



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 192 OF 2016**

**S K.....PLAINTIFF/APPLICANT**

**VERSUS**

**M. ORIENTAL BANK.....1<sup>ST</sup>DEFENDANT/RESPONDENT**

**JEREMIAH KOSGEL.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**J F K.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The plaintiff prays for an order that a temporary injunction do issue restraining the 1<sup>st</sup> defendant from selling or making any further disposition on land parcel No. **UASIN GISHU/SUGUTEK SETTLEMENT SCHEME/[...]** pending hearing and determination of the suit. The application is based on grounds that the 3<sup>rd</sup> respondent agreed to guarantee a loan that the 1<sup>st</sup> respondent advanced to the 2<sup>nd</sup> respondent.

The 3<sup>rd</sup> respondent offered the suit land as security pursuant to which a charge was registered over the suit land on 17.10.2011. The property relates to material but the defendants/respondents did not seek her consent. Moreover, that the debt has been settled but the 1<sup>st</sup> respondent's agents have gone ahead to advertise the land for sale by public auction.

The applicant contests that the disposition of the land in issue was without spousal consent as contemplated under section 28(a) and 93 of the Land Registration Act, 2012.

In reply to the application, Josphat Githagi, the Credit Officer of the Banks, Eldoret Branch states that on 17.10.2011, a charge over the suit property was registered in favour of the 1<sup>st</sup> respondent to secure overdraft facilities to 2<sup>nd</sup> defendant and which facility was guaranteed by the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant freely executed the charge having known the consequences. However, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have failed to repay the overdraft and therefore, the bank is within its rights of statutory power of sale to advertise for sale of the property.

According to the defendant, the charge was created before the Law on spousal consent came into operation and that the fact that on the property is a matrimonial home, is immaterial because the same became a commodity for sale when it was offered as security for repayment of the overdraft facility.

The 3<sup>rd</sup> defendant states that the plaintiff is his wife and that the suit is matrimonial property. He admits having failed to involve his wife in charging the property and that the bank never insisted for the consent. He executed the loan contract forms before the 1<sup>st</sup> defendant's Advocates who never informed him of the need to seek legal advice. He further states that the loan was fully repaid on 27.8.2012. However, the 2<sup>nd</sup> defendant, applied for the second loan facility in October, 2014. He executed a loan contract form on 8.12.2014 which sent out inter-alia, a condition that there be spousal consent.

I have considered the evidence on record in the application dated 11.7.2016 and the rival submissions and do find that the plaintiff's consent as a spouse was not necessary as per law in 2011 as the land

registration Act came into operation on 2<sup>nd</sup> May 2012. However, in the year 2014, when the overdraft facility was granted, the consent of the spouse was necessary as per section 28(a) and 93 of the Land Registration Act if the same affected the matrimonial property and could lead to the disposition of the same. Moreover, there is scintilla of evidence that the initial loan facility was repaid, however, it should go to full trial. The facts herein meet the test in ***Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others – Civil Appeal No. 39 of 2002***, where the Court of Appeal held that a prima facie case is 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 as to call for an explanation or rebuttal from the latter.

On the issue, as to whether the plaintiff will suffer irreparable damages, I do find that if she succeeds on ground that her consent was not sought and obtained, having sold the property by public auction, she will suffer irreparable harm.

The balance of convenience tilts towards granting an injunction as the plaintiff will suffer more if the property is sold.

Ultimately, I do grant an order that a temporary injunction do issue restraining the 1<sup>st</sup> defendant from selling or making any further disposition on land parcel No. **UASIN GISHU/SUGUTEK SETTLEMENT SCHEME/[....]** pending hearing and determination of the suit. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF OCTOBER, 2017.**

**A. OMBWAYO**

**JUDGE**