



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 142 OF 2016

TINAH MWIKALI MUSEE.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

LAZARUS KINYUMU MATIVO T/A SPECTRUM AUCTIONEERS...2ND DEFENDANT

MUSEE MATI.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 30th September, 2016, the Plaintiff is seeking for the following orders:

a. That a temporary injunction be issued against the 1st and 2nd Defendants/Respondents, restraining them, their agents, employees, servants or any other person(s) claiming or acting through them from auctioning, selling, offering for sale either directly or through private treaty, advertising, transferring, interfering, alienating, evicting, entering and or destroying in any way whatsoever and whatever all that land known as L.R. No. Mutonguni/Mithini/1383 Utoo area Kitui County registered in the names of Musee Mati till full hearing and determination of this suit.

b. That the cost of this Application be borne by the Defendants/Respondents.

2. The Application is premised on the grounds that the parcel of land known as Mutonguni/Mithini/1383 (*the suit land*) is a matrimonial land; that the Plaintiff, being the wife of the registered proprietor has a stake in the said land and that the 1st Defendant did not seek her consent and the consent of the Land Control Board before using the suit land as security.

3. The Plaintiff has deponed in her Affidavit that on 8th November, 2011, she learnt that the 3rd Defendant had charged the suit land and that on the basis of the said charge, the 2nd Defendant was granted a loan of Kshs. 4,500,000 by the 2nd Defendant.

4. It is the Plaintiff's case that she did not sign the spousal consent to allow the 3rd Defendant to offer the suit land as security.

5. In response, the 1st Defendant's Senior Legal Officer deponed that at all material times, the Plaintiff and the 3rd Defendant were Directors of Timex Building General Contractors Ltd; that the 1st Defendant offered a loan facility to Timex Building General Contractors Limited (*the company*) and that the loan

agreements were duly executed by the Plaintiff and the 3rd Defendant as the Directors of the borrowers.

6. According to the 1st Defendant, the loan facilities that the 1st Defendant granted to the company were secured by creation of a charge dated 17th May, 2010 over the suit land; that a further charge was registered on 13th January, 2012 and that the Plaintiff and the 3rd Defendant further executed a Deed of Guarantee and Indemnity with the 1st Defendant on 13th January, 2012 for the loan advances to the company.

7. The 1st Defendant's Legal Officer deponed that the borrower has failed to regularize its loan accounts; that the suit is an abuse of the judicial process because similar issues have been raised in Machakos HCCC No. 21 of 2015, Nairobi Insolvency Petition number 5 of 2016 and Nairobi Insolvency Petition number 4 of 2016.

8. It is the 1st Defendant's case that a similar Application was filed in Machakos HCCC No. 21 of 2015 and was conclusively heard and determined and that this suit is *res judicata* to that extent.

9. The 1st Defendant finally deponed that the issue of spousal consent cannot arise because such a consent was not a pre-condition to the creation of the charge.

10. The 3rd Defendant filed a Replying Affidavit in which he admitted that he executed a legal charge over the suit land; that he has repaid the loan save for the disputed interest of Kshs. 1,223,126 and that the 1st Defendant has refused to furnish him with statements.

11. The 3rd Defendant deponed that the alleged signature of the Plaintiff is not hers.

12. The parties filed their respective submissions and authorities which I have considered.

13. The Plaintiff's suit is premised on the ground that the suit property was charged by the 3rd Defendant without her knowledge contrary to the law.

14. According to the Plaintiff, the Plaintiff averred that the entire borrowing by the 3rd Defendant from the 1st Defendant was done in secrecy, without consultation, approval and or her consent and on that basis, she seeks for the discharge of the suit property.

15. The 1st Defendant's Senior Legal Officer on the other hand annexed on his Replying Affidavit the letter of offer and acceptance dated 6th October, 2011 showing that indeed the Plaintiff, together with the 3rd Defendant, signed, on behalf of Timex Building and General Contractors Limited (*the company*), the letter of acceptance in respect to the loan facility that was offered to the company to the tune of Kshs. 2,000,000.

16. The 1st Defendant's Legal Officer has also annexed another letter of acceptance that was signed by the Plaintiff dated 3rd July, 2012 showing that she had agreed that the company be granted a loan facility by the 1st Defendant of Kshs. 4,500,000.

17. The copy of the charge document annexed on the 1st Defendant's Replying Affidavit shows that the same was executed by the 3rd Defendant, as the chargee, on 11th May, 2010. On the same day, the Plaintiff, on behalf of the borrower, also signed the charge documents before J.M. Waiganjo advocate.

18. Although the Plaintiff has deponed that she was not aware of the loan facility that was advanced to the company, and that she has never consented to the charging of the suit land, she never filed a report by a document examiner to show that the signatures on the letters of acceptance and the charge document were not hers.

19. In any event, the registered proprietor of the suit land is the 3rd Defendant.

20. As at the time the suit land was charged, the provisions of the Land Act which made it mandatory for the spousal consent to be sought and obtained had not been legislated.

21. Although Section 78 of the Land Act provides that all the charges, including those which were registered before the enactment of the Land Act, were subject to the Act, such charges cannot be said to be invalid for want of spousal consent because the provision requiring spousal consent was not meant to apply retrospectively.

22. The Plaintiff has not denied that she is a co-director of the borrower. As a co-director of the borrower, the Plaintiff is presumed to have received all correspondences that were sent to the postal address of the borrower.

23. In view of the foregoing, I find that the Plaintiff has failed to show that she has a prima facie case with chances of success.

24. The detailed Affidavit of the 3rd Defendant is not relevant in this suit considering that the suit before the court is not whether the interest charged by the 1st Defendant is unconscionable or not, but rather, whether the Plaintiff gave her consent before the land was charged.

25. Indeed, the 3rd Defendant has not denied that he has filed a separate suit in which he is challenging the sale of the suit land. He ought to pursue that suit separately and not to attempt to cloud the issues in the two suits.

26. Having failed to show that she is the registered proprietor of the suit land, the issue of the Plaintiff suffering irreparable damage if the injunctive order is not issued does not arise.

27. For those reasons, the Plaintiff's Application dated 30th September, 2016 is dismissed with costs to the 1st Defendant.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE