



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ECL NO. 137 OF 2018

NANCY JERUTO BOMETT(As administrator Ad Litem of the Estate of

Eric Kibet Bomett (Deceased).....**PLAINTIFF**

VERSUS

POST BANK CREDIT LIMITED (In liquidation).....**DEFENDANT**

RULING

(Application for injunction; principles to be applied; plaintiff filing suit claiming that the deceased of the estate she represents never executed a charge in favour of the respondent bank; plaintiff claiming that charge was with a separate bank; respondent stating that the Land Registrar made an error in description of the bank; no charge instrument displayed by the applicant to show to which bank the charge was in favour of; correspondences showing exchange of communication between the deceased and the respondent; more plausible from the explanation provided that there was an error in the description of the bank when registering the charge; no prima facie case established; application dismissed).

1. This suit was filed on 9 April 2018 by way of plaint. Together with the plaint, the plaintiff filed an application for injunction which is the subject of this ruling.

2. The plaintiff has stated that she has filed this suit as the administrator of the estate of the late Eric Kibet Bomett through authority issued in the case Nakuru High Court Succession Cause No. 488 of 2006. She has also pleaded that before filing this suit, she sought leave in the case HCCC Miscellaneous Civil Application No. 303 of 2013 to file suit against the liquidator of the defendant. She has pleaded that Eric Kibet Bomett was the registered owner of the land parcel LR No. 10303/3 (IR No. 17550) measuring 159.9 Ha (the suit land). It is claimed that in the year 1992, Eric Bomett guaranteed a loan issued by Post Bank Limited to Hostaria Limited. In the year 2008, it is pleaded that the defendant, Post Bank Credit Limited (now in liquidation), issued a notice to sell the suit land but this was challenged through the suit Nairobi HCCC No. 184 of 2009, and an injunction issued. It is averred that the defendant went quiet until 9 January 2018, when it issued a 90 days notice to sell the suit land to recover an amount of Kshs. 22 Million. The plaintiff has contended that the defendant cannot purport to sell the land as it holds no charge. It is further pleaded that the loan was issued 26 years ago and therefore it is statute barred. In her affidavit in support of the application for injunction she has insisted that her late father guaranteed a loan issued by Post Bank Limited and not Post Bank Credit Limited (in liquidation). She has annexed a copy of the title deed in an attempt to prove this.

3. The application is opposed by the respondent through a replying affidavit sworn by Jane Kamita, the Liquidation Agent of the defendant. She has deposed inter alia that the applicant does not hold any letters of administration giving her permission to institute this case. It is also contended that she has not obtained leave to file this suit against the Liquidator of the defendant company. It is claimed that the late Eric Bomett guaranteed some money granted by Post Bank Credit Limited, but due to an error, the officials at the Lands Office wrote "Post Bank Limited" instead of "Post Bank Credit Limited". A copy of the charge instrument, dated 15 October 1992, is annexed to her affidavit. It is averred that to date, the monies loaned out have yet to be paid and that some significant amounts are still outstanding. She has annexed letters showing that there was correspondence from the late Eric Bomett, seeking accommodation after having been in default and at some point, he had even offered to privately sell a portion of the land to pay off the loan, but this did not materialize as Mr. Bomett died in the year 2006. She has stated that after his demise there were attempts to realize the security but these were not fruitful.

4. At the hearing of the application, both Mr. Kimatta for the applicant and Ms. Kavagi, for the respondent made brief submissions which I have taken into account in arriving at my decision. Mr. Kimatta pointed me to the search of the suit property and asserted that the charge therein is to Post Bank Limited where the deceased held an account. He submitted that the defendant holds no charge over the suit property. He also submitted that the applicant has annexed a grant of letters of administration to demonstrate her capacity. In his view, the matters raised can only be ventilated at a trial.

5. Ms. Kavagi in her response, first contested the jurisdiction of this court and cited the decision of the Court of Appeal in the case of **Patrick Kangethe vs Cooperative Bank Limited (2018)eKLR**. She further submitted that no leave to commence this suit has been sought as required

by the provisions of Section 56(2) of the Kenya Deposit Insurance Act, Cap 487C, Laws of Kenya. She pointed out that this statute commenced on 1st July 2014, and that the authority annexed by the applicant is one granted against the Liquidator, Deposit Protection Fund, in Misc. Application No. 303 of 2013, which was granted to pursue a suit against a different party and for a different claim, and not for purposes of filing this suit. She also submitted that the said authority was granted under Section 228 of the repealed Companies Act. She asserted that the applicant needed to seek leave pursuant to Section 56(2) before filing this suit. She further submitted that these technical objections aside, on the substance, the applicant does not deserve the discretionary remedy sought as she is guilty of material non-disclosure. She averred that the applicant has not disclosed the various correspondences between the deceased and the bank, which she now claims never held a charge. She submitted that the loan is not denied. She relied on various authorities all of which I have considered.

6. The principles for grant of an injunction were well settled in the case of **Giella vs Cassman Brown (1973) EA 358**. One needs to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

7. Before I go too far, there is a preliminary issue raised by the respondent, that this court has no jurisdiction and the case of **Patrick Kangethe vs Cooperative Bank** has been cited. I have looked at that decision but I am not persuaded that in the said case, the Court of Appeal held that the Environment and Land Court has absolutely no jurisdiction in a matter touching on a charge. In that case, the court felt that the issue was one of accounts and not the validity of the charge. In fact at paragraph 40 of the decision, the Court of Appeal, stated as follows :-

“...it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.”

8. It cannot have been the holding of the Court of Appeal that the Environment and Land Court has no jurisdiction over matters relating to a charge, for a charge is an instrument recognized as a disposition under the Land Act, 2012 and Land Registration Act, 2012, both statutes providing that the court with jurisdiction is the Environment and Land Court. The main thrust of the applicant's case is that Post Bank Credit Limited (in liquidation) never held a charge over the suit property and that the title clearly shows that the charge is registered in the name of Post Bank Limited. There is therefore a question over the charge instrument itself for which this court would have jurisdiction. I think I would also hasten to add, that so long as there is a question relating to the charge or the process of sale of a property by chargee, which processes are provided for in the Land Registration Act, and the Land Act, it is the Environment and Land Court which would have jurisdiction, and not the High Court, for the two statutes do provide that the Court with jurisdiction is the Environment and Land Court. I made a more elaborate finding on this issue in the case of **Lydia Nyambura Mbugua vs Diamond Trust & Another, Nakuru ELC Case No. 296 of 2013 (2018) eKLR** (ruling of 20 September 2018 on jurisdiction) and I really do not see the need of belabouring the point in the instance of this suit. In short, this is the correct forum for ventilating a dispute such as this, and this is the Court with jurisdiction to determine this matter.

9. I prefer to put aside the other technical objections, for I am not persuaded that the plaintiff has on merits, displayed to me a prima facie case with a probability of success. Although the plaintiff asserts that there is no charge registered in favour of Post Bank Credit Limited, the plaintiff has not given me a copy of the charge instrument which she wants to assert was made in favour of Post Bank Limited. The only charge instrument that has been made available is that displayed by the respondent. The same shows that Eric Bomett is chargor and Post Bank Credit Limited is the chargee. This charge shows that it was registered on 3 November 1992. The entry in the title of the suit property for this date, 3 November 1992, indicates charge to Post Bank Limited and not Post Bank Credit Limited. If there was a charge instrument or other document availed to me by the applicant, showing that the loan was actually by Post Bank Limited and not Post Bank Credit Limited, I would probably have been persuaded that there is a prima facie case displayed by the applicant. But surely without anything more to back up the allegation that the loan was to Post Bank Limited and not Post Bank Credit Limited, I find it difficult to push aside the explanation of the respondent that what happened was a simple mistake by the Land Registrar, who noted the wrong chargee in the register of the suit property. Moreover, I have seen the numerous correspondences that the late Mr. Bomett exchanged with Post Bank Credit Limited touching on his indebtedness. In essence, Mr. Bomett acknowledged that he borrowed money from Post Bank Credit Limited and that it is Post Bank Credit Limited who are the chargees. I do not see how the applicant can attempt to hang on what appears to me to be an error of recording by the Land Registrar, to claim that the loan was to Post Bank Limited and not Post Bank Credit Limited. I am thus not persuaded that the applicant, at least at this stage of the proceedings, has tabled prima facie evidence that the loan was from Post Bank Limited and not Post Bank Credit Limited.

10. Not being convinced that the applicant has made out a prima facie case, it is really unnecessary for me to go into the other issues raised by the respondent, if only to save precious judicial time.

11. Given the above, I find no merit in this application and it is hereby dismissed with costs.

12. I also vacate the interim orders of injunction granted at the ex-parte stage.

13. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 14th day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Langat holding for Mr. Kimatta for the plaintiff/applicant.

Mr. Imbwaga holding brief for Mr. Chacha Odera for the defendant /respondent.

Court Assistant: Nelima Janepher

Carlton Toroitich.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU