REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ENVIRONMENT & LAND CASE NO.24 OF 2015

ROSE CHEPKIRUI MIBEI.....PLAINTIFF

VERSUS

JARED MOKUA NYARIKI.....1ST DEFENDANT

BANK OF AFRICA (KENYA) LIMITED.....2ND DEFENDANT

HEZRON GITUMA ONSONGO

T/A HEGEONS AUCTIONEERS.....3RD DEFENDANT

R U L I N G.

(Application for injunction to stop an intended auction sale by chargee; plaintiff being wife to chargor; wife stating that she was not consulted and her consent not sought; property charged to secure money loaned to a third person; charge entered in the year 2011; whether at that time it was necessary to have spousal consent; no provision in 2011 for spousal consent; spousal consent being introduced in 2012 through the Land Act and Land Registration Act; provision not retrospective; notices before exercise of power of sale; statutory notice properly issued; auctioneer's 45 day redemption notice served on borrower and not chargor; such notice improper; redemption notice must be served on property owner or chargor; auctioneer's notice defective; injunction granted and sale stopped until proper auctioneer's notice is issued.)

This suit was commenced by way of plaint filed on 12th June, 2015. The plaintiff is wife of one Isaac Kipruto Mibei. The said Isaac Kipruto Mibei is registered as proprietor of the land parcel Kericho/Kipchimchim/5208 (the suit property) He did guarantee payment of a loan advanced by the 2nd defendant (the bank) to the 1st defendant (the borrower) in the year 2011 and offered the suit property as security. There was default and the bank proceeded to appoint the 3rd defendant (the auctioneer) to sell the suit property so as to recover its money. In her plaint, the plaintiff has averred that their matrimonial property is on the suit property and that her consent was not obtained before her husband charged the property. It is also her case that the bank has neglected to notify her husband of the borrower's failure to honour his obligations under the loan facility. It is further her position that the bank has not exhausted all avenues to recover the amount owing from the borrower before exercising its statutory power of sale. She has averred that the bank has not followed due process before exercising its statutory power of sale and that as a result their matrimonial home may be lost. In the suit, she wants the following orders :-

> *(a) A declaration that the plaintiff has an overriding interest in the land parcel Kericho/Kipchimchim/5208.*
>
> *(b) A declaration that the Charge against the land parcel Kericho/Kipchimchim/5208 in favour of the 2nd defendant is invalid.*
>
> *(c) A declaration that the Redemption Notice issued to the 1st defendant is invalid.*
>
> *(d) A permanent injunction restraining the 2nd defendant and its servants, employees and agents from selling and/or interfering with the land parcel Kericho/Kipchimchim/5208*

without the plaintiff's consent.

(e) Any other or further relief that this court may deem fit and just to grant.

Together with the plaint, the plaintiff filed an application for injunction, which is the subject of this ruling. In her application, she has asked for an order of injunction to restrain the defendants from offering for sale, advertising, selling, or transferring the suit property. The reasons given for the application are *inter alia* that the bank intended to sell the property on 19th June, 2015 but that the plaintiff and guarantor were not served with the Redemption Notice as required by law. In her supporting affidavit, the plaintiff has averred that she did not consent to the property being charged; that her spouse was not notified of the fact that the 1st defendant has been in default; and that neither she nor her spouse were served with the Redemption Notice.

The 1st defendant has not entered appearance nor responded to the application. But the 2nd and 3rd appearance appointed counsel and a replying affidavit, sworn by Monica Kamau, the Recoveries Assistant of the Bank, was filed to respond to the application. She has deposed inter alia that the first defendant was granted a loan facility of Kshs. 4,500,000/= which was secured by a charge over the suit premises; that the charge was registered on 19 July 2011; that at that time, spousal consent was not a requirement in the law; that there was default; that a three month statutory notice was issued through a letter dated 24 March 2014; that after expiry of the statutory notice a further 40 day notice was issued on 10 February 2015; that the notices elicited no response; that on 27 April 2015, a Redemption Notice was served upon the 1st defendant and the plaintiff's husband; that the bank has not yet advertised the property for sale and therefore the application for injunction is unmerited; that the plaintiff has no *locus standi* as she was not a party to the financial transaction; that the validity of the charge is not in question; that the plaintiff can be compensated by damages; that the plaintiff has not established a *prima facie* case with a probability of success; and that the application ought to be dismissed.

I directed counsels to file written submissions which they did. Counsel for the plaintiff submitted that the suit property is a matrimonial home and that the family, being the fundamental unit of society ought to be protected. It was submitted that to allow the sale of the suit property would be abdicating the duty to protect the family. Counsel relied on Article 45(1) of the Constitution on the protection of family and Article 18 of the African Charter on Human and People's Rights. It was submitted that Section 28 (a) of the Land Registration Act, 2012, recognizes the plaintiff's rights over matrimonial property as overriding interests. It was submitted that according to the Matrimonial Properties Act, the plaintiff has an interest in the property as she has made contributions towards it. He submitted that neither the plaintiff nor her husband received a single cent from the transaction and that the bank has not shown what measures, if any, it has taken to recover the money directly from the borrower.

On the part of the 2nd and 3rd respondents, it was submitted that at the time the charge was registered, the Land Act of 2012, which requires spousal consent, had not come into operation, and therefore spousal consent was not a requirement. He submitted that the plaintiff therefore has no locus standi. He submitted that spousal right to matrimonial property was not an overriding interest under the Registered Land Act, (CAP 300) (repealed in 2012 by the Land Registration Act). He submitted that there is no basis for the issuance of an injunction since all required notices were properly issued. He submitted that the plaintiff has not demonstrated a case with a probability of success and that she has not shown that she stands to suffer any irreparable loss which cannot be compensated by an award of damages. He submitted that the liability of the guarantor arises when there is default by the principal debtor and a formal demand has been made to the guarantor to pay the sum due. He submitted that once a property has been given as security, it becomes a commodity and is subject to sale and it was his view that since all statutory requirements have been met, the bank can proceed to sell the property.

I have considered the pleadings and the submissions of counsel and I take the following view of the matter.

The application before me is an application for injunction and to succeed in such application, an applicant needs to demonstrate that she has a prima facie case with a probability of success and further demonstrate

that she stands to suffer irreparable loss if the injunction is not granted. If the court is in doubt, it will determine the application on a balance of convenience. These principles were laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***.

I think the plaintiff's case is premised on three main grounds. These are that the charge was invalid for want of spousal consent; that the bank ought first to have taken steps to recover the money from the borrower before pursuing the guarantor; and finally, that the requisite notices have not been issued. I will proceed to make an assessment of these arguments of the plaintiff.

The charge herein was registered in July 2011. The suit property is registered under the regime of the Registered Land Act (RLA) and it was the RLA which was the applicable law at the time. The RLA was repealed by the Land Registration Act, Act No. 3 of 2012, which came into effect on 2 May 2012. It follows that as at July 2011, the charge was governed by the provisions of the RLA. I am not aware of any requirement, under the RLA, for spousal consent before a registered proprietor could enter into a disposition and none has been shown to me. It is therefore safe to state that *prima facie*, spousal consent was not a requirement while the RLA was still operative. Section 30 of the RLA, which provided for overriding interests, did not have "spousal rights over matrimonial property" as part of the overriding interests under the RLA. Spousal rights over matrimonial property were introduced as overriding interests by Section 28(a) of the Land Registration Act, 2012. Neither was there any requirement for spousal consent before a charge could be executed or registered. This came with the new land laws comprised in the Land Registration Act and Land Act, Act No. 6 of 2012. It cannot therefore be argued by the applicant that the charge is invalid for want of spousal consent. The requirement for spousal consent in the new land statutes cannot apply retrospectively. This indeed was the holding in the case of ***Stella Mokeira Matara vs Thadeus Mose Mangenya & Family Bank Ltd, Kisii ELC No. 209 of 2012 (2014) eKLR*** cited by counsel for the 2nd and 3rd respondents.

Counsel for the applicant referred me to Section 105(1) of the Land Act as making provision for relief since the subject property is matrimonial property. That provision of the law is drawn as follows :-

> ***105.*** *(1) The Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties.*

It will be seen from the above that the court has power to reopen a charge secured on a matrimonial home. But nowhere in the plaint is it pleaded that the plaintiff wishes to afford herself of the remedy in Section 105 above, and without such pleading, I am unable to apply the said provision of the law to this case.

The second argument of the applicant is that the bank ought to have pursued the borrower before proceeding to offer the suit property for sale. The husband of the plaintiff acted as guarantor. There has been default. Once there is default and notice is given to the guarantor, his obligation under the guarantee must take effect immediately. Unless the parties have agreed through contract, that the guarantor will not be called upon to make good the money owed by the principal debtor, the creditor is under no obligation to first pursue the principal debtor and leave alone the guarantor. I have not seen any provision in the charge instrument which obligates the bank to first pursue the principal debtor before proceeding to sell the suit property. The property herein is charged, and there is no provision in the law, that the chargee cannot pursue her statutory power of sale, before first exhausting any remedies that he may have against the principal debtor. The argument that the bank first ought to have pursued the principal debtor has no basis and must fail.

The final issue is whether the requisite notices under the law were issued. I have seen that the bank, through the letter dated 24 March 2014 written by its advocates, issued a statutory notice to the chargor and borrower. They were given three months to pay the debt. The same was sent by registered post and proof of postage is annexed. The statutory notice in my view was properly drawn, issued and dispatched to the chargor. I have seen no defect in the same. On expiry of the statutory notice, a 40 day notice was issued, said to be under Section 96(2) of the Land Act, on 10 February 2015 by the bank's advocates. This notice was addressed to both the chargor and borrower. The notice was sent by registered post and there is proof of postage. Again, I see nothing wrong with this notice. It was properly drawn, issued and

dispatched. The bank then instructed the 3rd defendant to prepare the property for sale.

It is a requirement under the Auctioneers' Rules of 1997, issued under the Auctioneers' Act that the auctioneer do issue a 45 days notice in the case of sale of immovable property. This is captured in Rule 15 which is drawn as follows :-

15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(a) record the court warrant or letter of instruction in the register;

(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second schedule indicating the value of each property to be sold;

(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

It will be seen from the above that the auctioneer is supposed to serve a Notification of Sale together with a 45 day notice for the redemption of the property. The notice, according to the above rule, is to be addressed and served upon the property owner. That is clear from a reading of Rule 15(c) and (d). The property owner in our case is Isaac Kipruto Mibei, the husband of the plaintiff. I have looked at the 45 days notice issued by the 3rd respondent. It is addressed to Jared Mokua Nyariki. Now, Jared is not the owner of the suit property and neither is he the chargor. He is merely the borrower. In my view, the Notice of Redemption as drawn is defective for it is not addressed to the owner of the property. There is no problem if the borrower is also addressed with the 45 days notice, and indeed it is prudent to do so, but service on the property owner/chargor is mandatory. Although the chargor was served with the notice, it is my view that this does not cure the defect in the notice. It is the same as issuing a statutory notice to the borrower and not the owner of the property. I do not think that the fact that the statutory notice is served upon the chargor, but is not addressed to him, cures the defect. The notice must be addressed to the owner of the property and must be served upon him. Having not served the appropriate 45 days notice, it is apparent that the bank cannot proceed to advertise the property for sale.

The application for injunction must therefore succeed to the extent that the 2nd and 3rd respondents need to be restrained from selling the suit property and cannot proceed to sell the suit property until they issue the proper 45 days notice. If a good 45 days notice is issued, I see no basis upon which I can stop the bank from exercising its statutory power of sale.

On the question of irreparable loss and balance of convenience, it is not necessary in the circumstances of this case to consider these two issues. There is a flaw in the process and that flaw cannot be overlooked simply because the bank has capacity to make good any loss by way of damages.

There was the issue of capacity raised by the respondents, but in my view, the plaintiff, as spouse, has a beneficial interest in the property and she can sue if the procedure is not followed in disposing of the property.

The applicant has succeeded to the extent above, and she will therefore have the costs of this application.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 13th DAY OF NOVEMBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of;

1. N/A on part of M/s Obondo Koko & Co.Advocates for Plaintiff/Applicant.
2. N/A on part of M/s Mulondo , Oundo, Muriuki & Co.Advocates, for 2nd and 3rd Defendants/Respondents.
3. N/A for 1st Defendant/Respondent who has not entered appearance.
4. Court assistant- Kenei.