R M S.....1ST DEFENDANT

EQUITY BANK LIMITED.....2ND DEFENDANT

KEYSIAN AUCTIONEERS.....3RD DEFENDANT

RULING

1. By Notice of Motion dated 14th December 2017, the plaintiff sought the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit, the honourable court be pleased to issue an injunction restraining the defendants herein whether by themselves, their agents and/or servants from offering for sale, advertising, selling or transferring all that parcel of land registered as LR No. [particulars withheld].

4. That costs of this application be in the cause.

2. The application is supported by an affidavit sworn by the plaintiff. She deposed that since 10th March 1995, she has been married under Maasai Customary Law to M K who is the registered proprietor of the parcel of land known as [particulars withheld] (the suit property). She added that sometime in the year 2014 a charge was registered against the suit property to secure a loan advanced by the 2nd defendant to the 1st defendant. She further deposed that despite the fact that her matrimonial home is on the suit property, she was neither informed about the charge nor was her spousal consent obtained. The 2nd and 3rd defendants advertised that the suit property would be sold by public auction on 19th December 2017.

3. The 2nd defendant responded to the suit and the application by filing Grounds of Opposition dated 18th January 2018 and Notice of Preliminary Objection dated 18th January 2018. The issues raised in the Grounds of Opposition were generally similar to those in the preliminary objection. The grounds specified in the Notice of Preliminary Objection were:

1. That the honourable court lacks the requisite jurisdiction to hear and determine this matter as it relates to Narok ELC No. 187 of 2017 (Formerly Nakuru ELC No. 382 of 2016) Muruntoi Kiramba vs Equity Bank, Richard Mancha Sururu and Keysian Auctioneers between the same parties touching on the same subject matter.

2. That this suit offends the provisions of Section 6 of the Civil Procedure Act, CAP 21 Laws of Kenya.

3. That the application dated 14th December 2017 is res judicata orders issued in Narok ELC No. 187 of 2017 (Formerly Nakuru ELC No. 382 of 2016) on 25th July 2017 by the Hon. Judge M. Kullow and orders issued on 14th November 2016 by the Hon. Judge S. Munyao.

4. That the suit and application is an abuse of court process as it does not raise any triable issues.

5. That the plaintiff's plaint and application herein are therefore frivolous, vexatious, scandalous, misconceived, bad in law and an abuse of the court process hence should be dismissed with costs.

4. Additionally, the 2nd defendant also filed a replying affidavit sworn by Joseph Muhia, its Credit Manager. He deposed that there exists another suit being **Narok ELC No. 187 of 2017 Murentoi Kirampa –vs- Equity Bank, Richard Mancha Sururu & Keysian Auctioneers** (the Narok case) which concerns the suit property herein and which is pending before ELC Narok and in which the court dismissed an application to stop statutory sale on 25th July 2017.

5. Directions were given that both the application and the preliminary objection be heard together by way of written submissions. Accordingly, both the plaintiff and the 2nd defendant filed submissions on 9th October 2018. The 1st and 3rd defendants neither responded to the application nor attended its hearing.

6. The law relating to preliminary objections is well settled. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

7. It should be noted that the preliminary objection herein is based on the assertion that there exists another suit, being the Narok case, which concerns the suit property herein and which is pending before ELC Narok and in which the court dismissed an application to stop statutory sale on 25th July 2017. It is the 2nd defendant and not the plaintiff which introduced the allegations about existence of the said case. The 2nd defendant cannot be allowed to introduce evidence and then seek to prop its preliminary objection using the said evidence. Clearly, the preliminary objection is not a valid one. It is dismissed. Nevertheless, since the very same issues have been raised in the grounds of opposition and replying affidavit, I will consider them as a general response to the application.

8. The issues raised by the 2nd defendant in the grounds of opposition as well as the replying affidavit in regard to **Sections 6 and 7 of the Civil Procedure Act** go to the jurisdiction of the court. I will therefore deal with them first. Should nothing turn on both, I will return to the merits of the application.

9. **Section 6 of the Civil Procedure Act** provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

10. On the other hand, **section 7** of the Act provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

11. As the side note to Section 6 suggests, if I find that the issues raised in this suit are also directly and substantially in issue in the Narok case, the result will be that this suit is stayed.

12. I have perused the plaint herein as against the plaint in the Narok case. In this matter, the plaintiff seeks a declaration that she has an overriding interest in the suit property, a declaration that the charge over the suit property in favour of the 2nd defendant is invalid for want of spousal consent and a permanent injunction restraining the 2nd defendant from selling the suit property. On the other hand, a perusal of the plaint in the Narok case, a copy of which was annexed to the replying affidavit filed on behalf of 2nd defendant reveals that the said suit was filed on 20th September 2016 and that the plaintiff therein is MK who the plaintiff herein says is her husband while both the defendants therein and the suit property therein are the same as herein. The reliefs sought therein are a declaration that an intended sale by public auction of the suit property is illegal and a permanent injunction to restrain the defendants from selling the suit property. In the circumstances, I find and hold that I find that the issues raised in this suit are also directly and substantially in issue in the Narok case. In the circumstances, I will not determine the Notice of Motion dated 14th December 2017. Instead, I will order transfer of this suit to ELC Narok so as to allow for a just determination of the dispute before the court. The court in Narok may be moved appropriately as regards res judicata, Notice of Motion dated 14th December 2017 and the suit generally.

13. In the end, I order that:

- a) This matter is hereby transferred to Environment and Land Court at Narok.
- b) Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 11th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Amulabu holding brief for Mr Otieno for the plaintiff/applicant

No appearance for the 1st and 3rd defendants/respondents

Mr Ikua holding brief for Ms Chesoo for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi