



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L 512 OF 2013

CHARITY KETER.....PLAINTIFF

VS

ECO BANK KENYA LTD.....DEFENDANT

(Suit filed by spouse of charge; spouse alleging that property was matrimonial property when it was being charged; spouse seeking injunction; previous suit having been filed by chargor and an application for injunction made and disallowed by both High Court and Court of Appeal; whether spouse can now seek an injunction in a separate suit; same spouse having also made an application in the suit by chargor to be enjoined as interested party and also having filed an application for injunction; that application remaining unprosecuted; application filed by chargee that this suit is an abuse of court process; whether on the facts suit is an abuse of court process; suit and application for injunction declared to be an abuse of court process and struck out with costs)

RULING

A. INTRODUCTION

1. The application for determination is an application dated 26 November 2013 filed by the defendant. In the application, the defendant seeks the following orders :-

1. *That the application be certified urgent and it be heard prior to the hearing of the plaintiff's application dated 12th November 2013.*
2. *That the plaintiff's Notice of Motion and Plaint dated 12th November 2013 respectively be struck out.*
3. *That the costs of this application and of the suit be awarded to the defendant.*

2. The application is based on the following grounds :-

(i) That the defendant's suit (sic) (probably meant the plaintiff's suit) is frivolous, vexatious and amounts to an abuse of the court process as there exists a similar suit being HCCC ELC 240 of 2013 and which the plaintiff has sought leave to be enjoined.

(ii) That the issues raised in the application have been heard and determined in HCCC ELC No. 240 of 2013 at the Eldoret High Court and in the Court of Appeal Civil Application No. NAI 250 of 2012 (UR 181/2012) and the application is res judicata.

(iii) That the said application and suit is only meant to frustrate the defendant from exercising its statutory power of sale.

(iv) That the plaintiff failed to disclose material facts to the effect that no matrimonial home exists on the suit properties and that Land Control Board consents were granted.

(v) That the grant of the orders sought will meet the ends of justice.

(vi) That it is necessary that this application be heard before the hearing of the plaintiff's application as an issue regarding abuse of court process and jurisdiction of the court has been raised.

(vii) That this honourable court has inherent power to make such orders for the ends of justice.

3. The application is supported by the affidavit of Edith Wanjiku, the Remedial Officer of the defendant bank. Before I go to the gist of that affidavit, I think a little background is necessary so as to understand the reasoning behind this application.

B. BACKGROUND

4. This suit was instituted by Charity Keter who described herself as the wife of Tony Kiplimo Keter. Tony Kiplimo Keter is the registered owner of the three properties in issue in this suit, being Land Reference Numbers 9399/32, 9939/34 and 9399/36, which are situated in Nandi Hills area. Vide a charge dated 23 November 2009, the said Tony Keter charged these three properties to the defendant, Ecobank Ltd, so as to secure certain financial facilities advanced to a company called Kwalitifoods Africa Ltd. It appears that Kwalitifoods Ltd defaulted in the payment of the loan and the bank then advertised the properties for sale in exercise of its statutory power of sale.

5. This prompted Tony Keter to file a suit, the same being originally Eldoret HCCC No. 221 of 2011 (now renamed Eldoret Environment and Land Case No. 240 of 2013). In that suit, Tony Keter contended *inter alia* that the charges on the three properties were invalid, because no consent of the Land Control Board was ever obtained, and that he (Tony Keter) did not execute any charge over the suit properties. He therefore sought a declaration that the intended sale over the three parcels of land is illegal, null and void.

6. In the same suit, Tony Keter filed an application for injunction. The application was given due consideration but found to be without merit and was dismissed by Azangalala J (as he then was) vide a ruling delivered on 18 September 2012. Tony Keter preferred an appeal against this decision, and also sought an injunction before the court of appeal, seeking to stop the intended sale. The Court of Appeal weighed the application and again found no merit in the same. The court proceeded to dismiss the application on 22nd February 2013.

7. Charity Keter, on 13 November 2013 instituted this suit by way of plaint. In her plaint, she has pleaded that she is the wife of Tony Keter and that Tony Keter, without her consent and knowledge, charged these properties to the bank. She has stated that her matrimonial home is situated within the 3 parcels of land and that the properties ought not to have been charged without her consent. It is pleaded that any such charge is invalid as it offends the provisions of Section 79 of the Land Act, 2012.

8. At the time of filing suit, the bank had advertised the properties for sale, which sale was scheduled to take place on the 29 November 2013. Charity Keter, vide an application dated 12 November 2013, filed on 13 November 2013 contemporaneously with the plaint, sought an order of injunction to stop the sale of 29th November. The application first came before me *ex-parte* on 14 November 2013. I directed that it be served and it be heard *inter-partes* on 26 November 2013.

9. Upon service of summons and of the application dated 12 November 2013, the defendant filed a defence, a response to the application for injunction, and also filed the subject application dated 26 November 2013.

10. In the supporting affidavit of Edith Wanjiku, it is deponed *inter alia* that there is no matrimonial property on the suit properties. It is also deponed that a similar application was filed by the chargor in Eldoret ELC No. 240 of 2013, which was heard and determined, and a further application to the Court of Appeal was also dismissed. It is further deponed that the plaintiff (Charity Keter), filed an application in the suit Eldoret ELC No. 240 of 2013, seeking to be enjoined to that suit and also sought interlocutory orders of injunction, which application is yet to be heard. A copy of the application is annexed to the supporting affidavit. It is averred that this suit has solely been filed with a view to circumvent the ruling of the High Court and the Court of Appeal which denied the chargor an injunction. It is stated that if the plaintiff has any valid claim, then she ought to seek relief in the existing suit No. 240 of 2013. It is further averred that when the plaintiff filed this application, she failed to disclose that she had filed an application in the suit No. 240 of 2013, seeking to be enjoined as a party in that suit. It is stated that the issues herein are the same issues being raised in the suit No. 240 of 2013. A valuation report was annexed to demonstrate that the suit properties are not matrimonial properties as alleged by Charity Keter.

11. On 28 November 2013, I directed the applications dated 12th November 2013 and the subject application to be argued on 24th March 2014. I issued a stay of the sale scheduled for 29 November 2013, upon certain conditions which were met by the plaintiff.

12. On 24th March 2014, I was of the view that since the application dated 26th November 2013, has potential to dispose of the suit and/or the application dated 12th November 2013, the same ought to be argued in priority to the application of 12th November 2013.

13. The plaintiff filed no replying affidavit and no grounds of opposition to the application dated 26th November 2013. On the day scheduled for its hearing, Miss. Maroko, counsel holding brief for Mr. Momanyi for the plaintiff, sought more time to file a reply, which request I declined, principally because no reason was provided as to why no response had been filed since 28 November of 2013. I directed the application to proceed.

14. Mr. Bundotich for the bank, relied on written submissions that he had filed. Miss. Maroko, opted not to make any submissions in response. In his submissions, Mr. Bundotich *inter alia* relied on Sections 3A and 7 of the Civil Procedure Act in stressing the point that this suit is an abuse of the process of court and that the issues are directly in issue in the suit ELC No. 240 of 2013.

C. DECISION

15. I have considered the application and the submissions of counsel and I take the following view of this application .

16. There is no doubt that a previous suit, being ELC No. 240 of 2013 is in existence. The plaintiff in that suit is Tony Keter, the registered owner of the suit properties. The plaintiff herein, has filed an application to be enjoined to that suit as co-plaintiff. I have seen that application which is dated 28 May 2013. It appears as if that application had not been prosecuted by the time this suit was filed on 13 November 2013. Neither has it been withdrawn to date.

17. The matters that the plaintiff has raised in this suit, are the same matters that prompted her to file the application dated 28 May 2013 in the former suit. There is indeed a similar application for injunction pending consideration, filed by the plaintiff herein in the previous suit, which application is strikingly similar to the application for injunction dated 12th November 2013 filed in this suit. No reason and no explanation was given by the plaintiff as to why she found it necessary to file a fresh suit and not prosecute her applications in the previous suit. In fact the presence of her applications in the suit ELC No. 240 of 2013 was not disclosed by her.

18. I think for the circumstances of this suit, it is an abuse of the court process, for the plaintiff to have gone quiet on her application for joinder and for injunction in the former suit, and while those applications are still pending, proceed to file this suit, raising similar issues that she has raised in the pending applications filed in the previous suit.

19. I am also of the view that the application for injunction dated 12th November 2013, was a clever way of obtaining an injunction, which had been considered and declined in the previous suit. I will of course be circumventing the order of the Court of Appeal issued in the previous suit which denied the chargor an injunction if I am to consider and allow the application for injunction filed in this suit by Charity Keter. The application for injunction of 12th November 2013 is therefore an abuse of the process of court.

20. I would not at this stage wish to go into the details of whether or not the case of Charity Keter is frivolous, or whether the suit properties are matrimonial properties. I think those are issues to be canvassed in the application filed by Charity Keter in the suit ELC No. 240 of 2013, and such issues will be dealt with in the said suit.

21. I have already held that this suit and the application dated 12th November 2013, are an abuse of the process of court. I therefore allow this application and proceed to strike out this suit, and with it, the application dated 12th November 2013, with costs to the defendant. I further vacate any interim orders issued herein.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

Miss J.J. Kiptanui present holding brief for Mr. Bundotich of M/s Kale, Maina & Bundotich Advocates, for defendant/applicant.

Mr. E.M. Momanyi of M/s Anassi Momanyi & Co Advocates for the plaintiff/respondent.