



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 187 OF 2016

ESTA KUTO.....PLAINTIFF

VERSUS

M. ORIENTAL BANK LTD.....1ST DEFENDANT

JEREMIAH KOSGEI.....2ND DEFENDANT

KIPKOSGEI KUTO.....3RD DEFENDANT

RULING

Esta Kuto has come to court claiming that at all material times to this suit, she has been lawfully married to the 3rd defendant for over 59 years and together, they have acquired matrimonial properties including land parcel No. Moiben/Lolkinyei 7(Kabiyet & Lelaibe) 99, the suit land herein. The suit land is registered in the name of the 3rd defendant who holds it in trust for himself, the plaintiff and their children. The plaintiff further states that on 27th June 2016, she received information from one of her sons to the effect that the 1st defendant's agent had advertised in the day's print media a notice of sale of the suit land by public auction on 15th July, 2016. She then conducted a Search at Uasin Gishu Lands Office and established that on 6th December 2011, a charge was registered in favour of the 1st defendant over a Kshs.12,000,000/= loan/overdraft that the bank herein advanced to the 2nd defendant and upon inquiring about the charge herein, the 3rd defendant, informed her that he stood as a guarantor for the said loan/overdraft and that the debt was fully repaid by 28th August, 2012. She believes that if the loan/overdraft facility offered to the 2nd defendant was fully settled by the borrower by 28th August 2012, then the purported notice of sale of the suit land is unlawful.

The plaintiff avers that a loan contract (if any) entered into after 28th August 2012, in which the suit land was offered as security must be in compliance with the provisions of section 28(a) and 93(1), (2), (3) and (4) of the Land Registration Act, 2012, which provides that spousal rights over matrimonial property overrides any other interest and that a disposition made without spousal consent shall be void at the instance of the spouse and that any charge over the suit land shall also comply with all relevant provisions of the Land Registration Act, 2012 including sections 32, 36, 43 and 56 which provide for registration, consent and mode of execution of such dispositions.

The plaintiff avers that if the contents of the Auction Notice dated 27th June 2016 are correct, that the 2nd defendant is in breach of contract to repay a loan that the 3rd defendant guaranteed to the extent to Kshs.12,000,000/=, then such contract, if any, is in breach of the mandatory provisions of section 28(a) and 93(1), (2), (3) and (4) Land Registration Act, 2012 which requires the express consent of a spouse in any disposition affecting matrimonial property such as the suit land.

THE APPLICATION

Accompanying the suit is an application under certificate of urgency praying for orders that an interim order of injunction do issue restraining the 1st defendant/respondent either by itself, its servants or agents from selling or making any further disposition on land parcel No. MOIBEN/LOLKINYEI 7(KABIYET & LELAIIBEI) 99 pending hearing and determination of this suit. The application is based on grounds that in December 2011, the 3rd defendant/respondent agreed to guarantee a loan/overdraft facility that the 1st defendant/respondent advanced the 2nd defendant/respondent. The 3rd defendant/respondent offered the suit land as security pursuant to which a charge was registered over the suit land on 6th December, 2011. The disposition herein relates to matrimonial property but the defendants/respondents did not seek her consent. The 3rd defendant/respondent has stated that the said overdraft was settled on 28th August, 2012. Despite the settlement of the said debt, the 1st defendant/respondent's agents have gone ahead to advertise for sale the suit land on 15th July, 2016 by public auction. Should the said sale proceed as per notice, then the applicant stands to suffer irreparable loss and damage as the suit land is matrimonial property and hosts her only home and the applicant and her children have no other source of livelihood. In any event, there is evidence that the debt in issue was fully repaid. No prejudice will be occasioned to the defendants/respondents the orders are granted pending hearing of the plaintiff/applicant's case.

In the supporting affidavit, she states she got married in 1957 under Nandi Customary law and their marriage was blessed with several children, all of who are now adults. In their marriage spanning 57 years, they have jointly acquired matrimonial properties including land parcel No. MOIBEN/LOLKINYEI 7(KABIYET & LELAIIBEI) 99, the suit land herein which is registered in the name of the 3rd defendant who holds it in trust for himself, their children and herself. She is aware that the 1st defendant/respondent deposited the original title deed in the 1st defendant/respondent bank for safe keeping. On 27th June 2016, she received a call from her son Alex who informed her that the 1st defendant/respondent agent had advertised in the day's Daily Nation Newspaper a notice of sale of the suit land by public auction on 15th July, 2016. That after deliberating over the issue with her children, she then asked him to do a Search at Uasin Gishu Land Office. On doing so, they established that on 6th December 2011, a charge was registered in favour of the 1st defendant/respondent over a Kshs.12,000,000/= loan/overdraft that was advanced to the 2nd defendant/respondent.

The 3rd defendant/respondent has since informed her that he guaranteed the said loan/overdraft by offering the suit land as security. He also gave her the 2nd defendant's/respondent's bank account statement showing that the loan was repaid by 28th August, 2012. Her advocate on record advises her which advice she verily believes to be true that since the said loan/overdraft facility was fully settled, then purported notice of sale of the suit land is therefore unlawful and that if a loan contract in which the suit land was offered as security was entered into after 28th August 2012, then such contract must be in compliance with the provisions of section 28(a), 32, 36, 43, 44, 56 and 93(1), (2), (3) and (4) of the Land Registration Act, 2012 which spells out the overriding interests over dispositions in land and that going by the contents of the Auction Notice dated 27th June 2016, that the 2nd respondent is in breach of contract to repay a loan that the 3rd respondent guaranteed to the extent of Kshs.12,000,000/=, then such contract, if any, is in breach of the mandatory provisions of section 28(a) and 93 (1), (2), (3) and (4) Land Registration Act, 2012, which requires her express consent as the guarantor's spouse in any disposition affecting matrimonial property such as the suit land. In the meantime, should the intended sale proceed, then she and her children stand to suffer irreparable loss and damages because the suit land hosts her only matrimonial home. She has also made improvements in the farm including construction of buildings and structures and have planted food crops, fodder crops and trees. She has also invested in soil conservation. The suit land is the source of their livelihood.

RESPONSE BY 3rd RESPONDENT

In his replying affidavit, Mr. Kipkosgei Kuto who claims to be aged and semi illiterate states the plaintiff is his wife and that the suit land is matrimonial property and that he has been the 1st respondent bank Eldoret Branch's customer over a long period of time and has deposited his title deeds with them for safe keeping and therefore cultivated a good relationship with Mr. Kipsang, a Loan's Officer in the said bank, who always helped him with the filling of cash deposit slips and in making cash withdrawals. In

November 2011, he visited the said bank and he found the Loans Officer seated with the 2nd respondent after a brief introduction, the Loans Officer informed him that the 2nd respondent whom he knew as maize dealer, wanted an overdraft facility and pleaded with him to be his guarantor and that he offers title deeds MOIBEN/LOLKINYEI 7(KABIYET & LELAIBEI) 99 and MOIBEN/LOLKINYEI 7(KABIYET & LELAIBEI) 100 as security. He acceded to the Loans Officer's request on the understanding that his title deeds would be returned as soon as the said overdraft was repaid.

On 16th November 2012, he went to inquire about the status of the loan and the said Loans Officer told him that the borrower cleared his overdraft in August, 2012. He then asked for his title deeds and he made copies of the same. He then made hand written notes on them which read that "I Kipkosgei Kuto" has today collected original of this title deed". He then stamped the said copies and asked him to append his signature before handing them to him. He told him that the copies of the title deeds he was giving him symbolized a technical release of the title deeds pending formal discharge of charge. The said Loans Manager has kept asking him to sign discharge of Charge forms since then but the title deeds herein have not been released to him. That when he also learned from his sons that the suit land was due to be sold on 15th July 2016, he quickly contacted Mr. Kipsang of the 1st respondent bank and the 2nd respondent both of who insisted that the loan was repaid. The 2nd respondent later brought him the relevant bank statement showing that the overdraft advanced to him in November to December, 2011 was repaid by 28th August, 2012 and therefore the debt was settled. He is not aware of any other loan that was advanced to the 2nd respondent other than the overdraft facility against which the suit land was charged on 6th December, 2011 and wishes to be supplied with the particulars of the loan contract, that the 2nd respondent defaulted in repaying together with his the bank statement to enable him scrutinize and determine his liability or otherwise.

He accepted to offer his property as security in favour of the 2nd defendant following persistent requests by the bank's Loan Manager, Mr. Kipsang on the understanding that his title deeds would be returned to him as soon as the overdraft given to the 2nd defendant/respondent was repaid and in November 2012, he visited the Loan Manager who informed him that the borrower cleared his overdraft in August 2012. He then asked for his title deeds and he made copies of the title deeds and made a note to the effect that he would release the title deeds once the same had been discharged.

The import of the charge was not explained to him as he was not informed of the need to seek independent legal advice especially considering that he is semi-literate and relied wholly on the Loan Manager's word.

The figure given in the statement annexed in the replying affidavit of the 1st respondent is in fact a credit in favour of the borrower and not a debt. As per the annexed statement, the loan was fully repaid upon deposit of Kshs.69,216,512.65 on 27th August, 2012 leaving a credit balance of Ksh.1,719,923.00 and that in view of the fact that the debt was fully repaid as at 27th August, 2012 any further overdraft facility after that date was illegal and needed a fresh charge for it to be effective against his titles.

That moreover, he was not served with the mandatory 90 day notice by the 1st defendant of its intention to exercise its statutory power of sale and neither did its auctioneers serve the 45 day redemption notice upon him before advertising the property for sale. That in any event, the 1st defendant has not annexed the charge documents to enable the court get the full gist of the contract between himself and the bank to enable the court have full facts before making a determination on the matters herein. He further states that although he has been using Box Number 52, Moiben, which belong to Lelaibe Primary School, he relocated to Kapsaret area of Uasin Gishu County in 1993 and he now uses his son's address Box Number 7048-30100, Eldoret. That as such, the notice allegedly sent to him through his former address did not reach him. He had notified the bank of his change of address but it appears they did not amend their records and in any event, he has always been a frequent visitor at the bank and he has always met Mr. Kipsang who has never given him any letter or informed him of the bank's intention to sell his land. No explanation has been given by the bank on how they could have allowed him to collect his titles in November, 2012 if the loan was still outstanding. That at no time was he informed that the amount he was guaranteeing was Kshs.12,000,000/= as he simply signed forms as directed by Mr. Kipsang. That he is surprised that although he had charged two titles, only one has been advertised for sale. That he has since

learnt that Mr.Kipsang has been fired by the bank following emergence of issues relating to this case in a bid to cover up the bank's ineptitude.

RESPONSE BY 1ST DEFENDANT

Mr. Josphat Githagi on behalf of the 1st defendant states that on 6th December, 2011, a Charge over MOIBEN/LOLKINYEI BLOCK 7(KABIYET & LELAIBEI)/99 and 100 for Kshs.12,000,000/= was registered in favour of the 1st defendant to secure overdraft/loan facilities to 2nd defendant and which facility was guaranteed by the 3rd defendant. The 3rd defendant freely executed the charge having understood the rights of the bank in the event of default by the principal debtor/borrower, that is, that the property would be sold in pursuance of the bank's power of sale. The 2nd and 3rd defendants have failed to repay the overdraft/loan facility and the sum due as at 30th September, 2012 was Kshs.168,119,877.85 and the plaintiff's allegation that the loan facility was repaid as at 28th August, 2012 is false and in the light of the default of repayment of the loan, the bank is perfectly within its rights of statutory power of sale. The intended sale of the security is grounded on default of payment by the 2nd and 3rd defendants.

According to the 1st defendant, the Charge over MOIBEN/LOLKINYEI BLOCK 7(KABIYET & LELAIBEI)99 & 100 was created long before the Land Registration Act and Land Act came into force and there was no requirement for spousal consent by the plaintiff. The law does not operate retrospectively to charges registered prior to April, 2012. He states that the fact that the suit properties has the matrimonial home of the plaintiff is non consequential as the same became a commodity for sale when it was offered as security for repayment of the overdraft/loan facility.

The application is clear case of an attempt to abuse the provisions of section 94 of Land Registration Act. The suit and application are frivolous and indeed an abuse of the process of court. The 1st defendant through Josphat Githagi filed a further affidavit stating that on 12th November 2015, the bank served a statutory notice upon the 3rd defendant with respect to MOIBEN/LOLKINYEI BLOCK 7(KABIYET & LELAIBEI)/99 & 100. The import of the charge was explained to Kipkosgei Kuto at execution of the charge and the counsel who prepared the charge certified that the 3rd defendant understood the import of the charge. That the 3rd defendant appears not to understand how an overdraft account operates. The account was in arrears as at 30.6.2016.

The plaintiff's **learned counsel Mr. Kipnyekuei** submits that the applicant is the wife of 3rd respondent since 1987 and that both have have acquired the suit property since 1994 and therefore any transaction ought to have involved the plaintiff as the spouse. The spousal consent was not obtained contrary to the provisions of section 28(a) of Land Registration Act. The provisions of section 93(4) of the same Act states that property charged, the spouse will have a right to the void the contract. The property was charged in December, 2011. Section 28(a) and 93(4) had not come into operation however the loan guaranteed in 2011 was fully repaid. Mr Kipnyekwei further argues that the debt was fully satisfied and therefore any new charge required a fresh contract between the lender, borrower, guarantor.

On the issue of irreparable harm, he argues that there is imminent danger that the applicant who did not benefit from the loan will be thrown out of her home. The plaintiff has been married for 60 years. On the issue of **Balance of convenience** he argues that it tilts in favour of the applicant as she is in possession. She is an innocent party.

Mr. Magut learned counsel for the 3rd defendant relies on the replying affidavit sworn by Kipkosgey Kuto and argues he loan was fully repaid as at 27.8.2012 as per the statement. There are copies of the title deed. On top, it was indicated that Kipkosgey Kuto had collected the original title. The loan was fully paid and therefore there is no reason for the bank's intention to sell the property. The statutory notice was not served on the 3rd defendant despite being the guarantor. He was not given 45 days redemption notice.

Mr. Mwetich learned counsel for the 1st respondent is opposed the application and relied on the replying affidavits of Josphat Githagi filed on 12.7.2016. According to counsel, the plaintiff's suit is basically premised on spousal consent which became a requirement under Land Registration Act on 2.5.2012. The

charge herein was registered in the year 2011. It has been a principle of law that when an Act of Parliament is passed, it cannot be retrospective. The particular laws herein do not apply. The exercise of power of sale herein depends on the provision of the Registration Land Act Cap. 300. There were no further dealings in the matter. The charge was registered on 6.12.2011, 6 months before the new Act. On repayment of loan, it is clearly shown to total amount owing in the further affidavit of Josphat Githagi showing as Kshs.192,562,370/=. It is not true that the amount was fully repaid. An overdraft facility oscillates on a credit and debit. The plaintiff does not understand the account. They should have showed the court the last record statements. The 1st defendant served notice as required by law and the the 3rd defendant did not notify the 1st defendant of any change of address as his last known address was 52, Moiben. On the issue of reparable injury, he argues that the defendants can compensate the plaintiff as they have the resources and that a matrimonial home offered for sale becomes a commodity for sale that has a value. Balance of convenience tilts in favour of his client as the plaintiff is a stranger to the 1st defendant. Stopping auction means his client will pay colossal amount as auctioneers charges.

Time and again applications for interlocutory injunctions have been considered by this court and the locus classicus case ***Giela V Cassman Brown*** has been applied. I have considered the pleadings and the affidavits and rival submissions and do find that the issues for consideration are as follows:

1. ***Has the plaintiff established a prima facie case with likelihood of success?***
2. ***Is the plaintiff likely to suffer irreparable loss that cannot be compensated in damages?***
3. ***Where does the balance of convenience tilt?***

HAS THE PLAINTIFF ESTABLISHED A PRIMA FACIE CASE WITH A LIKELIHOOD OF SUCCESS?

To begin with, section 28 of the Land Registration Act provides for spousal rights as an overriding interest in all registered land unless the contrary is expressed in the register. This rights therefore exist even without their being noted on the register. Sections 93(3) and (4) are relevant as they assert the spousal rights in land registered in the name of one spouse as they provides as follows:-

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge;

or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

The saving and transitional section of the act is very clear on transitional provisions on rights, liabilities and remedies of parties over land and in a nutshell the import of the section is that rights and liabilities under the old law can not be defeated under the new law. Thus on the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies and Nothing in the Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts. For the avoidance of doubt, any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act;

The plaintiff has demonstrated on prima facie basis that she is the wife of the 3rd defendant who is the guarantor of the the loan that was borrowed by the 2nd defendant through overdraft facilities, however,

the loan in issue was borrowed by the 2nd and guaranteed by the 3rd defendant before the new law came into operation and therefore spousal consent was not necessary. It is a cardinal principle in law or construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. This rule is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights it is deemed to be prospective only. The condition for the spousal consent was not provided for in the Registered Land Act cap 300 Laws of Kenya when the property herein was charged. The land Act that came into operation in 2012 does not apply as the rights and obligations under the financial facilities accrued before its enactment when the Registered land Act cap 300 laws of Kenya was in operation. On this issue it appears it is doubtful that the application will succeed.

On the issue as to whether the amount borrowed has been paid the same can only be determined after hearing the parties substantively in view of the fact that the 2nd defendant is yet to file his papers. Moreover, the parties for reasons known to them have failed to annex the charge document.

In the case of *Habib Bank AG Zurich vs. Eugene Marion Yakub Civil Application Number Nairobi 43 of 1982*, Unreported, Madan, Law and Potter JJA. held that;

“Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.” (See GV Odunga “Digest On Civil Case Law & Procedure” at pg 393)

In the case of *Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)* Ringera J. (as he then was) reiterated as follows;

“The settled principles for grant of an injunction are, first that the applicant must show a prema facie case with probability of success at the trial and if the court is in doubt it should decide the application on a balance of convenience...” (See GV Odunga, ibid at pg 402)

In *R v. Fulham Tribunal Ex-Parte Zerek [1951]2 KB1*, it was been held that in an application for injunction the procedure followed is to decide issues by affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by a clear breach by another party and where the dispute turns on a question of fact about which there is a conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence. I do find that it is doubtful that the plaintiff will succeed.

IS THE PLAINTIFF LIKELY TO SUFFER IRREPARABLE LOSS THAT CANNOT BE COMPENSATED IN DAMAGES?

In the case of *Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)*, supra., the learned judge Ringera J. (as he then was) noted that ***“...an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages”***

The plaintiff alleges that this is her matrimonial home whwere she resides with her children who are now adults and that if the property is sold she is likely to suffer irreparable injury. I do find this explanation proper and agree with the plaintiff argument that she is likely to suffer irreparable harm if the property is sold and they are evicted.

WHERE DOES THE BALANCE OF CONVENIENCE TILT?

The golden Rule in applications for injunctions is to maintain status quo and hence preserve the suit property. It follows therefore that in view of the circumstances herein, the most convenient order would be, the *status quo* be maintain with regards to the suit property pending the hearing and determination of this suit. On this limp alone the Plaintiffs'/Applicants' application succeeds.

CONCLUSION.

The court orders that the status quo to be maintained in the sense that the 1st Defendant not to exercise its statutory power of sale pending the hearing and determination of this suit.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE