



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 164B OF 2016**

**LUCY NJERI MACHARIA..... PLAINTIFF/APPLICANT**

**-VERSUS-**

**FRASHIAN WAMBUI NJERI ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FAULU MICROFINANCE BANK LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. On **22<sup>nd</sup> July, 2016** the plaintiff, **Lucy Njeri Macharia** (hereinafter referred to as the applicant) filed the suit herein seeking a permanent injunction to restrain the defendants, their servants and/or agents from selling, dealing, interfering, alienating or disposing off all that parcel of land known as **Loc. 11/Maragi/5068** (hereinafter referred to as the suit property).
2. Simultaneously with the plaint, the applicant filed a notice of motion seeking to, *inter alia*, temporarily restrain the defendants by themselves, their servants and/or agents from selling or advertising by way of auction or private treaty, dealing, interfering, alienating or disposing the suit property pending the hearing of the suit.
3. The application is premised on the grounds on its face, and is supported by the affidavit sworn on even date by the applicant. In that affidavit, she depones that she is the registered owner of the suit property and has attached a certificate of official search to confirm this position; that the 1<sup>st</sup> respondent (the applicant's daughter) obtained a loan facility from the 2<sup>nd</sup> respondent and the applicant acted as her guarantor. She avers that the 2<sup>nd</sup> respondent has never advanced the charge document for her perusal and neither did they obtain spousal consent from her husband before creating the legal charge despite the suit property being matrimonial property. Furthermore, the 2<sup>nd</sup> respondent has never furnished her with the requisite statutory notices and only served her with the letter dated **19<sup>th</sup> May, 2016** and a notification of sale both from Dalali Traders Auctioneers. She reiterates that should the suit property be sold, she will suffer irreparable harm as the whole family will be rendered homeless and destitute.
4. The application is opposed vide the replying affidavit of **Purity Raaria**, a legal officer sworn on **27<sup>th</sup> July, 2016**. She depones that the application is fatally defective, devoid of merit, vexatious, brought in bad faith and ought to be dismissed as the applicant had not come to court with clean hands. It is the 2<sup>nd</sup> respondent's contention, that the applicant executed a charge instrument in favour of the 2<sup>nd</sup> respondent dated 30<sup>th</sup> October, 2014 (PR-3) to the effect that she had agreed that the 2<sup>nd</sup> respondent if need be would sue or demand immediate payment from her or any person whose liabilities and obligations have

been guaranteed by her and also swore an affidavit on **24<sup>th</sup> October, 2014** during the securitisation process that she was a single woman (PR-4 and PR-5) .

5. The 2<sup>nd</sup> respondent further contends that the applicant was duly served with all relevant statutory notices as follows:

i) A letter dated **14<sup>th</sup> September, 2015**, in which the 2<sup>nd</sup> respondent issued a demand notice under **Section 90** of the Land Act to the 1<sup>st</sup> respondent to regularize her account, which was in arrears of **Kshs 68,106/-**. This was sent to both the applicant and the 1<sup>st</sup> respondent through registered mail on **15<sup>th</sup> September, 2015**.

ii) A letter dated **13<sup>th</sup> January, 2016** in which the 2<sup>nd</sup> respondent issued a notice of their intention to sell the property under **section 96** of the Land Act. This was also sent to both the applicant and the 1<sup>st</sup> respondent through registered mail on **21<sup>st</sup> January, 2016**.

6. The 2<sup>nd</sup> respondent further avers that the applicant's actions in swearing an affidavit that she was a single woman amounts to perjury and she cannot fall back on being misdirected or unduly influenced. It is the 2<sup>nd</sup> respondent's contention that neither the applicant nor the 1<sup>st</sup> respondent have made any proposals to the 2<sup>nd</sup> respondent on how they will clear the loan arrears and salvage the suit property despite several letters to them by the 2<sup>nd</sup> respondent. Finally, the legal officer depones that as the remedy sought is equitable, the applicant ought to have conducted herself in a manner that would enable her obtain the orders sought.

7. The 1<sup>st</sup> respondent supported the applicant's motion and the prayers sought. In her replying affidavit sworn on **9<sup>th</sup> November, 2016**, she depones that her father (the applicant's husband) was not aware of the transaction and neither was the applicant aware of the contents of the charge document. She further depones that the postal address the 2<sup>nd</sup> respondent sent the demand notices to, was not hers, therefore she could be deemed to have been properly served. However, she is amenable to enter into negotiations with the 2<sup>nd</sup> respondent to clear her arrears.

8. When the application came up for hearing on 1<sup>st</sup> December, 2016, **Ms Wanjira** holding brief for **Ms Kimani** chose to rely on the grounds of the application as well as the supporting affidavit and the following authorities filed in support of the applicant's claim;

**1. Peter Ngure Kihuto v Co-operative Bank of Kenya Ltd & Another [2015] eKLR,**

**2. Albert Mario Cordeiro & Another v Vishram Shamji 2015] eKLR,**

**3. David Ngugi Ngaari v Kenya Commercial Bank Ltd [2015] eKLR and**

**4. Joel Gitau Macharia & Others v Mary Mwangi Njuguna & Another [2015] eKLR.**

9. The 1<sup>st</sup> respondent who was unrepresented, informed the court that they had visited the 2<sup>nd</sup> respondent but the officers at the bank had not given her specific time lines within which to repay the loan.

10. Counsel for the 2<sup>nd</sup> respondent, **Mr. Onsare** submitted that the bank had halted the sale of the suit property to give the 1<sup>st</sup> respondent time to clear her arrears. He observed that despite the court order issued on 19<sup>th</sup> October, 2016 directing the 2<sup>nd</sup> applicant to deposit Kshs.100,000 with the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent had only paid Kshs 50,000. It was his submissions, that this clearly demonstrated that the applicant and 1<sup>st</sup> respondent by failing to comply with the court orders, had not come to court with clean hands and were therefore undeserving of orders sought.

11. The application before the court is for injunctive relief made under **Section 103** of the Land Act, 2012 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 now famous 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.”**

12. **Section 104** of the Land Act, 2012 lays down the criteria for consideration by the court before it grants any relief to the applicant.

13. It is the applicant’s case that she was never served with a copy of the charge document; that spousal consent was never obtained and that she has never been served with any document by the 2<sup>nd</sup> respondent except the letter dated 19<sup>th</sup> May, 2016 and the notification of sale, both from Dalali Auctioneers.

14. The applicant filed the following authorities in support of her case: **Peter Ngure Kihuto v Co-operative Bank of Kenya Ltd & Another [2015] eKLR, Albert Mario Cordeiro & Another v Vishram Shamji 2015] eKLR, David Ngugi Ngaari v Kenya Commercial Bank Ltd [2015] eKLR and Joel Gitau Macharia & Others v Mary Mwangi Njuguna & Another [2015] eKLR.** These authorities support the position that the courts will not allow the chargee to exercise its statutory power of sale unless the conditions as spelt out in the Land Act, 2012 are met.

15. The 1<sup>st</sup> respondent supports the applicant’s case and states that she too was not served with any notice. She gives her address for service as **P.O. Box 1028-10200, Murang’a**, and not **P.O. Box 205-10200, Murang’a** as indicated by the 2<sup>nd</sup> respondent.

16. On the other hand, the 2<sup>nd</sup> respondent states that they fully complied with the law as required and had not yet sold the suit property.

17. On whether the 2<sup>nd</sup> respondent fully complied with the conditions set out in **Sections 90(2)(a), 96(2) and (3) and Section 97(2)** of the Land Act, it is my view that together with the issue of spousal consent, these issues should be canvassed at the main trial when documents can be produced and witnesses called because as observed by **Lord Diplock in American Cyanamid Co. v Ethicon Limited (1975) 1 ALL ER 504 at 509;**

**“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”**

18. At this stage, all I need to establish is whether the applicant has satisfied the conditions set out in the **Giella** case to be granted the orders of injunction sought.

19. On 28<sup>th</sup> July, 2016 this court ordered the applicant to deposit a sum of **Kshs 100,000** with the 2<sup>nd</sup> respondent before close of business on that date. By **19<sup>th</sup> October, 2016** when the matter came up for hearing, the applicant and 1<sup>st</sup> respondent had only deposited **Kshs 50,000**. The 1<sup>st</sup> respondent urged the court to give her more time to raise the money as she had all intentions to make the payment. Mr Onsare, counsel for the 2<sup>nd</sup> respondent did not object and advised the applicant and 1<sup>st</sup> respondent to enter into some agreement with the bank on how the arrears would be paid. By the time this motion came for hearing, no further payments had been made by the 1<sup>st</sup> respondent to the bank.

20. **Okong'o J**, in the case of **Belcom Agencies Limited & another v Ecobank Kenya Limited &**

another [2015] eKLR, Okong’o J, while dealing with a similar application found as follows:-

**“As things stand now, the plaintiffs owe the defendants an admitted sum of Kshs. 9,791,128.59 as at 31st October 2012 which they are not servicing and which is admittedly secured by a charge over the suit properties. 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.”**

21. **Ochieng J in Kwality Candies & Sweets Ltd v Industrial Development Bank Ltd [2007] eKLR** made a similar finding;

**“When the Hon. Ransley J. delivered his Ruling on 20th April 2006, he dismissed the application dated 9th March 2006. It is instructive to note that the learned judge made the following findings:**

**“Leaving aside the fact that the Applicant had already been given a great deal of indulgence by the court, the Applicant seeks to rely on an agreement which has not been implemented in accordance with the terms thereof. It is clear that the agreement for the sale of the Muthaiga property is a long way of completion, if ever. Also the sale of the machinery, which is prayed in aid does not as yet exist. The Applicant does not deny that it owes money nor that the Respondent has a right to appoint a receiver, its only prayer is basically for more time. The order of Mr. Justice Emukule was given eleven months ago and yet no payment has been made since. In my view, the Applicant has had enough time and there must be an end to prevarication.”**

22. So, does the applicant deserve the orders sought after she failed to fully comply with orders of the court issued on 28th July, 2016? **Koome J (as she then was) in Aggrey Peter Thande v Co-operative Bank of Kenya & 2 Others [2009] eKLR** provides an answer:

**“In this case the plaintiff admits having defaulted in the loan repayment. He failed to comply with a consent order; he comes to court and obtains an order of injunction on conditions which he does not comply with. Is he entitled to an equitable relief by way of an order of injunction? I am afraid the plaintiff is not entitled to an equitable relief. The plaintiff admits having secured a loan, which he had not paid. He willingly used his title to secure borrowings and the natural consequences of his default, were well set out in the charge documents which he willingly executed. The bank under the terms of the lending was entitled to realize the charged property to recover the loan.**

**The plaintiff’s complaint as I understand it has nothing to do with the issuance of the statutory notices and the requirements for advertisement. The plaintiff claim is that the 1st defendant did not have the statutory power of sale and the property was sold illegally. Bearing in mind the plaintiff defaulted in loan repayment, I am afraid he has not established a prima facie case with a probability of success. In any case his remedies lie in damages if indeed he succeeds in proving his case.”**

23. I adopt the holding in the aforesaid case and decline to grant the orders of injunction sought and dismiss the application dated 22nd July, 2016 with costs to the 2nd respondent.

**Dated, Signed and Delivered at Nyeri this 1<sup>st</sup> day of February, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Ms Wanjira h/b for Mr. Onsare for the defendants

N/A for the plaintiff

Frashian Wambui Njeri – 1st defendant

Court clerk - Esther