



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 836 OF 2017**

**FAITH WANGU GATHU.....PLAINTIFF**

**VERSUS**

**SPEED CAPITAL LIMITED.....1<sup>ST</sup> DEFENDANT**

**CLEVERLINE AUCTIONEERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application before Court is the Plaintiff’s Notice of Motion dated 2<sup>nd</sup> August, 2017 brought pursuant to Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 rules 1& 2, Order 51 rule 1 of the Civil Procedure Rules; Section 3, 13, 14 & 19 of the Environment and Land Court Act; Section 79 (3) & 92(2) of the Land Act; Articles 159 & 162 (2) (b) of the Constitution of Kenya and all the other enabling provisions of the Law.

The application is based on the following grounds which in summary are that Plaintiff’s husband without her spousal consent took a loan facility of Kshs. 2 million on 22<sup>nd</sup> February, 2016 from the 1<sup>st</sup> Defendant and created a legal charge over their matrimonial home described as KAJIADO/KAPUTIEI - NORTH/28211 and KAJIADO/KAPUTIEI - NORTH/28212 hereinafter referred to as the ‘suit properties’. The loan facility was advanced to the Plaintiff’s husband without her knowledge yet the suit properties are jointly owned between them. The Plaintiff’s husband was served with the 45 days Redemption Notice and Notification of Sale both dated 9<sup>th</sup> May, 2017 respectively with the sale of the suit properties through public auction scheduled on 18<sup>th</sup> July, 2017. The advertisement for sale by the 2<sup>nd</sup> Defendant was meant to clear the outstanding loan facility of Kshs. 2, 743, 333.99/= owed by the Plaintiff’s husband to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant never served the Plaintiff with the mandatory ninety (90) days statutory notice of sale in accordance with section 90(2) of the Land Act. Further, the matrimonial property is a family property and home to the Plaintiff and their two children who risk suffering undue prejudice and loss. Upon learning of the purported advertisement for sale, the Plaintiff instructed her then advocates Messrs. **KIGET & COMPANY ADVOCATES through KIPROTICH WILLIAM KIGET** who filed a Miscellaneous Application No. 10 of 2017 at the Kajiado Chief Magistrate’s Court and which application is dated 11<sup>th</sup> May, 2017. The application was filed in an incompetent court that lacks jurisdiction. The Plaintiff has now filed the present suit before this court through Messrs. YANO & COMPANY ADVOCATES seeking to have injunctive remedies against the Defendants.

The application is supported by the affidavit of FAITH WANGU GATHU the Plaintiff herein where she reiterates that they jointly own the suit properties with her husband who did not obtain her consent when he charged it to the 1<sup>st</sup> Defendant to obtain a loan facility. She avers that as at 31<sup>st</sup> July, 2017, the suit

properties were still registered in their joint names. She seeks the court's intervention as she and her two children stand to suffer an immense loss as the suit land is their matrimonial home and they have nowhere else to go if the purported sale is allowed.

The application is opposed by the 1<sup>st</sup> Defendant which filed a replying affidavit sworn by JAMES OUMA their Chief Executive Officer where he deposes that the Plaintiff's husband approached them for a loan of Kshs. 2 million vide a loan agreement dated the 22<sup>nd</sup> February, 2016 and offered titles of the suit properties as security with the loan being approved and advanced to him and a legal charge registered on the said suit properties. He avers that the properties charged were registered in the joint names of the Plaintiff and her husband and thus spousal consent was unnecessary. He claims the borrower grossly defaulted and never paid up the loan in accordance with the contractual terms and the 1<sup>st</sup> Defendant sent a 90 day notice dated 28<sup>th</sup> June, 2016, statement of account dated 30<sup>th</sup> June, 2016 showing the arrears, to both the borrower and the Plaintiff via registered post and asked them to redeem their properties. He reiterates that upon issuance of the ninety (90) days' notice, the Plaintiff and her husband called on their offices pleading for more time to pay the loan. He contends that on 26<sup>th</sup> October, 2016 the Plaintiff and her husband attended a meeting at their offices and formally accepted another notice of forty (40) days to sell the charged suit properties. He confirms that a copy of this notice was sent to the Plaintiff and her husband via registered post but they continued to be in default and the auctioneer served them with the redemption notice, which the Plaintiff has duly acknowledged. He affirms that the Auctioneer advertised the suit properties for sale but did not get satisfactory bids and intends to advertise again anytime soon. He insists that the Plaintiff and her husband are in default and the 1<sup>st</sup> Defendant should be allowed to exercise its statutory power of sale, and they do not deserve the equitable remedy and not met the threshold of granting an injunction. He reiterates that the 1<sup>st</sup> Defendant is a strong financial institution which is in the process of converting to a bank and has been in business for over seven (7) years.

The Plaintiff FAITH WANGU GATHU filed a supplementary affidavit where she deposed that as a joint owner of the suit properties, she never signed any form requesting for a loan facility neither did she give her approval and is a total stranger to any contract granting the said loan facility. She insists she is not aware of any loan facility nor any approval as alleged by the 1<sup>st</sup> Defendant, and that spousal consent is a legal requirement. She denies going to the offices of the 1<sup>st</sup> Defendant and has never received any official communication informing her of the existence of the said loan facility. She further denies ever receiving or acknowledging any document and was not aware of the advert. She reaffirms that the suit properties are her matrimonial home with her children and they do not have alternative residence and any sale or eviction shall have adverse psychological effects to the children since they have all along known the house as their home.

The Plaintiff's and 1<sup>st</sup> Defendant's Counsel submitted on the application on 17<sup>th</sup> October, 2017. The Plaintiff's Counsel Mrs. Yano reiterated the facts of their claim and referred to the Matrimonial Property Act at Section 6 where matrimonial property is defined as property acquired during the subsistence of the marriage. She further referred to Section 12 of the Matrimonial Property Act and insisted that if the property has to be mortgaged, both spouses must give consent. She submitted that the 1<sup>st</sup> Defendant did not bother to note if the proper law on spousal consent was adhered to and at no one time were the monies paid into the Plaintiff's account. She insisted the Plaintiff was not served with any documents except for one and is in imminent danger of being evicted from the matrimonial home. She submitted further that the borrower of the monies is not in the matrimonial home. She sought for prayers 2 and 3 of the motion dated 2<sup>nd</sup> August, 2017.

The Counsel for the 1<sup>st</sup> Defendant Ms. Oswera opposed the application and relied on their replying affidavit filed on 21<sup>st</sup> August, 2017. She submitted that facts are not disputed as the loan was disbursed to Plaintiff's husband which loan has not been paid. She insisted the Plaintiff was well aware of the Charge over the suit properties as she signed the Charge document. She submitted that once property is given as security it can be sold at any time if a loan is not repaid. She referred to the notices annexed in their replying affidavit which she stated were sent to the Plaintiff and her husband to redeem the suit properties and the husband did acknowledge them. She prayed that the application should be dismissed since no

monies have been paid to redeem the loan.

Mrs. Yano reiterated that there is no Charge document to prove parties are the ones who borrowed monies. There is no proof Plaintiff was served with the notices and that Plaintiff got copies of documents from the 1<sup>st</sup> Defendant/Respondent when she learnt of the mortgage. Further the transaction was between Charles Gitau Kimani and 1<sup>st</sup> Defendant with the Plaintiff being in total darkness about it. She submitted that the Plaintiff and her children will suffer if suit properties are sold. She relied on the Case of *Giella Vs. Cassman Brown* to support the Plaintiff's case.

### **Analysis and Determination**

Upon perusal of the application together with the supporting/replying and supplementary affidavits and the parties oral submissions, at this juncture the only issue for determination is whether the interim and mandatory injunctions sought by the Plaintiff/Applicant ought to be granted pending the hearing and determination of the main suit.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of ***Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358*** as follows:

**"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."**

Bearing this principle in mind, it behooves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiff/Applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff/Applicant stated that she is the joint owner of the suit properties and her husband charged the said properties without her consent. The Plaintiff contends that she was not aware of the loan and never received any documents nor notices from the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant insists spousal consent was unnecessary in charging the suit properties as the Plaintiff was joint owner of the same. The 1<sup>st</sup> Defendant further claims that they served her with all the requisite documents.

Section 79(3) of the Land Act provides that ***'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.'***

I note that the 1<sup>st</sup> Defendant did not attach the Charge document in its replying affidavit. Further I note that the 1<sup>st</sup> Defendant indeed admitted that the spousal consent was unnecessary as the suit properties were jointly owned.

Section 12(1) of the Matrimonial Properties Act provides that: ***'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.'***

In relying on the provisions of Section 79(3) of Land Act and Section 12(1) of the Matrimonial Property Act, I note that the said provisions are couched in mandatory terms and hence it was compulsory for the 1<sup>st</sup> Defendant to obtain spousal consent from the Plaintiff before charging the suit properties.

Further section 96 (3) (c) and (f) of the Land Act stipulates as follows:

**“(3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-**

**(c) a spouse of the chargor who had given the consent;**

**(f) any person who is the co-owner with the charger;**

The Defendant insists the Statutory Notices were sent to the Plaintiff and her husband but she denies receiving any of them.

I hence find that due to the 1<sup>st</sup> Defendant’s failure to obtain spousal consent to Charge the Suit properties in which the Plaintiff is even a joint owner and lack of proof that the requisite statutory notices were served upon the Plaintiff before the sale was advertised, the Plaintiff has indeed established a prima facie with a probability of success.

On the second limb as to whether the Plaintiff/ Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. In the instant case, I note that the suit properties form part of the matrimonial property where the Plaintiff and the children of the marriage reside. The 1<sup>st</sup> Defendant even admits that they did not obtain spousal consent as the suit properties is jointly owned. From the foregoing, I find that the Plaintiff will hence suffer irreparable loss that cannot be compensated by an award of damages.

On a balance of convenience, from the facts and materials presented, I find that the balance tilts in favour of the Plaintiff who is likely to suffer more inconvenience if the injunction is disallowed as opposed to what the Defendants will suffer if the injunction is allowed.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently allow the Plaintiff’s Notice of Motion dated 2<sup>nd</sup> August, 2017 except for Prayer No. 3.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 5<sup>th</sup> day of December, 2017.

**CHRISTINE OCHIENG**

**JUDGE**

**Present:**

Omondi holding brief for Muaka for Plaintiff

N/A for Defendants

CC Mpoye