



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
CIVIL SUIT NO.369 OF 2013

JUDITH MUOK ATIENO.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

The plaintiff filed this suit against the defendant on 5th October, 2012 in the High Court of Kenya at Machakos. In her plaint dated 4th October, 2012, the plaintiff averred that she is the wife of one, Amos OpudoAkech (hereinafter referred to only as “**Akech**”) who is the registered owner of all that parcel of land known as LR. No. Kajiado/OlchoroOnyore/5682 (hereinafter referred to as “**the suit property**”). The plaintiff averred that the suit property is her matrimonial home and that Akech had charged the same to secure a loan that was advanced to him by the defendant. The plaintiff averred that, on or about 4th August, 2012, the defendant instructed M/s Cash Crop Auctioneers to sell the suit property for the recovery of a sum of Kshs.6,995,095.90 which the defendant claimed to be due from Akech to the defendant pursuant to which instructions, the said auctioneers served her with a 45 days redemption notice and a notification of their intention to sell the suit property unless the said amount was paid.

The plaintiff averred that, the sale that the defendant intended to carry out through the said auctioneers was illegal because it was based on a Charge which is invalid. The Plaintiff sought a declaration that the notification of sale dated 2nd May 2009 that was served upon her by the defendant is unlawful, null and void, a declaration that the Charge over the suit property is invalid and as such unenforceable, a declaration that the defendant cannot exercise its statutory power of sale over the suit property, an injunction to restrain the defendant from exercising its statutory rights under the Charge over the suit property and, general and punitive damages.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 4th October 2012 seeking a temporary injunction restraining the defendant from advertising for sale, alienating, disposing of, transferring and/or in any way dealing with the suit property pending the hearing and determination of the suit. In affidavit sworn on 4th October 2012, the plaintiff stated that Akech Charged the suit property which is their matrimonial home to the defendant to secure a loan of Kshs.2 million without her prior consent contrary to the provisions of Section 79(3) of the Land Act, 2012. The plaintiff stated that the defendant had instructed Cash Crop Auctioneers to serve her with a 45 days redemption notice and a notice of the defendant’s intention to sell the suit property to recover an amount of Kshs.6,995,095.90 that was said to be due from Akech.

The plaintiff reiterated that the sale that the defendant intended to carry out was illegal on account of the invalidity of the Charge that was created over the suit property which contravened the provisions of the Land Act 2012 aforesaid. The plaintiff stated that the defendant had also failed to serve the requisite notices before putting up the suit property for sale. The plaintiff claimed further that the defendant intended to sell the suit property at gross under value. The plaintiff also accused the defendant of claiming from Akech interest which is twice the principal amount that was owed when the loan became non performing contrary to the provisions of the Banking (Amendment) Act, 2006. The Plaintiff claimed that the sum of Kshs.6,995,095.90 that the defendant had claimed from Akech was more than what the defendant was entitled to under the provisions of the Banking (Amendment) Act aforesaid. It is on account of the foregoing that the plaintiff sought temporary injunction to restrain the defendant from selling the suit property.

The plaintiff's application came up for hearing ex parte before Dulu J. on 5th October, 2012 who certified it as urgent and granted an interim injunction restraining the sale of the suit property pending the hearing of the application inter partes on a date to be fixed at the registry. The application was fixed for inter partes hearing on 18th October, 2012. When the application came up for hearing on 18th October, 2012, the defendant asked for time to respond to the same and was given 14 days to do so. The court extended the interim orders until the hearing of the application.

The defendant neither filed a replying affidavit nor grounds of opposition to the plaintiff's application for injunction. Instead, it filed a petition under Articles 2(4), 20, 21, 23, 40, 159 and 165(3) (d) of the Constitution of Kenya claiming that its fundamental rights and freedoms under the constitution had been contravened in that it had been stopped from selling the suit property on the strength of the provisions of section 78 of the Land Act, 2012 which is unconstitutional in that it purports to take away rights that had accrued to the defendant prior to the coming to effect thereto by applying section 79(3) of the Land Act, 2012 retrospectively. The defendant's petition in which the Attorney General was the respondent and the plaintiff herein an interested party was heard by Mutungi J. who dismissed the same in a judgment that was delivered on 24th March 2015. Mutungi J. found that the defendant's constitutional rights had not been violated.

After the dismissal of its petition as aforesaid, the defendant filed another application, this time round seeking the discharge of the orders that were made by Dulu J. on 5th October 2012 and for the plaintiff's suit to be struck out. This is the application which is the subject of this ruling. It should be noted that as at the time of filing this application, the defendant had neither filed a replying affidavit in response to the plaintiff's application dated 4th October 2012 in which the orders sought to be discharged were granted nor filed a statement of defence to the plaintiff's claim. The plaintiff's application that was brought by way of Notice of Motion dated 23rd April 2015 under Section 1A, 1B, 3A of the Civil Procedure Act and Order 2 rule 15(1) (a), Order 40 rules 6 and 7 and Order 51 rule 1 of the Civil Procedure Rules was brought on the grounds that following the judgment that was made by Mutungi J. on 24th March 2015 aforesaid, the plaintiff herein discloses no or any reasonable cause of action and that the injunction order that was issued on 5th October 2012 has been in place for over a year.

The application was supported by the affidavit of one Albert Anjichi sworn on 23rd April 2015. In that affidavit Mr. Anjichi who is the defendant's recoveries officer in its credit operations department stated as follows; through a Charge and Further Charge dated 13th February 2001 and 23rd June 2003 respectively, Akech who is the plaintiff's husband gave the suit property to the defendant as a security to secure a loan that was advanced to him by the defendant. After Akech failed to repay the said loan, the defendant started the process of exercising its statutory power of sale over the suit property pursuant to the terms of the said Charges. The plaintiff then brought this suit to restrain the defendant from selling the suit property. The defendant responded to the suit by filing the constitutional petition that I have referred to above. Mr. Anjichi stated that in this suit the only contention by plaintiff is that Charges that were executed by Akech in favour of the defendant over the suit property were invalid for want of her consent which contention no longer holds following the decision of Mutungi J. aforesaid. Mr. Anjichi contended that Mutungi J. had held that the Charges that were executed over matrimonial properties prior to the coming into effect of the Land Act, 2012 and the Land Registration Act 2012 did not require spousal

consent. He stated that following this ruling, the plaint filed herein discloses no cause of action against the defendant.

The application was opposed by the Plaintiff through a replying affidavit sworn on 3rd July, 2015. In her affidavit, the plaintiff stated that in her plaint filed herein, she is not challenging the sale of the suit property only on account her right over the same as a spouse of Akech but also on account of the manner in which the defendant's statutory power of sale was being exercised. The plaintiff stated that the defendant did not serve all the requisite notices before putting up the suit property for sale and had also intended to put up the suit property for sale at a gross under value. The plaintiff contended further that the defendant loaded Akech's mortgage account with debts which were not secured by the Charge over the suit property and that the amount claimed by the defendant from Akech is illegal under the Banking (Amendment Act) 2006. The Plaintiff stated that all these issues can only be determined at the trial of the suit. The plaintiff stated that the strength or sub-stratum of her case was not lost or eroded by the judgment of Mutungi J. aforesaid for various reasons. First, because the petition by the defendant was dismissed and secondly, there are decisions by other judges of concurrent jurisdiction with Mutungi J. who have held that the Charges which were executed over matrimonial properties prior to the coming into effect of the Land Act and Land Registration Act, required spousal consent. The plaintiff cited the decision of Havelock J. in the case of Patrick Waweru Mwangi and Another vs. Housing Finance Co. Ltd. (2015) eKLR. On the issue of the order of temporary injunction which has remained in force for over a year, the plaintiff contended that the defendant is to blame for the same. The plaintiff contended that the defendant did not enter appearance and as such it has not been possible to have the suit heard and determined.

The defendant's application was heard by way of written submissions. The defendant filed its submissions on 18th September 2015 while the Plaintiff filed her submissions on 30th October 2015. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the plaintiff's replying affidavit in opposition to this application. Finally, I have considered the parties' respective submissions. The defendant has sought two reliefs. The first prayer is for the striking out of the suit and the second is for the discharge of the temporary injunction that was granted herein on 5th October 2012. I am of the view that if the first prayer is granted, it would not be necessary to consider the second prayer. The law is now settled that the power to strike out pleadings is a draconian remedy which the court would only exercise in clearest of cases. In the case of **D. T. Dobie Company (K) Ltd. vs. Joseph Mbaria Muchina & Another [1982] KLR 1**, Madan JA. stated as follows, on the exercise of this power;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

What I need to determine is whether the plaintiff's suit herein can be said to be so hopeless and weak beyond redemption. I have set out at the beginning of this ruling the plaintiff's case as pleaded in the plaint which is sought to be struck out. I have also pointed out that the defendant has not filed a statement of defence to the plaintiff's claim. The first limb of the reliefs sought by the defendant which is the striking out of the plaint filed herein is anchored on Order 2 rule 15(1) (a) of the Civil Procedure Rules. Under this rule, the court is not supposed to consider any affidavit evidence while considering whether or not the plaint discloses no or any cause of action. The court is only supposed to base its decision on the pleadings on record. Without the defence on record, this court is unable to say whether or not the plaint filed herein discloses a reasonable cause of action. In determining whether a plaint discloses a reasonable cause of action, the court must consider the defence that has been put forward by the defendant. Without a defence to the plaintiff's claim, how can the court say that the claim is hopeless and weak beyond redemption?

I am unable to see the relevance of Mutungi J.'s judgment of 24th March 2015 to the application before me. That judgment cannot amount to a statement of defence by the defendant on which the strength of the plaintiff's case can be measured. As rightly submitted by the plaintiff, Mutungi J. had dismissed the defendant's petition. In the course of his judgment however, he made certain findings on the issues of law

that were canvassed before him specifically whether Charges over matrimonial properties which were executed before the commencement of the Land Act, 2012 and the Land Registration Act, 2012 required spousal consent. He held that no such consent was required. It is on the basis of this finding that the defendant has brought the present application contending that, since the plaintiff's claim is based solely on her contention that her consent was not obtained prior to the execution by Akech of the Charge over the suit property in favour of the defendant, the claim cannot hold in the face of that finding.

This contention by the defendant in my view must fail for three reasons; first, the defendant has not filed a statement of defence incorporating the findings of Mutungi J. which is the basis of its application. The defendant is therefore citing the said judgment in vacuum. Secondly, it is not correct as submitted by the defendant that the only issue raised in the plaint filed herein concerns spousal consent. As I have stated above, the plaintiff has challenged the intended sale of the suit property on several grounds. It follows that even if it is assumed that the issue of spousal consent was settled by Mutungi J. in the judgment aforesaid, all the other issues raised in the plaint will have to proceed to trial. Finally, I am in agreement with the plaintiff that the finding by Mutungi J. on the issue of spousal consent was *obiter dicta*. It was not the *ratio decidendi* of his judgment. I think that I have said enough to show that the defendant's prayer seeking the striking out of the plaint filed herein has no basis and is not for granting. The defendant has not met the threshold for such relief.

The other relief sought was for the discharge of the order of temporary injunction that was made herein on 5th October, 2012 by Dulu J. This relief is sought on the ground that the said order has lasted for over one year. Again, I see no merit in this prayer. I am in agreement with the plaintiff that the defendant is to blame for the unreasonable length of time that the said order has lasted. As I have stated above, the defendant has to date not responded to the plaintiff's application for injunction in which the said order was given even after he was ordered to do so within 14 days on 18th October 2012. On that day, the court extended the orders that were granted on 5th October 2012 until the hearing of the injunction application *inter partes*. I am of the view that the defendant has created a situation in which it has not been possible to have the plaintiff's injunction application heard. First, instead of responding to the application, he filed a constitutional petition in these proceedings in the year 2012 which was not determined by the court until 24th March 2015. The petition was found to be without merit. Soon after the determination of that petition, the defendant came up with the present application instead of responding to the pending application for injunction. I am of the view that the defendant cannot benefit from its own wrong. In the case of, **Nabro Properties Ltd. vs. Sky Structures Limited and 2 others [2002]2KLR 299**, Gicheru JA. while quoting *Brooms Legal Maxims* stated as follows at page 312;

“...the author of a wrong who has put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.”

I am of the view that to discharge the order of injunction that was given herein on 5th October 2012 and extended on 18th November 2012 until the hearing of the plaintiff's application for injunction dated 4th October, 2012 would enable the defendant to benefit from its own wrongs.

The upshot of the foregoing is that the defendant's application dated 28th April 2015 fails wholly. The same is accordingly dismissed with costs to the plaintiff.

Delivered, Dated and Signed at Nairobi this 22nd day of January, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Ayieko for the Plaintiff

Mr. Kimani for the Defendant