



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C CASE NO. 91 OF 2017**

**ESTHER NJERI MWANGI.....PLAINTIFF/APPLICANT**

**VS**

**EQUITY BANK LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DAVID NDUNGO MAINA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant filed this Notice of Motion on 5/10/16 seeking the following reliefs;-

(a) Spent.

(b) That an injunction do issue barring the Defendants jointly and severally either by themselves, agents, servants and anybody or authority howsoever claiming through them from selling by public auction, private treaty or in any manner disposing and/or dealing with the property known as MURANG'A MUNICIPALITY BLOCK 3/148 until the hearing and determination of this application herein or until further orders of this Honourable Court.

(c) THAT an injunction do issue barring the Defendants jointly and severally either by themselves, agents, servants and anybody or authority howsoever claiming through them from selling by public auction, private treaty or any manner disposing, transferring or in any manner dealing with the property known as MURANG'A MUNICIPALITY BLOCK 3/148 until the hearing and determination of the suit herein or until further orders of this Honourable Court.

(d) That such further order as are expedient be made.

2. The application is grounded on the following grounds;-

(a) The suit property is set to be sold in a public auction scheduled to take place on 12/10/2016 as the 2<sup>nd</sup> Respondent has defaulted in servicing a loan he had secretly acquired.

(b) The applicant is the wife of the registered owner of MURANG'A MUNICIPALITY BLOCK 3/148 and the same is deemed as matrimonial property and spousal consent was not sought.

(c) That the 2<sup>nd</sup> Respondent charged the said property to the 1<sup>st</sup> defendant without the applicant's consent which property is in the process of being auctioned to realize the security in that the 2<sup>nd</sup> Defendant has failed to serve the loan.

(d) In the event of the sale taking place, the applicant and the children of the marriage will be rendered destitute.

(e) Spousal consent is mandatory before a family property is charged and to the extent that the plaintiff was kept in the dark, the resultant charge is void and legally untenable.

(f) It is in the interest of justice.

3. The plaintiff avers that she is the wife of the 2<sup>nd</sup> Defendant having been married under Kikuyu Customary Law. That the suit property LR NO. MURANG'A MUNICIPALITY BLOCK 3/148 is a matrimonial property. That she discovered that the 2<sup>nd</sup> Defendant had secretly charged the suit property to secure a loan from the 1<sup>st</sup> Defendant who is in the process of selling the same to realize the security. She states that the 2<sup>nd</sup> Defendant is in default. Her main contention is that spousal consent was not obtained from her by the 1<sup>st</sup> Defendant for which they were legally obligated to do so. She has attached the copies of advertisement, 45 days redemption notice and notification of sale all dated 28/7/16 together with a certificate of search dated 9/6/15 to support her application.

4. The 1<sup>st</sup> Defendant filed grounds of opposition contesting that the Plaintiff is not deserving of an injunction as she has not demonstrated a prima facie case; that granting the injunction would be tantamount to smothering the 1<sup>st</sup> Defendants statutory right of sale under section 96 of the Land Act; That the principal borrower, the 2<sup>nd</sup> Defendant is in default and as at 18/7/16 owed the bank Kshs. 1.7 Million which remains due and continues to accrue; that the suit property is registered in the name of the 2<sup>nd</sup> Defendant who had legal capacity to create the charge; that during the creation of the 1<sup>st</sup> charge on 23/12/2010 the spousal consent was not a requirement.

5. The 1<sup>st</sup> Defendant further filed a Replying Affidavit on 11/5/17 deponed by Janet Muthee as follows; that the first loan was taken on 23/12/10 in the sum of Kshs. 800,000/= against a collateral security of a charge over the suit property; that the spousal consent was not in force then; that on 25/4/12 an additional loan facility was advanced to the 2<sup>nd</sup> Defendant in the sum of Kshs 3Million and a further charge was registered on 23/5/12 over the suit property to secure the same; that he 2<sup>nd</sup> Defendant subsequently defaulted and has been in default todate; that the 2<sup>nd</sup> Defendant filed a suit CMCC No. 236 of 2015 Murang'a seeking to injunct the 1<sup>st</sup> Defendant from exercising its statutory power of sale by selling the security; that as at 27/4/17 the 2<sup>nd</sup> Defendant is in arrears to the tune of 1.6 Million as seen in the 2<sup>nd</sup> Defendants statement marked JM 7; that it has a right to so exercise its right of sale in view of the default. Copies of legal charge documents marked JM I JM2, JM3 JM4 are annexed.

6. Further that the Plaintiff has no known interest in law in the suit property as she is not privy to the loan transaction; that there was no legal obligation to seek spousal consent; that the suit property is not a matrimonial home to warrant spousal consent; that neither has the Plaintiff established a prima facie case nor does she stand to suffer any harm if the orders are not granted as the value of the suit property is known and therefore quantifiable and capable of being compensated in damages.

7. I have considered both the Plaintiff's and the 1<sup>st</sup> Defendants submissions together with case law were supplied. The 2<sup>nd</sup> Defendant did not oppose the application of the Plaintiff.

8. The law on temporary injunction is now settled. **Giella vs Cassman Brown and Co. Ltd (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”.

9. What is a prima facie case? **Mrao vs First American Bank of Kenya Ltd & Two Others C.A No. 39 of 2002 (2003 eKLR)**;

“A prima facie case in a civil application include 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”.

10. The Plaintiff’s case is primarily based on section 79 (3) of the Land Act and section 93 of the Land Registered Act and the Matrimonial Act Cap 49 of 2013.

Section 79 (3) provides as follows;

“A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons”.

Section 93 of LRA provides follows;

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

Section 2 of the Matrimonial Act Cap No 49 of 2013 defines Matrimonial home as;

“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property”.

Further in section 6 the meaning of Matrimonial home is given as;

“ (a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or home;

(c) or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

Section 7 of the said Act states that ownership of property of matrimonial property is;

“Subject to [section 6](#)(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

Additional protection to the matrimonial home is provided under section 12(1) thus;

“An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

and Section 12(5)

“The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

11. It is the Plaintiff's assertion that the charges are invalid due to absence of her consent as the spouse of the borrower. She deponed that she is married to the 2<sup>nd</sup> Defendant under Kikuyu Customary Law. No evidence has been led to prove that she is married under Kikuyu Customary Law or is a spouse. She also urged that the suit property is her matrimonial home; that she resides there with her children and stands to be rendered destitute if the suit property is sold. The Plaintiff has led no evidence to prove that her matrimonial home is situated on the said property. It is her duty and responsibility to bring herself under the ambit of Section 2 of the Matrimonial Act which defines a Matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property. It was her duty to lay evidence before the Court that the Plaintiff and 2<sup>nd</sup> Defendant occupy the suit property as their family house and that there is a home on the suit property and that the Plaintiff and 1<sup>st</sup> Defendant occupy the home as their formerly home/matrimonial home. I hold and find that the Plaintiff has not established that she is a spouse for which consent was required and secondly that the suit property is a matrimonial property.

12. I concur with the 1<sup>st</sup> Defendant's Learned Counsel that he 1<sup>st</sup> charge entered into on 23/12/2010 is outside the application of Land Act which commenced on 2/5/2012. However the 2<sup>nd</sup> one dated 23/5/12 is subject to the Act and looking at the wording of section 79(3) of the Land Act, the same is mandatory. I hold that the second charge required spousal consent. Barring that proof of whether she is married to the 2<sup>nd</sup> Defendant, she has a valid point. The law cannot be applied retrospective. The Supreme Court division in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others 2012 eKLR** states as much.

13. In the end I hold and find that the Plaintiff has not demonstrated a *prima facie* case against the 2<sup>nd</sup> Defendants with a probability of success.

14. As to whether the Plaintiff will suffer any harm if the orders are not granted, I rely on the decision of **Waweru J in Nahasho K Mbatia v Finance Company Limited (2006)Eklr;**

“once a chargor charges a property, he converts it to a commercial commodity with a monetary value that can be easily attained and its loss can then be adequately compensated by damages”.

15. Before I conclude I wish to comment on the issue of CMCC 236 of 2015. No evidence of collusion between the Plaintiff and 2<sup>nd</sup> Defendant has been presented before this Court and I will not make a finding on it. However, I note that the parties have not addressed me on the issue of whether the matter is *resjudicata*. It looks to me that the Court is faced with a scenario with a disappointed litigant attempting to dress up a suit in which he has failed in a new guise and try his luck once more. Could the 2<sup>nd</sup> defendant be attempting to relitigate the application for injunction that he lost at the lower Court? The Court frowns on duplication of cases as it squanders Judicial time which resource is scarce and hoards it away from those litigants most deserving.

16. In the end, I find the application is without merit and dismiss it with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2017.**

**J.G. KEMEI**

**JUDGE**