



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 474 OF 2017

EUNICE JELAGAT.....1ST PLAINTIFF

GEORGE KHARIRI.....2ND PLAINTIFF

VERSUS

MWANANCHI CREDIT LIMITED.....1ST DEFENDANT

MISTAN AUCTIONEERS.....2ND DEFENDANT

R U L I N G

Background

1. The plaintiffs are wife and husband. The 2nd plaintiff is the registered proprietor of Title No. Nairobi Block 82/7303 (hereinafter referred to as **“the suit property”**). The 1st plaintiff contends that the suit property is a matrimonial home within the meaning of Section 2 of the Land Act.

2. On 9/11/2016, the 2nd plaintiff and the 1st defendant entered into a loan agreement pursuant to which the 1st defendant loaned the 2nd plaintiff Kshs.7,000,000. It was agreed by the parties that the security for the loan amount would be the title (certificate of lease) of the suit property. The loan agreement provided that the loan would be repaid in two instalments of Kshs.700,000 payable on 9/12/2016 and Kshs.7,700,000 payable on 9/1/2017 respectively. It is not clear if any amount has been repaid.

3. On 10/7/2017 the 2nd defendant, acting as an agent of the 1st defendant, advertised the sale of the suit property in exercise of the chargee’s statutory power of sale. According to the newspaper notice, the sale is scheduled to take place on 25/7/2017 at the 2nd defendant’s office at College House, along University Way, Nairobi. It is this intended sale of the suit property by the defendants that has triggered the present suit and application.

Application

4. Through a Notice of Motion dated 18/7/2017, the plaintiffs seek an order restraining the defendants against selling the suit property in exercise of the chargee’s statutory power of sale. The application is supported by an affidavit sworn by the 2nd defendant. Also presented in support of the application is an affidavit sworn by the 1st defendant, in which she contends that her spousal consent was never obtained to charge the suit property.

Plaintiffs’ case

5. The 2nd plaintiff’s case is that the suit property has not been charged. Secondly, he contends that he

has not been served with a statutory notice as required under Section 90 (2) of the Land Act. Third, he states that he has not been served with the notice of sale as required under Section 96(2) of the Land Act. Fourth, he contends that the mandatory valuation has not been carried out as required under Section 97(2) of the Land Act. For those reasons, the applicants want the defendants to be restrained against selling the suit property in exercise of the chargee's power of sale.

6. The application came before me under certificate of urgency on 18/7/2017. I certified it urgent but declined to grant any ex parte order. I directed that the application be served and be heard inter partes today 21/7/2017 at 9.00 am. The defendants did not attend today's hearing. There was an affidavit on record indicating that the defendants were duly served.

7. Mr. Njenga who argued the application on behalf of the applicants canvassed three key grounds in support of the application. The first ground is that the suit property has not been charged. He referred the court to the official search attached to the 2nd plaintiff's affidavit showing nil encumbrance. Second, he contended that without the 1st plaintiff's consent, there would be no valid and enforceable charge. Third, he argued that the notices prescribed by the statute have not been served. Counsel referred the court to various provisions of the Land Act.

Determination

8. I have carefully considered the materials placed before the court, the legal framework governing the exercise of the chargee's statutory power of sale and the prevailing jurisprudence on the subject. The reason why I declined to grant an ex-parte interim order on 18/7/2017 was that I wanted to hear the defendants' response to the allegations made by the applicants. The response was not forthcoming when the application came up for hearing inter partes.

9. The issue to be determined in this Ruling is whether or not, in the circumstances of this case, and having due regard to the applicable legal framework, and the prevailing jurisprudence on the key issue, a restraining order should be granted in the manner proposed by the plaintiffs. I should state at this point that in pronouncing myself on this issue, I am required to exercise caution and avoid delving deep into the parties' respective cases or making what may appear to be a conclusive pronouncement on any aspect of the dispute.

10. A party seeking an injunctive order is required to satisfy the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella Vs Cassman Brown & Co. Limited (1973) E.A 358**. In summary, the applicant must establish that he has a prima facie case with a probability of success, and that he will suffer irreparable injury that cannot be compensated by an award of damages if the case were to succeed. If the court is in doubt, the application is to be determined on a balance of convenience.

11. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

“ a case in 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 so as to call for an explanation or rebuttal from the latter.”

12. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which

has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

13. Under Section 79(5) a formal charge takes effect only after it is registered in a prescribed register within the same framework. Under this framework a chargee is not entitled to exercise any of the remedies under the charge unless the charge is registered. The legal effect of this statutory framework is that, the remedy of statutory power of sale is not available to the 1st defendant if the formal charge has not been drawn, executed and registered.

14. I however take cognizance of the fact that Section 79(6) recognizes informal charges created through formal and witnessed instruments of undertaking duly executed by the chargor. Similarly an informal charge may be created through deposit of title. A chargee exercising the chargee’s statutory remedies under Section 79(7) of the Land Act can only do so after obtaining an order of the court permitting the chargee to invoke that remedy. No such order has been availed to this court by the defendants.

15. An official search is an extract of the land register of the material land. It bears all encumbrances registered against the material title. The official search presented to the court by the 1st applicant bears “nil” in the encumbrances section of the register. This means that there is no charge registered against the suit property. Consequently, the formal charge that may have been contemplated in the loan agreement dated 9/11/2016 has not taken effect. The net effect of this is that the lender (1st defendant) cannot sell the suit property in exercise of the chargee’s statutory power of sale.

16. If the 1st defendant were to exercise the remedy available to a lender holding the informal charge contemplated under Section 79(7) of the Land Act, it would have to demonstrate that it has a valid court order authorizing it to do so. Upon obtaining the court order, it would have to issue the statutory notices and carry out statutory valuation before exercising the statutory remedies.

17. I would add that the statutory notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. Similarly, the right to exercise the statutory remedy of sale accrues only after the mandatory statutory valuation stipulated under Section 97 of the Land Act. Failure by a chargee to comply with the law is a sufficient basis for the court to grant restraining orders in favour of a defaulting borrower.

18. In the absence of controverting evidence from the respondents, the materials and the allegations presented by the plaintiffs remain unchallenged. In the circumstances, I am satisfied that the plaintiffs have satisfied the criteria set out in **Giella Vs Cassman Brown & Co. Limited (1973) E.A 358**. I accordingly grant Prayer 3 of the plaintiffs’ Notice of Motion dated 18/7/2017. The plaintiffs shall retrieve and serve summons to enter appearance forthwith. This matter shall be mentioned before the Deputy Registrar on 27/9/2017 for pre-trial.

Dated, signed and delivered at Nairobi on this 21st day of July 2017.

B M EBOSO

JUDGE

In the presence of:-

Andrew Njenga Advocate for the Plaintiffs

No appearance for the Defendants

Halima Abdi - Court clerk