



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO. 61 OF 2017**

**KENNEDY KIMUTAI SALAT.....PLAINTIFF**

**VERSUS**

**KANULI INFORMATION**

**TECHNOLOGY SOLUTIONS LTD.....1<sup>ST</sup> DEFENDANT**

**FAULU MICROFINANCE BANK LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is coming up for determination is the Plaintiff's Notice of Motion dated 18<sup>th</sup> May 2017 brought pursuant to Order 51 Rule 1, Order 40 Rule 1 and 4 of the Civil Procedure Rules and sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act. The main prayer sought in the application is for an order of injunction to restrain the 2<sup>nd</sup> Defendant by itself, its agents, servants, employees or otherwise from attaching, advertising for sale, selling and/or doing any other act which is prejudicial to the Plaintiff/applicant's proprietary interest in land parcel number KERICHO/CHEPSIR S.S/311 pending the hearing and determination of the suit herein.

The brief facts of the case are that in November 2015 the 1<sup>st</sup> Defendant obtained a loan amounting to Kshs. 11,200,000 from the 2<sup>nd</sup> Defendant. Out of this amount the loan of Kshs. 5600,000 was secured by a personal guarantee and a charge over title number KERICHO/CHEPSIR S.S/311 registered in the plaintiff's name. The 1<sup>st</sup> defendant failed to service the loan facility as a result of which the 2<sup>nd</sup> Defendant sought to exercise its statutory power of sale as provided for under the charge. This is what prompted the Plaintiff to institute this suit alleging fraud in the manner in which the 2<sup>nd</sup> Defendant purported to sell the suit property and the seeking the following reliefs:

a) That this honourable court declare that the charge over title no KERICHO/CHEPSIR S.S/311 is null and void ab initio and order an injunction restraining the 2<sup>nd</sup> Defendant by itself, its agents, servants, employees or otherwise from attaching, advertising for sale, selling and/or doing any other act which is prejudicial to the Plaintiff/applicant's proprietary interest in land parcel number KERICHO/CHEPSIR S.S/311 and direct that the 1<sup>st</sup> Defendant do make good the loan facility.

b) Costs of this suit

c) Any other relief that this court may deem fit and just to grant.

The 2<sup>nd</sup> Defendant filed a Defence in which he states that the charge was properly prepared and executed and denies any fraud. It states that it has undertaken all the procedures specified in the law to recover the amount due and owing by way of exercising its statutory power of sale. The 1<sup>st</sup> Defendant has not filed any documents, despite having been served simultaneously with the Plaintiff, the Plaintiff filed this application for injunction. The application is supported by the Plaintiff's affidavit sworn on the 17<sup>th</sup> May 2017 in which he deposes that the 1st Respondent fraudulently caused the plaintiff's title aforementioned to be charged to the 2<sup>nd</sup> Defendant to secure a loan of Kshs. 5,600,000. He further deposes that pursuant to the alleged fraud, the 2<sup>nd</sup> defendant has issued a 45 day's notification of sale of the charged property through Antique Auctioneers. He states that the property has been undervalued for purposes of the sale.

The application is opposed by the 2<sup>nd</sup> Respondent through its legal officer's Replying Affidavit sworn on the 26<sup>th</sup> May 2017. I do not wish to repeat what is stated in it but the long and short of it is that the Plaintiff's suit is a mischievous attempt to frustrate the 2<sup>nd</sup> Defendant's attempt to exercise its statutory power of sale as the 2<sup>nd</sup> Defendant complied with all the procedural and statutory requirements before advertising the suit property for sale. She has attached the charge instrument as well as all the notices and relevant documents. She adds that if the injunction is granted the 2<sup>nd</sup> Defendant will suffer irreparable loss as the outstanding loan will outstrip the value of the charged

property.

There are two main issues for determination:

1. Whether the suit property was properly and lawfully charged to secure the loan facility;
2. Whether the Plaintiff has met the threshold for the grant of a temporary injunction

In his Plaintiff and written submissions, the Plaintiff has challenged the validity of the charge on the grounds of fraud. The particulars of fraud include:

- a) failure to obtain the necessary Land Control Board consent;
- b) charging the property without the approval of the plaintiff
- c) causing matrimonial property to be charged without the requisite spousal consent;
- d) causing the registration of the charge without properly executed legal documents

On the first ground the Plaintiff states that no consent of the Land Control Board was obtained to charge the property and if the same was obtained, he was not party to it as he was never called to the Land Control Board for purposes of seeking consent to charge his property. Under Section 6(1) of the Land Control Act Cap 302 of the Laws of Kenya failure to obtain Land Control Board consent within 6 months from the date of a controlled transaction renders the transaction null and void. In support of his position, the plaintiff has cited the case of **Onyango & Another V Luwayi (1986) KLR 513** which held that the sale was void for all purposes for failure to obtain Land Control Board within 6 months.

Secondly the plaintiff states that his property was charged without his approval as it was not properly executed as contemplated by section 45 of the Land Registration Act. The said section requires that the person executing an instrument appears before the Registrar, public officer or other person accompanied by an independent person for purposes of establishing the identity of the chargor and verifying that the chargor has understood the contents and effect of the charge and voluntarily executed the same. The person accompanying the chargor is expected to complete a certificate to that effect. This requirement is only dispensed with if the person is known to the Registrar and he or she must note the reason for dispensing with the appearance of the parties.

In its submissions the 2<sup>nd</sup> defendant maintains that the charge was executed by the plaintiff and duly registered in compliance with the Land Registration Act. They submit further that having surrendered the title document to the 2<sup>nd</sup> defendant, the plaintiff is deemed to have understood the full import of the terms set out in the charge instrument. I must state that at this point in time, on the basis of the material placed before the court, I am not able to establish the validity of charge. This will only become clear when the matter goes to full hearing. Be that as it may, there is established jurisprudence on how the courts treat a challenge to the validity of a charge or mortgage in the face of the bank's exercise of its statutory power of sale. In the case of **M'Mella V Savings and Loan Kenya Limited (2007) 2 EA 316** quoted in the case of **Albert Mario Cordeiro & Another V Vishram Shamji (2015) eKLR** Gikonyo J posed the following question:

*"..Could one say that because the charge was not valid, the appellant was released from his duties under the charge? The answer is yes, in our view, yes during the period when the charge remained invalid. But we make haste to add that the appellant was only released from his duties under the charge and not under the contract"*

The position stated in the above authority means that even if the charge is found to be invalid for whatever reason, it would continue to operate as a contract inter parties between the plaintiff and the 2<sup>nd</sup> defendant. It is common ground that the 1<sup>st</sup> Defendant borrowed money from the 2<sup>nd</sup> Defendant and since the 1<sup>st</sup> Defendant has defaulted in repayment of the loan, the 2<sup>nd</sup> defendant cannot be discharged from his obligation as a guarantor. In the case of **Hyundai Motors Kenya Limited V East Africa Development Bank Ltd (2007) eKLR** cited in the case of **Julius Mainye Anyega V Ecobank Kenya Limited 2014 eKLR** Warsame J (as he then was) stated as follows:

*"I hold the view that the interpretation or invalidity of the mortgage document cannot be used to obtain an order preserving the status of the suit property"*

However, in the case of **Alice Awino Okello V Trust Bank Kenya Limited & Another LLR 625 (CCK)** quoted in the case of **Koilleken ole Kipolonka Orumoi V Mellech Engineering & Construction Ltd & 2 Others (2015) eKLR** the Court of Appeal stated as follows:

*"The balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right which is recognized in law and as such it should not be allowed to proceed in doubtful circumstances"*

The Plaintiff has raised some serious doubts about the validity of the charge which in my view, ought to be resolved before the 2<sup>nd</sup> defendant is allowed to exercise its statutory power of sale. Should they prove to be baseless, the 2<sup>nd</sup> Defendant will still be entitled to proceed with the sale. As has been submitted by learned counsel for the Plaintiff, the charged property is valued at Kshs. 14,000,000 which is way above the sum secured of Kshs. 5,600,000. There is therefore no danger that the loan will outstrip the value of the security, at least not in the near future.

Regarding the deposition that the suit property is matrimonial property, the 2<sup>nd</sup> Defendant has pointed out that at the time of signing the

charge, the plaintiff swore an affidavit stating that he was single as a result of which there was no need to for the 2<sup>nd</sup> defendant to obtain spousal consent. But even assuming that the suit property is a matrimonial home, it was incumbent upon the plaintiff to make this disclosure at the time of signing the charge in order to avail himself of any protection under the law and not spring up the issue only after the 1<sup>st</sup> defendant has defaulted. The correct position in law was elaborated in the case of **Julius Mainye** cited above where the court stated as follows:

***“The suit property may be a matrimonial home. But what is startling is the applicant’s argument which properly understood, suggests that matrimonial homes should never be sold under the mortgagee’s statutory power of sale. These statements have become quite common in applications for injunction to restrain a mortgagee from exercising the statutory power of sale. I want to disabuse mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving notices to the spouses of the mortgagor who had given consent. These protections once availed will not prevent the sale of a matrimonial home which is given as security for a loan”.***

In the case of **Maltex Commercial Supplies Limited & Another V Eurobank (in Liquidation) HCCC No. 82 of 2006** the court stated that;

***“Any property whether it is a matrimonial home or spiritual house, which is offered as security for a loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the debt secured”***

Having failed to disclose that the suit property was a matrimonial home, the chargor cannot now cry foul by alleging impropriety on the part of the 2<sup>nd</sup> defendant. With due respect, I do not agree with counsel for the plaintiff that the 2<sup>nd</sup> Defendant ought to have carried out independent due diligence to establish if the property was a matrimonial home. Indeed, the controversy around matrimonial property rights may have informed the removal of section 28 (a) the Land Registration Act through the amendments made in 2016. The said section provided that spousal rights over matrimonial property were overriding interests.

Considering all the circumstances of this case, I hold the view that there is sufficient reason for the court to exercise its discretion in favour of the Plaintiff as some of the depositions made will need to be tested at a full hearing. This is therefore a case where the court must decide the matter based on the principle that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to be wrong. This principle was set out in the case of **Films Rover International (1986) 3 All ER 772** which was quoted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR**. I am persuaded that there would be a much larger risk of injustice if I found in favour of the 2<sup>nd</sup> Defendant than if I determined the application in favour of the Plaintiff. Should the Plaintiff fail to prove his case at the main hearing the 2<sup>nd</sup> defendant would still be at liberty to exercise its statutory power of sale.

In the circumstances, I find it just and equitable to make the following orders:

- a) Pending the hearing and determination of the suit herein a temporary injunction is hereby issued restraining the 2<sup>nd</sup> Defendant by itself, its agents, servants, employees or otherwise from attaching, advertising for sale, selling and/or doing any other act which is prejudicial to the Plaintiff/applicant’s proprietary interest in land parcel number KERICHO/CHEPSIR S.S/311.**
- b) The injunction shall stay in force for a limited period of six months to enable the Plaintiff comply with Order 11 of the Civil Procedure Act and fix the case for hearing. The orders of injunction will automatically lapse if this condition is not met within the stipulated period.**

The costs of the application shall be in the cause.

**Dated, signed and delivered at Kericho this 10<sup>th</sup> day of November 2017**

**J.M ONYANGO**

**JUDGE**

In the presence of:

Miss Chelimo for the Plaintiff/ Applicant

No Appearance for the Defendants/ Applicants

Court Assistant Rotich