



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 30 OF 2015**

**MOHAMMED N. H. MOGHE.....1ST PLAINTIFF**

**AHMED N. H. MOGHE.....2ND PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

***Mohammed N. H. Moghe* and *Ahmed N. H. Moghe*** suing as joint administrators of the Estate of the late Nuh Hussein Moghe have come to court against National Bank of Kenya for an injunctive order restraining the defendant/respondent from selling, transferring, disposing off, auctioning and/or in any other manner dealing and/or interfering with all that parcel of land known as Eldoret Municipality Block 2/68/1 pending the the hearing and determination of this suit and also that costs of this application be provided for.

The application is based on grounds that the defendant/respondent acting through its agents, Watts Enterprises, has advertised for the sale of the said parcel of land known as Eldoret Municipality Block 2/68/1 in the Daily Nation of 19th July, 2010. The plaintiff/applicant has since learnt that the purported sale is meant to enable the defendant/respondent realize its alleged security for a guarantee purportedly executed by one of the Administrators of the estate in favour of one, Yusuf Jamal Noor. The plaintiffs/applicants have no knowledge of any such guarantee, neither has he ever executed and/or authorized the same. That the said guarantee is fraudulent, null and void *ab initio* for want of compliance with the mandatory provisions of the law. That the purported sale is equally null and void *ab initio* for want of compliance with the mandatory provisions of the law, and failure by the defendant/respondent to issue the statutory 90 days notice to all Administrators of the estate. Moreover, that the sum claimed by the defendant/respondent is illegal and unlawful. Lastly, that the entire estate of Nuh Hussein Moghe (Deceased), stands to suffer irreparable loss and damage should the purported sale proceed and therefore it is just, fair and expedient that this application be allowed.

The application is supported by the affidavit of Mohammed N. H. Moghe who states that he is an administrator of the estate of the late Nuh Hussein Moghe. The other surviving co-administrator is one, Ahmed Nuh Moghe. One other co-administrator, Mohammed Nuh Hussein Moghe has since passed away. He became a co-administrator of the said estate pursuant to the Grant of Letters of Administration issued in Eldoret High Court Probate and Administration Cause No. 190 of 1994 which was issued on 5th January, 1995 and confirmed on 4th August, 1999. The process of distribution of the said estate has not been done and that one of the properties forming part of the estate is all that parcel of land known as Eldoret Municipality Block 2/68/1.

Sometimes in March, 2013, he received a statutory notice dated 28.01.2014, from the

defendant/respondent purporting to invoke their statutory power of sale in respect of property no 2/68/1. He has since learnt that the purported sale is meant to enable the defendant/respondent to realize its alleged security for a guarantee allegedly executed by the administrators of the estate of the late Nuh Hussein Moghe, in favour of one, Yusuf Jamal Noor, which transaction(s) he neither authorized nor sanctioned, participated in nor was made aware of at the time as he resided in the United Arab Emirates. He is informed by his Advocates on record that in the circumstances, the said guarantee, in its current form, is fraudulent null and void *ab initio* for want of compliance with the express provisions of the law, primarily, the Law of Succession Act Cap. 160, Laws of Kenya and that the intended sale is null and void for reasons that the said guarantee was allegedly executed by an administrator of the estate of the deceased when the grant of letters of administration of the estate of the said deceased had not been confirmed and the same was therefore done in contravention of the mandatory provisions of the law. The alleged guarantee was purportedly executed by an administrator of the estate of deceased when distribution of the said estate had not been done. The co-administrators do not have power in law to offer as security property comprising a deceased's estate and/or transfer any interest in the same before the grant of Letters of Administration is confirmed and distribution thereof done. The execution of the guarantee amounted to inter-meddling with the estate of a deceased person, which is prohibited in law and which is itself an offence. The guarantees were executed without the consent of the plaintiffs/applicants who is a co-administrator and whose consent was mandatory for the alleged guarantee to have any force in law. That neither of the surviving administrators have ever been personally served with the mandatory ninety (90) days statutory notice of sale as required by law.

He confirms that in their capacities as the Administrators of the estate of the deceased, they made several formal requests to the defendant/respondent for provision of the respective loan facility statements to enable them take accounts on behalf of the estate of the deceased to no avail. That he is aware that the Administrator/Administratrix of the estate of Yusuf Jamal Noor obtained a court order issued by the Chief Magistrate's Court in Kitale on 30.05.2014 compelling the defendant/respondent to provide the estate with the entire overdraft and/or loan facility account statements relating to the deceased to enable the estates representatives take accounts, which order the defendant/respondent declined to fully comply with.

He is informed by his Advocates on record that it is fair and imperative that the defendant/respondent be compelled to provide the estate with concise and detailed statements showing all debits and credits and interest rates charged so as to properly arrive at the right balance (if any) and/or confirm if at all the alleged loan has been sufficiently settled and that to date, the defendant/respondent has never fully complied with the said court order despite several reminders from the applicants to that end. The bank statements preferred by the defendant/respondent are incomplete and/or inconclusive and do not clearly give an accurate of the items levied, more specifically the interest charged. From the defendant's/respondent's conduct, it is clear that the defendant/respondent lacks the relevant credible factual evidence to support the demand for the sums allegedly owed and further, the defendant/respondent is in contempt of court. The defendant/respondent has repeatedly illegally and unjustifiably been varying the interest rates thereon and without the approval of the relevant ministry and without notifying or providing that information to the borrower or the plaintiffs/applicants contrary to applicable banking principles, practices and the law. The defendant/respondent, without notice and/or authority from the guarantor(s) of the facility, unilaterally increased the overdraft facility contrary to the respective banking rules and procedures and that the defendant/respondent unlawfully consolidated the borrowers' accounts using the said security to settle outstanding debts of the borrower and further charge interest thereon, without the consent and/or approval of the guarantor(s). The applicant believes that the issues raised are substantive in nature which ought to be heard and determined on merit to the estate of the deceased for the benefit of the beneficiaries who are likely to suffer substantial loss in case the orders are not granted.

The respondent filed a replying affidavit sworn by **Paul Chelanga**, the Remedial Manager based at the respondent's head office stating that the respondents are forum shopping as the orders sought are pending determination in Eldoret Hccc No. 85 of 2004, **Mohammed N. H. Moghe Vs National Bank of Kenya Ltd** and that the issue of account's statements was fully adjudicated and determined in Kitale CMCC No. 90 of 2013, Fathumo Nuh Hussein and Mohammed Yusuf Vs National Bank of Kenya. Moreover, that the plaintiffs should have sought to be enjoined in Eldoret Hcca No. 85 of 2004. The defendant claims to

have duly entered into a legally binding agreement with the late Yusufu Jamal Noor for the advancement of a financial facility which was guaranteed by the plaintiffs and other co-administrators and secured by a charge over the suit property registered in the name of the said guarantors. The plaintiffs themselves entered into a contract with the defendant and in so doing, they received legal advance on consequences of default.

When the bank entered into the financial arrangement on the plaintiffs' guarantee, the said property had been registered in their names as proprietors without an indication that they held the property in trust for anyone. According to the defendant, the charge and guarantee was entered into after the plaintiffs were registered as the proprietors on transmission. On the issue of statutory notices for sale, it is alleged that the plaintiffs have always been served but instead of paying, they have resorted to suits. The current outstanding amount in respect of the loan facility is Kshs.11,954,070/= and the same continues to accrue interest.

In the supplementary affidavit filed on 7.4.2015 and sworn on 1.4.2015, Mohammed Nuh Moghe states *inter alia* that the application is properly before court and that Eldoret Hcca No. 85 of 2004 was instituted by his co-administrators and was withdrawn before hearing and determination whilst Kitale CMCC Misc. Application No. 90 of 2013 was instituted by the beneficiaries of the Estate of the borrower for their own interests and benefits and that the Estate of the deceased was not a party to the proceedings and that the defendant provided incomplete accounts.

The plaintiffs/applicants submit that they have a *prima facie* case with High chances of success as the guarantee/security perfected in and over the suit property the respondent is illegal, defective and null and void *ab initio*. The charge instrument was registered and/or perfected on 22.07.1997 whilst the confirmation of a grant was issued to its applicants on 06.09/1999. The respondents registered security prior to confirmation of the grant of representatives by the court. According to the plaintiffs, the defendant's action or omission amounts to inter-meddling with the Estate of deceased contrary to section 55 and 71 of the Law of Succession Act.

On the issue of statutory notices, it is argued that the facility advanced was limited to Kshs.2,000,000/= plus interest thereon and other charges arising from the respective account. However, the statutory notice dated 20.01.2014 issued by the respondent demands from the applicants payment of an agree-gate sum of Kshs.11,640,344/= which are not due and owing and therefore, the statutory notice issued and served upon the applicants is invalid and therefore, defective, pursuant to the mandatory provision of section 90 of the Land Act and terms and conditions set out in the charge instrument.

The plaintiffs further argue that the respondent gave further credit advances to the borrower against the charge in the form of temporary overdraft facility in the sum of Kshs.500,000/= against the terms of the charge and without consent of the chargor. Moreover, that the consolidation of accounts of the borrower secured by distinct charges was illegal as there was no provision of consolidation of charges.

Most importantly, the plaintiffs argue that they were never properly served with the alleged statutory notices pursuant to section 74 of Registered Land Act (repealed) and 96 (2) of the Land Act. The applicant's address is P. O. Box 7323, Eldoret whilst the statutory notice was served on 1380, Eldoret, which was no longer operating. The plaintiffs argue they are administrators of the Estate of the deceased Nuh Hussein Moghe and bring this action in their capacity as the personal representatives of the Estate of the deceased. They claim to bring their action on their behalf and on behalf of the beneficiaries. The beneficiaries stand to suffer irreparable loss of their entire inheritance. They reiterate that the nature of loss likely to be suffered cannot be adequately compensated with damages. On balance of convenience, they argue that it tilts towards granting the orders of injunction sought.

The defendants reply in their submissions that the plaintiffs have no *prima facie* case with a probability of success. On this point, the defendant argue that the plaintiff is guilty of forum shopping as suit No. Eldoret Hccc No. 85 of 2004 has neither been finalized nor withdrawn. The plaintiff in that suit is dead however, therefore the plaintiff in the suit herein being a co-administrator should have applied for substitution. There is no notice of withdrawal of the suit.

According to the defendant, the plaintiff should have applied for substitution. Moreover, that the Eldoret Hccc No. 85 of 2004 has abated and therefore the suit herein is *res-judicata*.

Moreover, the defendant argues that the suit is an abuse of the process of court as this is the third suit filed in respect of this matter being Eldoret Hccc No. 85 of 2004 and Eldoret CMCC No. 651 of 2010. Their intention in filing multiple suits was their need to obtain interim orders to delay the defendants of its statutory power of sale without serious intention of prosecuting the case.

On the validity of guarantee and charge instruments, the defendant argues that the 1st plaintiff did fully consent to the entire transactions he is attempting to distance himself from. He argues that the 1st plaintiff has not disclosed the donation of a power of Attorney to his co-administrator which was executed at the Kenya Embassy in Riyadh.

On the dispute as to the amount owned and accounts, the respondent argues that courts should not grant any injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute on the amount due under the mortgage. The defendant further argues that the statutory notice was sent to the correct address of the applicant as admitted in the pleadings.

On irreparable loss, the applicants argue that they stand to lose their entire inheritance and that the suit property is the source of income and livelihood for the family but to counter the argument, the defendant argues that the plaintiff can be compensated in damages.

On balance of convenience, the defendant argues that it tilts hands dismissing the application for injunction as granting the same will cause the outstanding amount to outstrip the value of the suit property and the defendant may never recover some substantial losses.

I have considered the submissions of both counsel and do find the following issues ripe for determination:

1. ***Whether the plaintiff has demonstrated a prima facie case with a probability of success.***
2. ***Whether the plaintiff will suffer substantial loss if injunction is not granted.***
3. ***Where does the balance of convenience tilt?***

On the first issue, the applicants' argument that the guarantee perfected on 22.07.1997 whilst the confirmation of grant was made on 6.9.1999 was illegal, defective, null and void is valid, however, this court notes that the applicants were the authors of the illegality. The applicants appear determined to benefit from their own mistake or misrepresentation as the guarantee of the loan to the National Bank of Kenya was signed by the plaintiffs thus **Mohammed Nuh Hussein Moghe** through his attorney Muhamud Nuh Hussein Moghe, **Ahmed Nuh Hussein Moghe and Muhamud Nuh Hussein Moghe**. At the time of signing the guarantee and the charge the plaintiffs were the registered proprietors of the parcel of land as per the certificate of search produced. I have looked at the certificate of confirmation of grant and do find that the same is incomplete. Though the fact that the guarantee was executed before confirmation of the grant raises an arguable point that the security offered was invalid and that it amounted to inter-meddling with the estate of a deceased person this court observes that the plaintiffs have not disclosed how the property was distributed. However this is an issue that might be addressed during trial.

Section 55 of the Law of Succession Act Cap. 160, Laws of Kenya provides that:

***(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.***

***(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or***

*partly before or after the date of death.*

Section 71 provides as follows;

***(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.***

***(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—***

***(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or***

***(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or***

***(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or***

***(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:***

***Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.***

The import of the aforesaid provisions is that the process of succession by way of letters of administration is concluded by confirmation of grant and distribution of the properties to the heirs. This appears not to have been done before the property in dispute was charged to the bank.

On statutory notices and the amount claimed as outstanding therein, I do agree with the defendant that the court cannot grant injunction to restrain a mortgagee from exercising his power of sale solely on the ground that there is a dispute on the amount due under the mortgage. I fully agree that it is not the duty of the Judge to take accounts in respect of the loan balance.

Moreover, the applicants' argument that they were never properly served with the statutory notices is misplaced as the address provided in the charge document is P. O. Box 1380, Eldoret and not 7323, Eldoret. The applicants did not notify the defendant of change of address if any and therefore, they are bound by the address supplied in the charge and guarantee document. Moreover, the 1st plaintiff has admitted having received the statutory notice.

The allegation by the defendant that the applicant is forum shopping in the Judiciary and that the application is an abuse of the process of the court can only be addressed by this court if an application is made under Order 2 Rule 16 of the Civil Procedure Rules for dismissal of the suit for being an abuse of the process of the court but not in the current application.

On the issue of irreparable loss, this court finds that the the applicants have demonstrated the property belonged to a deceased person and that the same was charged before confirmation of grant and therefore, there is a likelihood for the rights of the beneficiaries of the deceased's estate being affected.

On a balance of probabilities this court finds that it tilts towards granting the orders sought as the parties

have not come out clearly on how the property was distributed. Ultimately the application is allowed thus an injunctive order is hereby issued restraining the defendant/respondent from selling, transferring, disposing off, auctioning and/or in any other manner dealing and/or interfering with all that parcel of land known as Eldoret Municipality Block 2/68/1 until the hearing and determination of this suit. Costs in the cause. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2016.**

**ANTONY OMBWAYO**

**JUDGE**