



Mwendwa v Kirigia; Consolidated Bank of Kenya & another (Interested Parties) (Environment and Land Appeal E037 of 2023) [2024] KEELC 71 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 71 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E037 OF 2023
CK NZILI, J
JANUARY 17, 2024**

BETWEEN

EVAH MUKAMI MWENDWA APPELLANT

AND

PETER MUTHURI KIRIGIA RESPONDENT

AND

CONSOLIDATED BANK OF KENYA INTERESTED PARTY

DAVID KIJOGI INTERESTED PARTY

RULING

1. The court is asked to issue inhibition and temporary injunction orders restricting any dealings barring and restraining the respondent and the interested parties from evicting the applicant and the family from LR No. Abothuguchi/Githongo/916, pending hearing and determination of the appeal.
2. The grounds are on the face of the application and the affidavit of Evah Mukami Mwendwa sworn on 17.10.2023.
3. Briefly, the applicant avers that suit land was used as security for the advancement of credit facility without spousal consent, any alleged spousal consent was a forgery; she was on the verge of being evicted from the only residence and matrimonial home, the trial court failed to holistically look at the evidence tendered in arriving at its judgment; there appears to have been fraud or collusion in the alleged affidavit for spousal consent; the application has been made without delay and unless the orders sought are granted, she stands to be prejudiced.
4. The 1st and 2nd interested parties oppose the application by replying to an affidavit sworn by Mary Kitawa and David Kijogi on 1.11.2023, respectively. The 1st interested party avers by a letter of offer dated 15.2.2016, it advanced Kshs.2,000,000 to Ezra Mwiti t/a Makfix Solutions Ltd, which loan



was served by a legal charge over LR No. Abothuguchi/Githongo/916, registered in the respondent's name, who further guaranteed the borrower in the event of default. Attached to the affidavit was a copy of the letter of offer instrument of charge dated 9.3.2016 and a deed of guarantee as an annexure marked MK "1" & MK "2".

5. The 1st interested party averred the appellant voluntarily, with no coercion or undue influence, had executed a spousal consent in compliance with the law before the legal charge instruments were registered. The 1st interested party further averred the borrower failed and or refused to remit the agreed monthly installments to it, and as a result, the loan fell into arrears. The 1st averred that owing to the default, requisite statutory notices were issued to the borrower and the respondent who ignored to clear the outstanding arrears, leading to initiation of debt recovery measures by way of public auction as per advertisement in the standard newspaper on 29.3.2022, a copy annexed and marked as MK "3".
6. Upon learning of the moves, the 1st interested party averred the respondent filed Githongo Magistrates Court CC No. E007 of 2022 seeking injunctive orders to stop the auction sale under an application dated 21.4.2022. Additionally, the 1st interested party averred the trial court delivered a ruling on 14.11.2022, dismissing the same for a successful public auction on 20.12.2022 to the 2nd interested party.
7. The 1st interested party, while transferring the suit property to the 2nd interested party, learned of an inhibition registered against the suit property under an application filed by the applicant in Nkubu ELC No. 5 of 2022.
8. Further, the 1st interested party averred an independent advocate had witnessed the signed spousal consent; hence, a valid charge was created and registered in its favor. Therefore, it was averred that the contents of paragraphs 3 and 4 of the supporting affidavit were a non-starter; it was never raised before the trial court, and this court should reject the invitation to frame new issues for determination at this stage.
9. Similarly, the 1st interested party averred that the contents of paragraph 5 of the supporting affidavit were a mere clutching of straws as the applicant willingly signed a spousal consent, and to suggest a forensic examination be conducted on her specimen signature was outrageous and amounted to a wild goose chase for it was not raised before the trial court.
10. The 1st interested party also averred that the applicant by signing the spousal consent, lifted the protection veil, and converted the suit property into a trading commodity capable of sale and transfer in the event of a default in contractual obligation by the respondent and the borrower. It was averred that the applicant was clearly on an untenable mission to reopen and rewrite a contract.
11. The 1st interested party averred the applicant was estopped from claiming a family home of sentimental value since she willingly, without coercion, undue influence, or duress, executed the spousal consent and never disputed the registration of the charge in favor of the 1st interested party.
12. In addition the 1st interested party averred that a person seeking equitable relief must come to court with clean hands and fully disclose all the facts. Unfortunately, it was averred that the application before the court was marred with deceitful representation whose intent was to hoodwink the court, yet she has not demonstrated that she deserves the reliefs sought, the application is made in bad faith; it intends to prejudice, frustrate and obstruct it from effecting the transfer in favor of the 2nd interested party.
13. On the other hand, the 2nd interested party averred that the respondent having filed in the Githongo ELC Case No. E007 of 2022, colluded with the applicant to file a new suit at Nkubu law courts, where she obtained inhibition orders to prevent the transfer. He attached the pleadings as an annexure marked



- DK "4" and urged the court to find the appeal without merits; the application as falling short of meeting a threshold for conservatory order of injunctions or inhibition; a scheme by the applicant and the respondent to defeat the cause of justice and block him from enjoying the fruits of his land purchase.
14. The 1st interested party relied on written submissions dated 1.11.2023. It is submitted that the applicant has not met the grounds to grant the orders of injunctions as set in [*Raphael Mulinge Muthusi & others v Mary Ndila Nyolo*](#) (2022) eKLR, [*Nguruman Ltd v Jan Bonde Nielsen & 2 others*](#) C.A No. 77 of 2022 and [*Mrao Ltd v First American Bank of \(K\) Ltd*](#) (2003) eKLR.
 15. The 1st interested party submitted that order 42 rule 27 of the [*Civil Procedure Rules*](#) bars an appellant from adducing additional evidence on appeal, and in this case, the issue of signing a spousal consent was never disputed at the trial court. Further the 1st interested party submitted the suit that the property was already sold, and the issues raised could not be raised for she has no legal rights over the property, and her continued stay on the property constitutes an illegal possession given any rights of redemption over the property was extinguished on 20.12.2022, when the auction sale took place. Reliance was placed on [*Kamulu Academy Ltd & another v British American Insurance \(K\) Ltd & others*](#) (2018) eKLR.
 16. Further, the 1st interested party submitted allegations that the suit formed part of the matrimonial property with sentimental value, was irrelevant. Reliance was placed on [*Wilstone Mdingi Mwawagunga v Kenya Women Microfinance Bank PLC*](#) (2022) eKLR, [*Naftali Ruthi Kinyua v Patrick Thuita Gachure & another*](#) (2015) eKLR and [*Stanbic Bank & another Martin Tumaini Ngala*](#) (2018) eKLR.
 17. On inhibition orders, the 1st interested party submitted that the applicant had failed to meet the threshold as held in [*Dorcas Muthoni & others v Michael Ireri Ngari*](#) (2016) eKLR, for the ground advanced by the appellant were devoid of truths and baseless the alleged issue of spousal consent was not raised before the trial court; the property is already sold, and her rights did not exist over the land after the fall of the hammer.
 18. The 1st interested party submitted that since the equity of redemption was extinguished, the applicant was on a wild goose chase, only coming after the land was long lawfully and legally auctioned; otherwise, what was remaining was to finalize the transfer and registration in favor of the 2nd interested party. Reliance was placed on [*Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina*](#) (2019) eKLR.
 19. The issue for determination is whether or not the applicant is entitled to a grant of inhibition or injunction pending appeal. In the case of [*Kitbo Civil & Engineering Co. Ltd v NBK*](#) (Civil Appeal application) E 706 of 2021 (2023) KECA 381 (KLR) 31st March 2023 (Ruling), the court cited with approval [*Alfred Mincha Ndubi v Standard Ltd*](#) (2020) eKLR [*Multimedia University & another v Prof. Gitile N Naituli*](#) (2014) eKLR and [*Stanley Kangethe Kinyanjui v Tony Keter & 2 others*](#) (2013) eKLR, that the applicant has to establish the appeal is arguable and was likely to be rendered nugatory if the injunction is not granted and the appeal succeeds. The court said that considering whether the appeal will be rendered nugatory, a party must demonstrate any peculiar facts or exceptional circumstances and raise arguable grounds for his appeal. On the nugatory aspect, the court said it depends on whether what is sought to be stayed, if allowed to happen, will be reversible or, if not, whether damages will reasonably compensate the aggrieved party.
 20. The applicant complains that a valid spousal consent to charge the property was never obtained from her. She also avers that the suit land is her matrimonial home, which she occupies with her children. In [*Africa Safari Club Ltd v Safe Rentals Ltd*](#) (2010) eKLR, the court said that with a scenario of almost equal hardship by the parties, it was incumbent upon the court to pursue the overriding objective to act



fairly and justly, by putting the two hardships on a scale, treating both parties with equality or placing them on equal footing in so far as it is practicable.

21. In this appeal, the applicant has not disputed that the suit property was sold through a public auction on 20.12.2022. The 2nd interested party has exhibited a certificate of sale, advertisement notice, conditions of sale, and a copy of the transfer.
22. The 2nd interested party, on the other hand, avers that the respondent had challenged the public auction in a different suit before a different court, which was dismissed, paving the way for the public auction on 20.12.2022, where the 2nd interested party was the highest bidder only for the applicant to turn up with an inhibition order.
23. An injunction pending appeal is discretionary in nature. The interested parties term the application as an abuse of the court process. An abuse of court process applies to proceedings wanting in bonafide, which are frivolous or vexatious. It also refers to abuse of legal procedure or improper use of the legal process. It consists of the intention, purpose, and aim of the person exercising it to harass, irritate, annoy the adversary, and interfere with the administration of justice. See [*Muchanga Investment Ltd v Safaris Unlimited \(Africa Ltd\) & others*](#) (2009) eKLR.
24. The applicant has not denied that the respondent had filed a different suit to stop the public auction. The applicant was not a party to that suit. It is unclear why she filed a different suit before a different court. It appears the applicant was attempting to forum shop and perhaps get favorable orders. There is also no indication if the applicant's orders dismissing the injunction to stop the auction were appealed against. The applicant has also not denied that there was a pending loan that led to the public auction.
25. In [*Patricia Njeri & others v National Museums of \(K\)*](#) (2004) eKLR, the court said a temporary injunction would be exercised against an applicant whose appeal is frivolous or where it will inflict more significant hardship than it would avoid. Put another way, in [*Madbupaper International Ltd v. Kerr*](#) (1985) eKLR, the court said it would be wrong to grant a temporary injunction if the appeal is frivolous and would inflict greater injustice than it would avoid.
26. The interested parties have said all the legal processes were followed, and the equity of redemption was extinguished on 20.12.2022, at the fall of the hammer. The interested parties submitted that the applicant, and the respondent lost their right; hence, no inhibition or temporary injunction can safeguard it. The 1st interested party has averred that the appellant is on the suit land illegally.
27. An arguable appeal need not succeed but would be one that requires to be heard by a court. See [*Kenya Commercial Bank v Nicholas Ombija*](#) (2009) eKLR. The interested parties have not denied that the applicant occupies the suit land. Besides finding that the applicant voluntarily executed the spousal consent, the trial court did not hear her on merits. The lower court suit is still pending. The applicant had raised a claim of beneficial interest to the matrimonial home.
28. In [*Mugo Muiru Investment Ltd v EWB & others*](#) (2017) eKLR, the court cited with approval [*Kenya Commercial Bank v James Osebe*](#) (1982-1988) 1 KLR 48, that a remedy of a borrower whose property is sold in a public auction following statutory sale was in damages. The court said that at the auction sale, Housing Finance Corporation of Kenya knew or ought to have known that Elizabeth claimed to be a co-owner and was in possession and control since she had attempted to take over the second debt. The court said the equitable interest combined with actual possession and control of the matrimonial home gave rise in common law to an overriding interest superior to that of an adverse possessor. The court said that before the Land Registration Act, became operational, the married spouse's unregistered proprietary interest in the matrimonial home was held in trust as an overriding interest. The court said



the transfer by the Housing Finance Corporation of Kenya to the appellant was subject to Elizabeth's overriding interest.

29. The court cited with approval Lord Denning in *William and Glyn's Bank v Boland* (1979) 2 ALL ER 697, that anyone who lends money on the security of a matrimonial home ought to realize a wife has a share on it and should not turn a blind eye to the wife's interest and a bank should recognize the integrity of the matrimonial home which it cannot destroy by disregarding the wife's interest and that courts should not give money over social justice and that a wife's position should be protected in the society.
30. The interested parties were aware of the spousal consent. They should have made more inquiries on the occupation rights of the spouse. Similarly, the interested parties knew of the pending suits. The doctrine of *lis pendens* requires a party aware of pending suits to be aware of the pending litigation rights. I think the applicant has an arguable appeal.
31. The interested parties have not stated if they gave the applicant the mandatory 3 months' notice to hand over vacant possession or be evicted as per law. In *Wilstone Mdindi Mwawugunga (supra)*, the court cited *Julius Mainge Anyega v. Eco Bank Ltd* (2014) eKLR with approval that no matrimonial property will be sold without giving the necessary notices to the mortgagor's spouse.
32. There is no evidence by the interested parties that they gave the applicant, who had allegedly signed a spousal consent notice of the default by her husband, and the impending statutory power of sale. In *MWK v. PKM (interested party) Equity Bank (K)* (2019) eKLR, the court observed that under Sections 105 and 106 of the *Land Act*, a charge could be reopened by the court if there was unfair dealing or practices, including discrimination.
33. To my mind, I think the appellant has demonstrated an overriding right, which should be protected by way of inhibition and interim injunction pending appeal; otherwise, if the eviction occurs and transfer is affected, there will be more harm to the applicant if her appeal were to succeed, than to the interested parties if they were to await a little while for the appeal to be heard on merits.
34. The upshot is that the inhibition and temporary injunction orders shall be issued against the interested parties from transferring or effecting any changes to the title number or evicting or interfering with the applicant's quiet use, occupation, and possession of the suit land. The orders shall subsist for a period of one year. Lower court file be availed. Mention on 27.2.2024.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JANUARY 2024

In the presence of:-

C/A - Kananu/Mukami

Kaimenyi for 2nd Interested Party

Lugutu for 1st Interested Party

HON. CK NZILI

JUDGE

