



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
E & L CASE No. 361 OF 2015
(FAST TRACK)

HEZEKIA KIPKORIR MARITIM & 10 OTHERS.....PLAINTIFFS/APPLICANTS

VS.

PHILIP KIPKOECH TENAI.....1ST DEFENDANT/RESPONDENT

JONATHAN KIPKETER KURGAT.....2ND DEFENDANT/RESPONDENT

COMMERCIAL BANK OF AFRICA LIMITED...3RD DEFENDANT/RESPONDENT

RULING

The Application.

By a Notice of Motion dated 17th day of September 2015, the Plaintiffs are seeking an interlocutory injunction against the 3rd Defendant restraining it whether by itself, its servants and/or agents from selling, or transferring and evicting the plaintiffs from occupation of the land parcel known as **ELDORET MUNICIPALITY BLOCK 20(KAPYET)/2600** pending the hearing and determination of this suit. The said application is brought pursuant to Order 40 Rule 1 of the Civil Procedure Rules 2010, section 1A, 3A and 63 of the Civil Procedure Act, Cap 21 Laws of Kenya.

The application is premised on the grounds that; the plaintiffs have a *prima-facie* case with a probability of success, that damages shall not be adequate remedy and that the balance of convenience tilts favour of the plaintiffs. The application is supported by the supporting affidavit sworn on 17th September 2015 by Hezekiah Kipkorir Martim on behalf of other plaintiffs. He deposed that the plaintiffs purchased the land parcel in question from the 1st Defendant and that they have learnt that the 1st defendant had used the land in question as security for the loan advanced to the 2nd defendant by the 3rd defendant and that the 3rd defendant intends to sale the same under the exercise of statutory power of the chargee. It is deposed that the plaintiffs have settled on the suit land together with their families in their respective portions and that the said sale of land is improper.

The 1st plaintiff, Hezekiah Kipkorir Maritim on behalf of other plaintiffs has deposed at paragraph 9 of the supporting affidavit that the intended sale is improper due to the reasons that the defendants fraudulently entered a mortgage relationship knowing that the plaintiffs were in occupation of the land, that no valuation of the property was carried out and that the defendants dishonestly charged the property with intention to dispossess the plaintiffs from their land, that no consent was obtained from the plaintiffs, that no exercise of exhaustion of alternative remedies has been carried out with probability of success. It

is deponed that in view of the foregoing reasons the plaintiffs have a *prima-facie* case.

Response by the Defendants

The 1st and 2nd defendants have not responded to the instant application. However the application is opposed by the 3rd Defendant *vid* a replying affidavit sworn on 10th October 2015 by one Michael Kariuki, the Customer Relationship Manager of the 3rd Defendant. It is deposed that the instant application is bad in law, incompetent, mischievous, frivolous, misleading, an after thought and an abuse of the Court Process. It is deposed that at the time of offering the credit facility to the 2nd defendant, the suit property herein was encumbered in favour of a company known as Leshego Kenya Limited and the 3rd Defendant financed takeover of the said facilities. It is deposed by the 3rd Defendant that it is not true that the charge herein was fraudulent since the plaintiffs interest in the suit land at the time of the charge were not registered. It is deponed further that the alleged sale agreements executed between the plaintiffs and the 1st defendant relate to a different parcel of land and not the suit land being Eldoret Municipality Block 20 (KAPYET) Block 2600.

It is deposed that the plaintiffs are not privy to the tri-partite agreement between the defendants and that being strangers they do not have the capacity to lodge any claim to interfere, amend or prevent the performance of the obligations and duties contained the letters of offer, guarantee, charge and further charge. It is deposed further that this honourable court is not an avenue for renegotiation of contract nor can it be called upon to relieve a party from its obligation under bargain and that in any event the plaintiff's claim herein should be directed at the 1st defendant with whom they have contracted an agreement with.

It is deposed by the 3rd defendant that the plaintiff's prayer for the postponement of the statutory power of sale as deposed to under paragraph 11 of the supporting affidavit is not supported by any contractual or legal basis and should therefore be ignored and the orders issued by the court to prevent any dealing in the suit land should be lifted and the 3rd Defendant allowed to proceed with the intended sale.

Submissions by the Plaintiffs/Applicants.

The Plaintiffs/Applicants vide their advocates, Gicheru & Co. Advocates filed their written submissions dated 8th December 2015 and submitted that on various dates the Applicants purchased land from the 1st Defendant/Respondent and whose their collective shares of portion of land purchased from the 1st defendant forms Eldoret Municipality Block 20(Kapyemit)2600. It was submitted that the principles for granting an interlocutory injunction were discussed in the case of *Giella vs. Cassman Brown Limited [1973]EA 358* and these include; applicant must demonstrate a *pri-mafacie* case with probability of success, that he will suffer irreparable harm and three the court to consider balance of convenience.

It is submitted that the applicants have settled on the suit land with their families, and that the same forms part of the matrimonial property and hence denying the applicant will cause irreparable harm to the applicants, which cannot be cured adequately by damages. Applicants' advocates submitted that as it was held in *Mbuthia vs. Jimba Credit Corporation Limited [1988]KLR 1*, in matters of land it is usual to grant injunctions to protect the parties' profound interest in ownership of land whether as residential property or as a capital asset of production. Counsel on invoking the principle of balance of convenience, cited the case of *American Cynamid Co. vs. Ethincon Limited [1975] 1 All ER 504; [1975] A.C 396 HL*, where Lord Diplock stated that it is not part of the court's function at this state of the litigation to try to resolve conflicts on affidavit as to facts on which the claims on affidavits as to facts on which the claims either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and nature considerations and that these are matters to be dealt with at trial. Counsel further relied on the case of *Trietix Industrial Limited and Others vs. National Housing Corporation and Another [2014]eKLR, H.C at Mombasa Civil Suit No. 8 of 2011*.

3rd Defendant's/Respondent's Submissions

The 3rd Defendant through Mburu Maina & Co. Advocates filed their written submissions dated 14th

December 2015 and submitted as follows;

It is submitted that the principles for the grant of injunction were laid out clearly concisely in the celebrated case of Giella vs. Cassman Brown & Company Ltd, [1973]EA 358. Counsel went ahead to submit on the said principles as established in the Giella case.

On whether there is a pri-mafacie case with a probability of success; it is submitted that the plaintiffs have no prima facie case with a probability of success. It is argued that the plaintiff lacked authority to sue on behalf of other plaintiffs; 2nd to 11th plaintiffs. On invoking the provisions of Order 1 Rule 13 (1) & (2), counsel submitted that authority granted to appear, plead or act for such other in any proceedings to be in writing. To this end, counsel relied on the case of Andrew Ileri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Nganga Kangi & another [2015] eKLR, H.C at Embu Civil Case No. 4 of 2013, where according to the counsel it was held that a suit filed without authority is a non-starter and that the court went ahead to dismiss the same for noncompliance with the law.

It is submitted further that the plaintiffs have failed to establish a pri-mafacie case due to the fact that they lack locus standi on the suit property as they have no interest in the same. It is submitted that the suit property is LR NO. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/2600 while the plaintiffs as shown by their respective sale agreements acquired interests in KAPYEMIT ELDORET MUNICIPALITY/BLOCK 20/2330, ELDORET MUNICIPALITY BLOCK (KAPYEMIT)1887 and ELDORET MUNICIPALITY/BLOCK 20/158.

It is submitted that under the provisions of section 26 of the Land Registration Act, 2012, the Title Deed against which the 3rd Defendant's interest are registered was the conclusive evidence of proprietorship the 3rd defendant was required to rely on in ascertaining whether the 3rd parties' interests and encumbrances were being claimed over the property and that the 3rd Defendant's interest rank in priority to the alleged plaintiffs interest if any exist.

It is further submitted by the 3rd Defendant's counsel that only the chargee or the chargor and her spouse can make an application to re-open certain charges, since none of the plaintiffs fall in this category, they lack locus standi to seek for the courts exercise of its discretion under the said section 105 of the Land Act. It is submitted that under section 105 and 106 of the Land Act 2012 is not absolute but qualified in that the court must have regard to the provisions of section 106 (3)(f) of the said Act which includes the importance of not undermining the confidence of reputable charges in the market for charges. Counsel relied on the case of Kenya National Capital Corporation Ltd vs. Alberto Mario Cordeiro & Another [2014]eKLR C.A at Nairobi, Civil Appeal No. 274 of 2003, where Court of Appeal held that only persons who are privy to a contract and who negotiate a contract or third parties who are beneficiaries of the negotiated contract are allowed to enforce its terms or seek remedies in a court of law. Counsel for the 3rd Defendant/Respondent submitted that the allegations of fraud made by the plaintiffs against the 3rd defendant/respondent cannot be proved as per the law and that pursuant to section 26 of the Land Registration Act, 2012, certificate of title is exclusive evidence of proprietorship. It is submitted that the plaintiff are required to prove fraud to a level that is beyond a balance of probabilities. To this end counsel relied on the cases of Mutsonga vs. Nyati (1984)KLR 425 and Koinange & 13 Others vs. Koinange (1986)KLR 23 quoted with approval in the case of Mary Jerono Mengich vs. David Kipleting Rugut [2013]eKLR, H.C at Eldoret, Environment and Land Court, Case No. 132 of 2012.

On Irreparable Loss; it is submitted that the property alleged to be owned by the plaintiffs was purchased and the value of the properties are known and that the appreciated value can be ascertained through valuation. To this end counsel relied on the case of Andrew Muriuki Wanjohi vs. Equity Bank Building Society Limited & 2 Others [2006]eKLR, H.C at Nairobi, Civil Case No. 203 of 2005, where the learned judge Ochieng J. observed that offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon and hence if the chargee were to sell off the suit property, the chargor's loss could be calculable on the basis of the real market value of the said property. While relying on the holdings in Andrew Muriuki Wanjohi case, *ibid* and Samson Mwathi Nyutu vs. Savings & Loan Kenya Limited [2015]eKLR, C.A at Nairobi, Civil Application No. 28 of 2015, counsel submitted that in the foregoing cases the courts held that even

where sentiment is attached to a mortgage property statutory rights will prevail over sentiment.

On Balance of Convenience; it is submitted that the same lies with the Defendant/Respondent being allowed to proceed with the statutory sale for the reasons the arrears in relation to default herein in subject to the security (Suit land) in question continues to accrue interest and that at the time of filing the instant suit the outstanding arrears were Kshs. 4,168,285.70. It is submitted that the net result of restraining the 3rd defendant from exercising its statutory power of sale is that the outstanding amount may outstrip the value of the suit property and the 3rd defendant may never recover some substantial losses. To this end counsel relied on Andrew Muriuki Wanjohi vs, Equity Building Society, supra, where it was held that if the defendants are restrained from selling off the suit property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property and that if the property were sold, the plaintiff can find other accommodation by being compensated in case the property is found to have been wrongly sold by the defendant.

In conclusion, the 3rd Defendant's/Respondent's counsel has urged the court to find that the plaintiffs have not established any prima facie case with a probability of success, that the plaintiffs are not likely to suffer irreparable loss and that the balance of convenience tilts in favour of the 3rd defendant being allowed to exercise the Statutory Power of Sale.

Determination

In view of the foregoing, the following salient issues may be due for determination;

- *Whether the 1st Plaintiff lacks authority to swear on behalf of the 10 plaintiffs herein? (Whether the instant suit is competent)*
- *Whether the plaintiffs lack locus standi to challenge the 3rd Defendant's exercise of Statutory Power of Sale?*
- *Whether the 3rd Defendant ought to be Injuncted from exercising its Statutory Power of Sale ?*

Whether the 1st Plaintiff lacks authority to swear on behalf of the 10 plaintiffs herein?

By a plaint dated 17th day of September 2015, the 11 plaintiffs, filed this suit against the three defendants. However it is only one plaintiff, the first plaintiff, Hezekiah Kipkoriri Martim that swore a verifying affidavit. In the said verifying affidavit, the said Hezekiah K. Martime deposes that **“THAT I am the 1st Plaintiff herein hence competent to swear this affidavit on my own behalf and on behalf of other plaintiffs herein.”** On filing the suit, the plaintiffs also filed the instant application under the certificate of urgency seeking the injunction against the 3rd defendant/respondent. The application is supported by the Supporting Affidavit and once again the same is sworn by Hezekiah Kipkorir Martim on behalf of the 10 other plaintiffs.

As a result of the foregoing, the 3rd Defendant's counsel faulted the 1st plaintiff's actions and argued in his written submissions that the 1st plaintiff lacked authority to swear affidavit and/or to sue on behalf of the 10 other plaintiffs and that as such the instant suit is not competent. Counsel relied on the provisions of **Order 1 Rule 13 (1) & (2) of the Civil Procedure Rules 2010**. The said provisions states as follows;

“13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

While Order 4 Rule 1(2) & (3) stipulates as follows;

“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”

As much as the plaintiffs have a common cause against the defendants, this suit has been filed by the 11 plaintiffs in their individual capacity and not on representative capacity. This is so because by dint of the provisions of **Order 1 rule 8 of the Civil Procedure Rules 2010**, a party may file and or defend a representative suit on behalf of others. The said provisions stipulates as follows;

“8. (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”

It appears that by dint of the provisions of Order 1 rule 8 a party representing others in a suit on representative capacity is mandated and empowered to act on their behalf. This is so because the foot note to the Order 1 Rule 8 reads as follows;

“One person may sue or defend on behalf of all in same interest.”

It follows therefore that the instant suit is not a representative suit. The plaintiffs as outlined in the plaint are 11. However, it is only the first plaintiff that has sworn both the verifying affidavit to the plaint and the supporting affidavit to the instant application on his behalf and on behalf of other plaintiffs. The provisions of **Order 1 rule 13 (1) & (2) and Order 4 Rule 1(3) of the Civil Procedure Rules** are very clear. That **‘...Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding... The authority shall be in writing signed by the party giving it and shall be filed in the case’...and that ‘...Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.’**

In the instant case, the 1st plaintiff purports to swear both the verifying affidavit and the supporting affidavit on behalf of other plaintiff, apparently, without any written authority as per the foregoing provisions of the law. The 3rd Defendant’s counsel, has questioned the competence of the instant suit and submitted that the plaintiffs have not established a prima- facie case with probability of success for failure to comply with the said provisions of **Order 1 rule 13(1) & (2) , of the Civil Procedure Rules**. I will revisit the issue regarding premafacie case at a later stage. The question to be answered at this point is ***Whether the instant suit is incompetent for lack of written authority from other plaintiffs mandating the 1st plaintiff to swear affidavit on their behalf?***

The 3rd Defendant’s/Respondent counsel relied on the case of ***Andrew Ireri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Nganga Kangi & another [2015] eKLR, H.C at Embu Civil Case No. 4 of 2013***, where the learned judge Muchemi J. held the suit therein a non starter for lack of written authority to act on behalf of others.

In the case of ***Mohamed Bwana Obo Athman & 24 others v Kenya Airport Authority [2014] eKLR, In the Environment and Land Court at Malindi, ELC No. 78 of 2014***, the learned judge Angote J. at

paragraphs 16 to 20, observed as follows;

“16. According to paragraph 4 of the Plaint, the Plaintiffs commenced the suit in which they were representing all the residents of Manda Island pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

17. Although the Plaint as drawn has twenty five Plaintiffs, the Verifying Affidavit annexed on the Plaint was sworn by the 1st Plaintiff alone. The said Verifying Affidavit did not make any reference to either the other 24 Plaintiffs or the residents of Manda Island. There is also no evidence that the other Plaintiffs authorized in writing the 1st Plaintiff to swear the Verifying Affidavit on their behalf or on behalf of the residents of Manda Island as pleaded at paragraph 4 of the Plaint contrary to the provisions of Order 4 Rule 3 of the Civil Procedures Rules. Order 4 Rule 3 of the Civil Procedure Rules provides that where there are several Plaintiffs, one of them, with the written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

18. Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules provides that where there are more Plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and the authority shall be in writing signed by the party giving it.

19. The 1st Plaintiff did not state on whose authority he signed the Verifying Affidavit and the Supporting Affidavit in support of the current Application.

20. In view of the fact that it was averred at paragraph 4 of the Plaint that the suit was a representative suit, in the absence of the written authority by the residents of Manda Island, the suit as currently filed is a non-starter.”

While in the case of *Abdulla Abshir & 38 Others vs. Yasmin Farah Mohamed [2015] eKLR, H.C at Nairobi (Milimani) Civil Suit No. 165 of 2015*, the learned judge Mabeya J. when he was confronted with similar situation as is in the instant case he delivered himself at length, at paras 9 to 17, as follows;

“9. Before considering the application on merit, I think it is important to deal with the issue of lack of authority in filing the current suit is capable of disposing off the matter. Mr. Muragara, Learned Counsel for the Respondent submitted that the 1st Applicant having no authority of the other 38 Applicants to bring the current suit in the suit and the application are incompetent and the application should be dismissed on that ground alone. Ms Asli submitted that although no authority had been executed by the other Applicants, the 1st Applicant had sworn in the Verifying Affidavit that he had the authority of the other 38 Applicants to swear the Verifying Affidavit on their behalf.

10. Order 1 Rule 13 of the Civil Procedure Rules provides:-

“13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”
(Emphasize added)

11. In Chalicha Farmers Co-operative Society Ltd Vs George Odhiambo & 9 others (1987) eKLR, the Court of Appeal observed on representative suit thus:-

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those

who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the Plaintiff's witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first Respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 Rule 8 or Rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The Trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.”

12. From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.

13. From the Chalicha Farmers case it would seem that lack of such an authority does not necessarily void the proceedings, what it does is to incapacitate the person purporting to represent his co-parties from so doing. The case by his co-parties remain unprosecuted. They have to appear themselves and prosecute the matter.

14. In the present case, it is not in dispute that the 1st Applicant did not get any authority from the 2nd to the 38th Applicant to represent, appear, act or plead on their behalf. There is no written authority signed by them and filed in court. Order 1 Rule 1(2) and (3) of the Civil Procedure Rules provides that:-

“(2) The Plaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in Rule 1(1) (f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the Verifying Affidavit, may swear the Verifying Affidavit on behalf of the others” (Emphasis mine)

15. From the foregoing, it is quite clear that a Plaint must or should be accompanied by a Verifying Affidavit. In this regard, the Plaint in this case as relates to the 2nd to the 39th Applicants is incompetent having been filed without authority. The Plaint in respect to their claim was never accompanied with any Verifying Affidavit. That incompetence however is not fatal. See Agricultural Finance Corporation & Another Vs Drive-In Estate Development Ltd (2006) eKLR. The lack of a proper, valid or any Verifying Affidavit does not render a Plaint void, it only renders it voidable. This is so by virtue of Rule 1 (6) of Order 4 which provides that a Plaint that does not comply with, inter alia, sub-rules (3) and (4) may be struck out by the Court on its own motion or on application by any party. Since the 2nd to 39th Plaintiff can regularize the position by filing compliant Verifying Affidavits, and there being no application before me to strike out the Plaint, I will leave it intact and make no comment on it as regards the affected Plaintiffs.

16. Does the defectiveness of the Plaint as aforesaid, make the application incurably defective or incompetent. I do not think so while it may well be that the application as related the 38 affected Applicants is defective. It does not affect the position of the 1st and 5th Applicants. To that extent, I hold that the application as relates the 1st and 5th applicants competent as they properly swore the Affidavit in support thereof. The two are hereinafter referred to as

“the applicants”.

17. On the other hand in paragraph 1 of the Supporting Affidavit the 1st Applicant states that he is authorized by the rest of the Applicants to swear the Affidavit on their behalf. Whilst there is no requirement in applications that authority to swear Affidavits be in writing or be filed, I think that there having been no original authority signed and filed as relates the suit, that averment is not adequate and is of no consequence. It cannot save the position of the rest of the 37 Applicants who never swore any Affidavit in support of the application. Accordingly, their application is hereby struck out.”

In view of the foregoing decisions of the High Court, it is quite clear that the High Court appears to exhibit a conflicting position on whether a party acting on behalf of others without an express written authority renders a suit a non starter. However, the court of appeal appears to have settled the foregoing issue when it held in the case of *Research International East Africa Ltd V Julius Arisi & 213 Others [2007] eKLR, C.A At Nairobi Civil Appeal No. 321 Of 2003* that the superior judge had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs, but to allow the parties to remedy the situation by complying with the rules of procedure. In the foregoing *Research International East Africa Ltd* Case, *ibid*, the learned Judges O’Kubasu, Githinji and Onyango Otieno rendered themselves as follows;

“In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the Grace Ndegwa’s case (*supra*) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing. Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.

The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.”

In view of the foregoing and with regard to the competence of this suit and the instant application, it is my view that even if the 2nd to 10th plaintiff’s suit was declared a non starter for failure to authorize the 1st Plaintiff to swear respective affidavits on their behalf, the 1st Plaintiff’s claim against the defendants shall still stand. As it was held by the Court of Appeal in the foregoing *Research International East Africa Ltd* Case, *ibid*, the honourable court has discretion and jurisdiction to allow the plaintiffs to comply with the aforesaid requisite rules. In any event as observed by Mabea J. in *Abdulla Abshir & 38 Others vs. Yasmin Farah Mohamed [2015] eKLR*, there being no application before the court to strike out the Plaint, the court ought to leave it intact and make no comment on it as regards the affected Plaintiffs. It is also my humble view and as observed by Mabea J. *ibid*, “...**From the foregoing, it is quite clear that a Plaint must or should be accompanied by a Verifying Affidavit. In this regard, the Plaint in this case as relates to the 2nd to the 39th Applicants is incompetent having been filed without authority. The Plaint in respect to their claim was never accompanied with any Verifying Affidavit. That incompetence however is not fatal.**” At this point it is my humble opinion that the court ought to exercise its discretion and allow the plaintiffs to comply with the rules of procedure and neither to strike out the plaint nor to dismiss the suit of the 10 plaintiffs.

Whether the plaintiffs lack locus standi to challenge the 3rd Defendant’s exercise of Statutory Power of Sale?

The 3rd defendant's/Respondent's counsel has submitted that the plaintiff's are not privy to the charge herein and being the third parties have not demonstrated any merited case against the Bank, the 3rd Defendant which is entitled to exercise its statutory power of sale with regard to charged suit land. The plaintiffs case is that they individually bought parcels of land from one Philip Kipkoech Tenai that collectively form part of the suit land being **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600** and which was eventually charged by the 1st defendant to secure the loan that was advanced to the 2nd defendant by the 3rd Defendant. The plaintiff have stated that they are in physical occupation of the said land whereby they have established matrimonial homes. The Defendant has contended that the alleged land purchased by the plaintiffs from the 1st defendant is different from the suit land.

The plaintiffs are seeking an injunctive order against the Defendants with regard to land parcel Reg. No. **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600** The green Card attached to the instant application as annexure HKM 2 reveals that the land parcel in question is registered in the name of Philip Kipkoech Tenai, the 1st Defendant. From the sale agreements attached to the instant applications brought by plaintiffs, it quite clear that the land in question, that is **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600**. As much as the plaintiffs have stated at paragraph 15 of the plaint 'on various dates, individually purchased land from the 1st defendant whose their collective shares of portion of land purchased from the 1st defendant forms ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600'. This is doubtful because of various reasons.

First and foremost, the sale agreements annexed herein and marked HKM 3 show that the plaintiffs purchased different parcels of land from either the 1st Defendant and or the third parties as demonstrated here below;

1. The sale agreement dated 6th June 2010 is between **Patrick Makhama Okonda, the 3rd Plaintiff** herein, and one **Thomas Injenga Tabasia, not a party to this suit**. This sale agreement shows that the said Patrick Makhama Okonda purchased an ? of an acre of land at consideration of Kshs.230,000/= being part of the land parcel No. **KAPYEMIT ELDORET MUNICIPALITY BLOCK 20/2330**, from the said Thomas Injenga Tabasia.
2. The sale agreement dated 24th June 2009 is between one **Philip Kikoech Tenai, the 1st Defendant herein** and one **Jepkemei Changwony, the 4th Plaintiff**. This sale agreement shows that the said **Jepkemei Changwony** purchased parcel of land measuring 50 x 100 FT (an ? of an acre) at consideration of Kshs.80,000/= being part of the land parcel No. **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT) 1887**, from the said **Philip Kikoech Tenai**,
3. The sale agreement dated 21st December 2010 is between one **Philip Kipkoech Tenai, the 1st Defendant herein** and one **Tony Kiprotich Maiyo, the 5th Plaintiff**. This sale agreement shows that the said **Tony Kiprotich Maiyo** purchased parcel of land measuring 50 x 100 FT an ? at consideration of Kshs.82,000/= being part of the land parcel No. **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT) 1887**, from the said **Philip Kikoech Tenai**.
4. The sale agreement dated 19th July 2009 is between one **Everline M. Shivachi the 6th Plaintiff** and **Philip Kipkoech Tenai, the 1st Defendant herein**. This sale agreement shows that the said **Everline M. Shivachi** purchased an ? of an acre at a consideration of Kshs.120,000/= being part of the land Plot No. **1887**, from the said **Philip Kikoech Tenai**. **There is also an addendum to this agreement, the same is dated 3rd November 2009 whereby Everline purchased a further a ? of an acre in addition to the earlier purchased an ? of an acre at a consideration of Kshs. 30,000/=**
5. The sale agreement dated 3rd October 2010 is between **Julius K. Mitei 7th Plaintiff** and **Philip Kipkoech Tenai, the 1st Defendant herein**. This sale agreement shows that the said **Julius K. Mitei** purchased 0.05 Ha of land at a consideration of Kshs.70,000/= being part of the land Parcel No. **ELDORET BLOCK 20/158**, from the said **Philip Kikoech Tenai**.

It is apparently clear from the foregoing that the land in question, **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600** is different from the above exhibited various parcels of land. The only common feature in the said land parcels is KAPYEMIT and/or BLOCK 20. The plaintiffs have not in any way demonstrated that the foregoing parcels of land are part and parcel of the suit land and or resulted from the same. This is so because the annexure marked HKM 2, the Green Card that is attached to the instant application shows that the suit land, **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600**, is registered in the name of the 1st Defendant. The said Green Card does not in any way reveal whether the said land was subdivided to give rise to any other parcel of land. In fact according to the said Green Cards, what gave rise to **ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)2600** is **Plot No. 2331**.

In the premises and based on the documents supplied, the plaintiffs have not satisfactorily demonstrated their interest in the suit land. Be that as it may the plaintiff have stated that they are in physical occupation of the suit land together with their families. It follows therefore that since at this interlocutory stage, the court may not be able to ascertain whether the plaintiff's have the occupational interests in the suit land or not, and since the same can only be competently ascertained during the trial, the plaintiffs ought to be given benefit of doubt and therefore it is my view that they have *locus standi* to challenge the 3rd Defendants' Statutory Power of Sale based on their assertion that they are in occupation of the suit land. The land issue being volatile, they, plaintiffs, should be given an opportunity to be heard.

Whether the 3rd Defendant ought to be Injuncted from exercising its Statutory Power of Sale ?

The principles governing the grant or denial of the injunctive orders were laid down in the celebrated case of ***Giella vs. Cassman Brown (1973) E.A 358***. In the foregoing case the court observed that the plaintiff is required to demonstrate; that;

- a. A *prima facie* case with a probability of success against the defendant,
- b. Likelihood of suffering irreparable loss and harm unless orders sought are granted, and
- c. That in the event of doubt, the court is to decide the matter on a balance of convenience.

Prima facie case with a Probability of Success

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.

In the instant case, the suit property is duly registered in the name of the 1st Defendant. The plaintiffs have alleged occupational rights. The title is the legitimate proof of ownership of land unless and until is

proved otherwise. And also bearing in mind the doctrine of the sanctity of the title, the plaintiffs occupational rights cannot supersede the rights of the registered owner. It follows therefore that at this juncture, the plaintiff have not demonstrated a prima facie case with probability of success.

Irreparable Harm

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”

In the instant case, the Plaintiffs/Applicants acquired the land parcels on a consideration of purchase price that has been quantified on their respective sale agreements. It is therefore my considered view that in any event the 3rd Defendant exercises its statutory power of sale against the 1st and 2nd defendants, the plaintiff can sue the 1st defendant for the refund of their purchase price and hence the plaintiffs/applicants have not demonstrated that failure of grant of the injunctive orders will render him an irreparable harm.

Balance of Convenience

The golden Rule in applications for injunctions is to maintain status quo and hence preserve the suit property. (See *Ringera J, supra*). 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 limb alone the Plaintiffs’/Applicants’ application succeeds.

Conclusion.

The court orders that the status quo to be maintained in the sense that the 3rd Defendant not to exercise its statutory power of sale pending the hearing and determination of this suit.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE