



REPUBLIC OF KENYA



**Kimotho & another v Family Bank Limited & another (Environment & Land
Case 10 of 2023) [2024] KEELC 1024 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 10 OF 2023
JO OLOLA, J
FEBRUARY 29, 2024**

BETWEEN

LEAH WAMBUI KIMOTHO 1ST PLAINTIFF

JORAM MUNG'URI MAINA 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

DIGIT AUCTIONEERS 2ND DEFENDANT

RULING

1. By the Notice of Motion dated and filed herein on 16th February 2023, Leah Wambui Kimotho and Joram Mung'uri Maina (the Plaintiffs) pray for orders that a temporary order of injunction be issued restraining the two Defendants from advertising, selling, alienating, transferring, disposing off or in any other way dealing with the parcel of land known as Mahiga/Kihome/1022.
2. In addition the Plaintiffs pray for a temporary order declaring the public auction of the said parcel of land held on 7th February, 2023 by the 2nd Defendant on behalf of the 1st Defendant to be irregular, illegal and unprocedural.
3. The application which is supported by an Affidavit sworn by the 1st Plaintiff is based on the grounds:
 - (i) That the 2nd Defendant acting on the instructions of the 1st Defendant issued a Public Auction Notice and proceeded to auction the suit property which is the Plaintiffs' ancestral land on 7th February, 2023.
 - (ii) That the Notice issued by the 2nd Defendant was not proceeded by the mandatory statutory notice thereby making the sale by auction unlawful and illegal.



- (iii) That the Plaintiffs did not at any time consent to the charging, guaranteeing and/or use of their ancestral land as security;
 - (iv) That the sale and the intended transfer of the suit property is illegal, unprocedural, unwarranted and made in bad faith with the intention of denying the Plaintiffs their rights to the ancestral land;
 - (v) That unless the order of injunction sought is granted the Plaintiffs will suffer great loss and damage; and
 - (vi) That it is only fair and just that the orders sought be granted.
4. Messrs Family Bank Limited and Digit Auctioneers (the 1st and 2nd Defendants respectively) are opposed to the application. In a Replying Affidavit sworn on their behalf by the 1st Defendant's Manager – Legal Services Wambani Sylvia, the Defendants assert that the Plaintiffs being the children of the chargor, do not have the *locus standi* to file a suit against a chargee and that there is no requirement in law for a chargee to obtain a consent of the adult children of the chargor prior to creating a charge in its favour.
 5. The Defendants aver that on 7th February 2023, the charged property known as Title No. Mahiga/Kihome/1022 was set to be sold by the 2nd Defendant on the instructions of the 1st Defendant to recover the loan facility advanced to the borrower, one Ephantus Mugo Karani but the 2nd Defendant was unable to obtain a serious bidder considering the reserve price and the sale was postponed.
 6. The Defendants assert that the 1st Defendant complied with the law and issued all the requisite notices and processes required before putting up the property for sale and the claim by the Plaintiffs that no statutory notice was required is nothing but hearsay.
 7. The Defendants aver that it is significant that the chargor has never challenged the recovery process initiated by the 1st Defendant despite being made aware that the borrower was in default. It is their case that the chargor executed the charge instruments as well as the Letter of Guarantee and Indemnity both dated 20th May, 2021 having understood and appreciated the legal consequences.
 8. I have carefully perused and considered the application as well as the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 9. The Plaintiffs by the Motion before the Court have sought for an order of temporary injunction to restrain the Defendants from disposing off the parcel of land known as Mahiga/Kihome/1022 by way of sale or transfer. The Plaintiffs further urge the Court to temporarily declare that the sale by way of public auction of the said property on 7th February, 2023 was irregular, illegal and unprocedural.
 10. From the Defendant's Replying Affidavit, it was apparent that the sale previously scheduled for the said 7th day of February, 2023 did not proceed after the 2nd Defendant failed to obtain a serious bidder given the reserve price for the suit property. There was therefore no need for the Court to make a declaration as sought at Prayer No. 5 of the Motion.
 11. As was long stated in the celebrated case of *Giella -vs- Cassman Brown & Company Limited* (1973) EA 358:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant



might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

12. As to what would amount to a prima facie in a civil application such as this, the Court of Appeal observed as follows in *Mrao -vs- First American Bank of Kenya Limited & 2 Others* (2003 KLR 125:

”... a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable’ case. It is a case 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 as to call for an explanation or rebuttal from the latter.”
13. In the matter before me, the two Plaintiffs contend that they are the daughter and son of one Maina Mung’uri who is the registered proprietor of the parcel of land known as Mahiga/Kihome/1022 and that their mother has since passed away. The Plaintiffs assert that sometime on 11th February, 2023, they did come across some fliers issued by the 2nd Defendant notifying the public about the sale of the said property which was scheduled for 7th February, 2023.
14. It is the Plaintiffs’ case that upon enquiry, they came to discover that the suit land had been offered as security for a loan facility extended by the 1st Defendant to one Ephantus Mugo Karani and that the offer was made without their consent or knowledge. The Plaintiffs assert that all through, they were unaware that their father had used the suit property to guarantee anyone nor did they consent to the guarantee.
15. The Plaintiffs further aver that the suit property is the only ancestral land owned by their family and thence their only inheritance together with their other siblings. It is accordingly their case that any such sale of the suit property by the Defendants would be unlawful and illegal.
16. From the material placed before the Court, it was apparent that the suit property had indeed been charged to the 1st Defendant Bank for a loan facility offered to the said Ephantus Mugo Karani. It was further evident that the said borrower had defaulted on the loan payment. From the annexures to the Replying Affidavit of Wambani Sylvia, it was also apparent that the Bank had issued a 90 days’ Statutory Notice of Sale to the chargor dated 16th May, 2022 for the sum of Kshs.1,599,462.00. The said notice was served by registered post to the said Maina Munguri at his given address in Wanguru. (See Annexure SW1).
17. It would also appear from annexure SW2 of the said Replying Affidavit that neither the borrower nor the chargor rectified the default by clearing the loan arrears and that the Bank issued a 40 days’ Notice of Intention to sell the property on 16th August, 2022. Subsequently the Bank did through Messrs Geosky Services Limited prepare a valuation report dated 8th September, 2022 and instructed the 2nd Defendant to dispose of the suit property by way of public auction which is under challenge herein.
18. It was indeed significant that the chargor has never challenged the recovery process initiated by the 1st Defendant despite being made aware that the borrower whom he had guaranteed was in default.
19. While the Plaintiffs have founded their claim herein on the basis that they are the children of the chargor and that the suit land is their ancestral land, the Plaintiffs have neither exhibited evidence that they are the children of the chargor nor anything to demonstrate that the suit property is their ancestral land.
20. Again, while the Plaintiffs insist that no statutory power of sale notice was issued to them in regard to the auction, it was clear to me that there was no way the 1st Defendant Bank could be required to



serve the statutory notice of sale upon them as they were neither the registered proprietors of the land nor the chargor himself.

21. In their application before the court, the Plaintiffs insist that the charged property was offered as security without their knowledge and consent. With respect, I was unable to find any law on authority that requires a chargor to seek and obtain the consent of his children before charging a property which is registered in his name.
22. As my brother Justice Sila Munyao observed in [Oganga & Another -vs- Orangi & 3 Others](#) (2023) KEELV 16348 (KLR):

“It is time that children stopped having a notion that what belongs to their parents belong to them in equal measure, and that their parents must subdivide and distribute land to them in a particular manner.”

23. Arising from the foregoing, I was not persuaded that the Plaintiffs had established a *prima facie* case with the likelihood of success at the trial. I was equally for the reasons given not persuaded that the Plaintiffs had invested anything in the suit property and that they stood to suffer any damage or injury that might not be adequately compensated by an award of

Damages.

24. It follows that I did not find any merit in the Motion dated and filed herein on 16th February, 2023. The same is dismissed with costs to the Defendants.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 29TH DAY OF FEBRUARY, 2024.

In the presence of:

No appearance for the Plaintiffs

Mr. Kamocho for the Defendants

Court assistant - Kendi

J. O. OLOLA

JUDGE

