



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 244 OF 2015

PHYLIS WANGARI GITHINJI.....PLAINTIFF/APPLICANT

-VERSUS-

AGRICULTURAL FINANCE CORPORATION LTD....1ST DEFENDANT/RESPONDENT

ANDREW GITHINJI MWIHURI.....2ND DEFENDANT/RESPONDENT

LEGACY AUCTIONEERING SERVICES.....3RD DEFENDANT/RESPONDENT

RULING

Introduction

1. On 22nd September, 2015 the plaintiff, **Phyllis Wangari Githinji** (hereinafter referred to as the applicant) filed the suit herein seeking a declaration that the charge created over land parcel **Tetu/Kiriti/69** (hereinafter referred to as the suit property) was unlawful, thus null and void and/or voidable. She also sought a permanent injunction to restrain the 1st and 3rd defendants, their servants, agents, employees or anyone working under their instructions from advertising for sale, offering for sale, or selling the suit property by public auction.
2. Simultaneously with the plaint, the applicant filed a notice of motion seeking to, *inter alia*, restrain the 1st and 3rd defendants, their servants, agents, employees or anyone working under their instructions from advertising for sale, offering for sale, selling the suit property by public auction pending the hearing and determination of the suit.
3. The application is premised on the grounds on its face, and is supported by an affidavit sworn on **18th September, 2015**. In that affidavit, the applicant depones that the 2nd respondent (her husband) had taken out a financial facility and charged the suit property to the 1st respondent without her knowledge; that she was thus perturbed when she received the redemption notice and notification of sale from her casual labourer stating that the suit property would be sold by way of public auction on 8th October, 2015.
4. The application is opposed vide the replying affidavit sworn on **5th October, 2015** by **Mainga Evans**, a legal officer in the 1st respondent's corporation on their behalf and on behalf of the 3rd respondent. He depones that the 2nd respondent borrowed Kshs 300,000 from the 1st respondent and used the title to the suit property as security for the loan; that all along, the applicant knew of the arrangement and a monthly sum of Kshs 9,750 was been deducted from her bank account.

5. It is his contention that the 2nd respondent fell into arrears in repayment of the loan facility and was duly served with all relevant notices on the following dates;

i) Letters dated 14th July, 2011, 21st September, 2011, 9th February, 2012, 27th September, 2013 and 13th March, 2014, by the 1st respondent reminding him that he was in arrears and should make arrangements to clear the same. As at 13th March 2014, the arrears stood at Kshs 108,711.

ii) A letter dated 23rd February, 2012 by which the 1st respondent recalled the loan amounting to Kshs 355,500 and issued a statutory notice of their intention to sell the property within 3 months under the Agricultural Finance Corporation Act, Cap 323, Laws of Kenya.

iii) A letter dated 28th July, 2015 through which Legacy Auctioneering Services issued the 45 days' redemption notice.

6. The legal officer further depones that the application is a clear attempt to hoodwink the court as the applicant executed the banker's order in favour of the 1st respondent regarding the loan agreement. It is his contention that the applicant has not come to court with clean hands and has failed to disclose material particulars. According to him, this application is brought in bad faith and is an abuse of the court process aimed at defeating the 1st respondent's statutory right of sale.

7. The 2nd respondent vide his replying affidavit sworn on **2nd October, 2015**, supported the applicant's motion. He blamed the 1st respondent for failing to disclose to him that his wife's consent was mandatory under the new Land laws. He admits taking the loan facility from the 1st respondent but stated that he had paid close to half the amount owing and the only reason why he had stopped repaying the loan was because his only cow had died making it difficult for him to raise the money.

8. The applicant swore a supplementary affidavit on **6th November, 2015** where she averred that the 2nd respondent never disclosed all material facts to her; that had they done so, she would not have consented to her husband using the suit property as security for the loan facility.

9. The application came for hearing on 8th December, 2016, with **Mr Miano** appearing for the applicant, **Mr Mutuma** holding brief for **Mr Rashid** for the 1st and 3rd respondents and the 2nd respondent appearing in person.

10. Mr Miano submitted that the 2nd respondent (the applicant's husband) took the loan facility and used the suit property as security without the applicant consent. He argued that if the suit property was sold, the applicant would be rendered destitute.

11. In reply, **Mr Mutuma** relied on the replying affidavit of Mainga Evans and submitted that the applicant assisted the 2nd respondent in taking out the loan and even used her account to repay the loan. Furthermore, the Land Act, 2012, was not in force when the loan facility was granted in 2010, therefore spousal consent was not mandatory.

12. On his part, the 2nd respondent submitted that he was never advised by the 1st respondent's officers that spousal consent was mandatory and associated himself with the submissions made on behalf of the applicant.

13. In a rejoinder, Mr Miano admitted that while it was true that the money by the 1st respondent was deposited in the applicant's account, the 2nd respondent also had access to that account and there was no evidence that the applicant knew what was going on.

The law applicable:-

14. The application before me is for injunctive relief by the chargor to prevent a chargee from exercising their rights under a charge. **Ouko J.** (as he then was) observed in the case of **Patrick Karimi Wairagu t/a Thigi General Stores vs. Barclays Bank of Kenya Ltd & Another** (Nakuru HCCC NO. 93 OF 2011) that the applicant must also satisfy the three conditions of **Giella vs. Cassman Brown & Company Ltd (1973) E.A 358:-**

“The onus at this stage, is upon the Applicant to persuade the court that upon the facts he has relied on and on the application of the law, he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour.”

Analysis and determination

15. It is the applicant’s contention that spousal consent was never obtained although the suit property is matrimonial property. The 2nd respondent supports this position and states that he was never advised by the 1st respondents officers that he needed to obtain consent from the applicant.

16. As pointed out by Mr Mutuma counsel for the 2nd respondent, the Land Act, 2012 was not operational at the time the charge was registered on 28th May, 2010. Therefore obtaining spousal consent was not mandatory in 2010. **Mutungi J** captured this very well in the case of **E N W v P W M & 3 others [2013] eKLR**, when he stated;

“Charges taken 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 of the new Land Registration Act and therefore the plaintiff in the present case cannot have refuge under the new Land Act.

17. Regarding the contention by the applicant that she never allowed her husband to charge the suit property and had no idea what was going on, I find the applicant to be dishonest. I say so because she executed the banker’s order from which the monthly sum of Kshs 9,750 was drawn and bank account used for these transactions was in her name.

18. **Okong’o J** in the case of **Belcom Agencies Limited & another v Ecobank Kenya Limited & another [2015] eKLR**, stated as follows:-

“Justice is a double edged sword. It cuts both ways. It would be unconscionable in the circumstances to grant the orders sought by the plaintiffs herein. The conduct of the plaintiffs does not deserve the exercise of this court’s discretion in their favour. Injunction is an equitable remedy. He who comes to equity must come with clean hands and must also do equity. I have found the plaintiffs conduct inconsistent with these equitable principles.”

18. Finally, it is important to note that the 2nd respondent is registered as the sole proprietor of the suit property and was under no obligation to disclose the details of the transaction to the applicant. In this, I am guided by the words of **Omondi J** in the case of **Mary Ngaru v Family Bank Ltd & 2 others [2014] eKLR** when she relied on the decision of **Ojwang J** (as he then was) in **Muchoki v Mwangi [2005] eKLR** and stated;

“The terms of proprietorship as shown on the document of title include the right of alienation, and it is not specified that the lawful title holder is under any obligation, during his or her lifetime, to pay regard to any broader family preferences before exercising such a right. This has the effect of conferring upon property titles the marketable quality which guarantees that third parties acting in good faith and giving value in return, can lawfully acquire land title from its original owner. In theory therefore, Peter Muchoki Gachina’s land title, or part of it, could lawfully pass on to the defendant through an exclusive two-party transaction involving vendor

and purchaser, without the intervention of broader family interests such as those represented by the plaintiff in this case. This being possible, it follows that the defendant if he acted in good faith and gave value for the suit land, and lawfully got himself registered as the new owner, would become the lawful proprietor of the same for all purposes, and his title could not then be defeated by claims founded on the moral claims of the family.”

19. For the above reasons, I find that the applicant is not entitled to the orders sought and I dismiss her application with costs to the 1st and 3rd defendants.

Dated, Signed and Delivered at Nyeri this 8th day of February, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Ms Ann Thungu h/b for Mr. Miano for the plaintiff/applicant

N/A for the defendants

Court clerk - Esther