**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 364 OF 2017**

**GLADYS WANJIKU WAITITU……….....................……....……………….PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO. LTD………………..…………..…...............1ST DEFENDANT**

**NAHASHON KAMAU MWAURA ………………....……....…..............2ND DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiffs' Notice of Motion dated 22nd February 2017. The application is brought under Order 40 rules 1, 2 of the Civil Procedure Rules 2010. The prayers sought in the application are:

*1. Spent.*

*2. Spent.*

*3. That pending hearing and determination of this suit, the defendants whether acting in person through their agents, servants, employees or any other person acting under the instructions of or at the behest of the defendants be restrained from selling, disposing off, transferring, alienating or in any other way so to do interfering with land parcel number KIAMBOGO/KIAMBOGO BLOCK 2/6180 – MWARIKI AREA.*

*4. That costs hereof be provided for.*

2. The application is supported by the plaintiff’s affidavit wherein she deposes that the second defendant herein is her husband and that the suit property KIAMBOGO/KIAMBOGO BLOCK 2/6180 – MWARIKI AREA is a matrimonial property as well as their matrimonial home wherein she lives with the second defendant and their two children. She further deposes that the defendants entered into a lending contact wherein the suit property was charged in favour of the first defendant without her knowledge and consent. That although she has spousal interest over the property, no spousal consent was granted by her as envisaged by section 79 (3) of the Land Act 2012. That on 20th February 2017, she came across an advertisement in a newspaper indicating that the first defendant had instructed an auctioneer to sell the property on 28thFebruary 2017 owing to the second defendant’s default as regards the repayment of the loan. She thus urges the court to stop the sale since she considers the charge add null and void for want of spousal consent.

3. The first defendant responded to the application through a replying affidavit sworn by Joseph Lule, its Assistant Legal Manager. He deposed that the second defendant is the registered proprietor of a property

known as KIAMBOGO/KIAMBOGO BLOCK 2/16180 (MWARIKI). He exhibited a copy of the title deed. He further deposed that pursuant to charge dated 28thOctober 2009, the second defendant charged the property in favour of the first defendant to secure a loan of KShs 480,000. Again, pursuant to further charge dated 1stSeptember 2010, the second defendant charged the property in favour of the first defendant to secure a loan of KShs 4,350,000. At the time the said two instruments were registered, there was no legal requirement that there be spousal consent. That yet again, pursuant to second further charge registered on 24th October 2012, the second defendant charged the property in favour of the first defendant to secure a loan of KShs 2,600,000. Prior to the registration of the second further charge, the plaintiff swore an affidavit on 16th October 2012 wherein he stated that he is married to the plaintiff and that he had obtained the plaintiff's consent to charge the property. Similarly, the plaintiff signed a spousal consent on 16th October 2012 in the presence of an advocate wherein she consented to the property being charged. The deponent annexed copies of all the aforesaid charge documents, affidavits and consent as well as copies of notices which had been issued by the first defendant in preparation for exercise of statutory power of sale, following failure by the second defendant to service the loan as agreed.

4. Mr. Lule further deposed that following the default, the plaintiff engaged in payment negotiations with the first defendant through emails, copies of which were annexed. That as part of the preparations for the sale, the first defendant sent valuers to value the property in December 2016 and the plaintiff granted them access. Mr. Lule therefore urged the court to dismiss the application.

5. Parties agreed to argue the application by way of written submissions. In that regard, the first defendant filed its submissions on 21st July 2017 while the plaintiff filed her submissions on 27th July 2017. Both parties also filed lists of authorities. The second defendant neither filed any document nor participated in the hearing despite being served.

6. Citing **section 30(g) of the Registered Land Act** (repealed) and **section 28(a) of the Land Registration Act 2012**, the applicant argued that her interest as a spouse in actual occupation of the suit property is an overriding interest and that therefore the charge instruments dated 28th October 2009 and 1st September 2010 were subject to the said overriding interest. As regards the charge instrument registered on 24th October 2012, the applicant argues that the defendants misled her into believing that the property was only securing the loan of KShs 2,600,000 while there were two previous legal charges registered without her consent. The applicant thus urges the court to grant the injunction sought.

7. The first defendant has in its submissions stated that the requirement of spousal consent was introduced by **section 79(3) of the Land Act 2012**, which came into operation in May 2012, long after the charge instruments dated 28th October 2009 and 1st September 2010 had been registered. The section cannot operate retrospectively. Consequently, the said instruments were validly registered notwithstanding absence of spousal consent. Regarding the charge registered on 24th October 2012, the first defendant spousal consent was duly obtained prior to its registration. Thus, the first defendant urged the court to hold that the applicant had failed to establish a *prima facie* case with a probability of success. Further, the first defendant urged the court to find that by offering it as security, the defendants had transformed the suit property into a commodity for sale and that its sale could not result in irreparable loss.

8. I have considered the submissions and authorities. In an application for an interlocutory injunction such as the present one, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. More recently in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal further elaborated these tests as follows:

**In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

**(a) establish his case only at a *prima facie* level,**

**(b) demonstrate irreparable injury if a temporary injunction is not granted, and**

**(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society[2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "*leap-frogging*" by the applicant to injunction directly without crossing the other hurdles in between.**
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> **It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.**
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> **On the second factor, that the applicant must establish that he "*might otherwise*" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "*adequately*" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.**

9. The sole reason for which the plaintiff faults the proposed exercise of statutory power of sale is the alleged absence of spousal consent. There is no dispute that the suit property was charged in favour of the first defendant or that the property is matrimonial property or that there was default or that statutory notices were issued. Indeed, the second defendant who is the chargor has not complained at all regarding the manner in which the sale was being arranged. It is also instructive that the second defendant who shares the matrimonial home with the plaintiff has so far not responded to the application and the suit despite being served.

10. Regarding the issue of spousal consent, the replying affidavit of Joseph Lule is very clear that spousal consent was indeed obtained before the last charge was registered on 24th October 2012. The copy of the consent that was exhibited by the first defendant actually formed part of the charge document and is numbered page 39 of the charge document. It was executed on 16th October 2012 in the presence of an advocate. Additionally, the second defendant swore an affidavit on 16th October 2012 confirming that he had obtained the plaintiff's spousal consent. I note that the plaintiff did not offer any evidence to respond to and challenge the evidence offered by the first defendant. I therefore have no hesitation in finding as I hereby do, that spousal consent was granted by the plaintiff. I am fortified in this finding by the fact that the plaintiff communicated severally with the first defendant and at no time prior to the filing of this suit did she complain about not having given consent.

11. The requirement of spousal consent was introduced by section **79(3) of the Land Act 2012**. The Act came into force on 2nd May 2012. Prior to that date there was no requirement for spousal consent and the second defendant did not need to obtain spousal consent prior to registration of the charge instruments dated 28th October 2009 and 1st September 2010. Simultaneously with **Land Act 2012**, parliament also enacted **Land Registration Act 2012** which also came into operation on 2nd May 2012. Section 109 of **Land Registration Act 2012** repealed Registered Land Act. I am not alone in holding the view that there was no requirement for spousal consent prior to 2nd May 2012. Mutungi J. stated as follows in **Barclays Bank of Kenya Ltd v Attorney General & another [2015] eKLR**

> **I further hold that section 79(3) of the Land Act cannot apply to prior charges taken prior to the coming into force of the Land Act 2012 and a chargee of a matrimonial property under a prior charge will be taken to have accrued a right over the charged property without the requirement of spousal consent and would in terms of section 162 of the Land Act 2012 be entitled to have the benefit of the rights and interest conferred by the prior charge notwithstanding the absence/lack of spousal consent as envisaged under section 79(3) of the Land Act 2012.**

In view of the foregoing, I find that the plaintiff has failed to establish a prima facie case with a probability of success.

12. Even assuming that I was to find that a prima facie case has been established, the plaintiff would still need to show that she would suffer irreparable damage. The plaintiff does not deny the validity of the charge registered on 24th October 2012. Clearly therefore, the suit property became a commodity for sale whose monetary value can be easily quantified and paid. In that regard, the provisions of **section 99(4) of the Land Act 2012** offer the plaintiff and the second defendant an adequate remedy.

13. I have said enough to show that Notice of Motion dated 22nd February 2017 must fail. It is dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 29th day of September 2017**.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Mukira holding brief for Mr. Murimi for the plaintiff/applicant

Mr. Langat holding brief for Mr. Kisila for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistant: Gichaba