



**Kamau v NCBA Bank Kenya PLC & 3 others (Environment & Land
Case E020 of 2024) [2024] KEELC 4039 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E020 OF 2024**

MD MWANGI, J

MAY 14, 2024

BETWEEN

BONIFACE KIHU KAMAU PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

JANE NYAMBURA BAIYU 2ND DEFENDANT

NEEMA SHELTERS LIMITED 3RD DEFENDANT

REGISTRAR OF LANDS, NAIROBI COUNTY 4TH DEFENDANT

((In respect of the Notice of Motion application by the Plaintiff/Applicant dated 22nd January, 2024 seeking an order of interlocutory injunction restraining the Defendants from selling, auctioning, alienating, transferring, mortgaging, disposing off or interfering with the Applicant's peaceful enjoyment, ownership and possession of Apartment No. B4 (Cape Garden Apartments) situated on L.R. No. 2/702, Nairobi pending hearing and determination of the suit).))

RULING

Background:

1. The application under consideration is the Plaintiff's Notice of Motion dated 22nd January 2024 seeking an order of interlocutory injunction restraining the Defendants from selling, auctioning, alienating, transferring, mortgaging, disposing off or interfering with the Applicant's peaceful enjoyment, ownership and possession of Apartment No. B4 (Cape Garden Apartments) situated on L.R. No. 2/702, Nairobi. It is premised on the grounds on the face of it and the supporting affidavit of the Plaintiff, Boniface Kihui Kamau sworn on 22nd January 2024.



2. The Plaintiff alleges that he is the sole beneficial owner of the suit property having solely purchased it in the year 2010 for the sum of Kshs. 14,000,000/=. He avers that the 1st Defendant has instructed valuers to carry out a valuation of the suit property with a view to auctioning it pursuant to statutory notices purportedly issued under section 96(2) of the Land Act, 2012.
3. The Plaintiff states that he learnt from one of the statutory notices that the 2nd Defendant had been advanced a personal loan facility against title to the suit property, purportedly guaranteed by the 3rd Defendant Company, Neema Shelters Ltd. He affirms that any loans accessed by the 2nd Defendant were of a personal nature, unconnected to him and or the 3rd Defendant Company and without his approval or a resolution of the 3rd Defendant Company.
4. The Plaintiff and the 2nd Defendant are husband and wife respectively and are currently undergoing a divorce. The suit property does not form part of the matrimonial property. The Plaintiff alleges that the purported pledge of the suit property by the 2nd Defendant to the 1st Defendant is a calculated and blatant attempt to steal a march against the Plaintiff in future contemplated matrimonial proceedings.
5. The Plaintiff states that there is a likelihood that the 2nd Defendant purported registration of the charge over the suit property and guarantee by the 3rd Defendant was in collusion with the 1st Defendant's officials and is therefore fraudulent and illegal.

Response by the 1st and 2nd Defendants.

6. The 1st Defendant's response to the Plaintiff's application was by way of a Replying Affidavit sworn by one, Christine Wahome who terms the application by the Plaintiff as misguided, bad in Law, without merit and an abuse of the process of Court solely meant to vex and frustrate the 1st Defendant in its legitimate exercise of its statutory power of sale.
7. She further deposed that the Plaintiff lacks the locus standi to institute the suit as the suit property is registered in the name of Neema Shelters Ltd, the 3rd Defendant in this case who is also the Chargor. The deponent attached a copy of title to the suit property as an annexure to her affidavit which confirms that it is registered in the name of Neema Shelters Ltd.
8. The deponent asserted that under Section 103 of the Land Act, an application for relief against the exercise by Chargee of any of the remedies under Section 90(3) of the land Act may only be made by a chargor(s), a spouse of the chargor and the trustee of the estate of the chargor where the chargor has been adjudged bankrupt.
9. The deponent affirms that the Chargor in this case is Neema Shelters Ltd. It is therefore Neema Shelters Ltd, only, that has a right to seek the remedies under Section 90(3) of the Land Act. The Plaintiff/Applicant has not established any proprietary interests in the land. His allegation that he is the sole beneficial owner/proprietor of the land is false.
10. The borrower of the loan facility from the 1st Defendant was Jane Nyambura Baiyu, the 2nd Defendant herein. The charge and guarantee were executed by both the Plaintiff and the 2nd Defendant as directors of the 3rd Defendant Company.
11. Upon default in the payment of the loan facility, the 1st Defendant issued the requisite statutory notices to the registered owner of the suit property as by law provided, as hereunder;
 - a. 30 days statutory notice dated 15th November, 2022.
 - b. 90 days statutory notice dated 5th July, 2023 and



- c. 40 days' statutory notice dated 16th October, 2023.
12. The deponent avers that the suit property is in the name of the Company (3rd Defendant). It does not constitute matrimonial property.
 13. At the time of the creation of the charge, and the guarantee, the chargor provided minutes of the meeting of its directors approving the creation of the charge and issuance of guarantee, and the Plaintiff was in attendance. The Plaintiff further voluntarily executed the charge instrument as a director of the chargor (the 3rd Defendant Company).
 14. The deponent asserts that a company is a distinct legal personality, independent of its directors and shareholders. The Plaintiff's claim is therefore not legally plausible.
 15. The 2nd Defendant too filed a Replying Affidavit where she states that the Plaintiff's/Applicant's application is full of falsehoods and unsubstantiated allegations meant to mislead the Court. She confirms that the Plaintiff and herself are the Directors/Shareholders of the 3rd Defendant Company, Neema Shelters Ltd; through which they run the business of purchasing and disposing of properties.
 16. The 2nd Defendant affirms that the Plaintiff was at all times aware of the loan taken with the 1st Defendant whose principal amount was Kshs 18.7 million and that he fully participated in acquiring it. The loan was acquired to repay another loan acquired for the purchase of a 15 acres' parcel of land at Mavoko being, L.R. No. Mavoko Block 3/49966. The two directors/shareholders of the 3rd Defendant Company met and agreed as evidenced by the minutes attached to the 2nd Defendant's affidavit as exhibits. The amount acquired was transferred into the account of the 3rd Defendant Company.
 17. The crux of the matter as categorically put by the 2nd Defendant is that the apartment held by the bank as security is owned by the 3rd Defendant Company and if there is no other recourse, the 1st Defendant has a right to exercise its statutory right of sale to recover the outstanding amounts.

Directions

18. The Court's directions were that the application be canvassed by way of written submissions. The Plaintiff's submissions are dated 20th February, 2024. The 1st Defendant's submissions are dated 12th March, 2024. The 2nd Defendant's submissions are dated 15th March, 2024. The court has had the opportunity to carefully read and consider the said submissions and the attached authorities which now form part of its record.

Analysis and Determination

19. The Plaintiff in his affidavit in support of the application herein alleges that he is the sole beneficial owner/proprietor of the suit property. However, the suit property is registered in the name of the 3rd Defendant – a Limited Liability Company who is also the chargor. The Plaintiff as well as the 2nd Defendant are the shareholders cum directors of the 3rd Defendant Company.
20. As Lord Denning M.R. stated in *Moir –vs- Wallersteiner* (1975) ALLER 849;

“It is a fundamental principle of our Law that a Company is a legal person with its own corporate identity, separate from the Directors or Shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the Company itself is the one person to sue for the damage. Such is the rule in *Foss –vs- Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the Company is defrauded by outsiders. The Company itself is the only one who can sue. Likewise, when



it is defrauded by insiders of the minor kind, once again the Company is the only person who can sue”.

21. The 3rd Defendant company is a legal person with its own corporate identity, separate from the Directors or Shareholders and with its own property rights and interests to which alone it is entitled. It can sue and be sued in its own name. Neither the Plaintiff nor the Defendant can purport to sue on behalf of the company though they be the directors and or shareholders.
22. The court agrees with the 1st Defendant’s submissions that the Plaintiff’s suit and application are therefore not legally plausible. Secondly, Section 103 of the Land Act, is unambiguous to the effect that an application for relief against the exercise by Chargee of any of the remedies under Section 90(3) of the land Act may only be made by;
 - a. The Chargor;
 - b. If joint Chargors, by one or more of them on their own behalf;
 - c. A spouse of the Chargor to the extent that the spouse was required to give consent to the creation of the charge but did not; and
 - d. If the Chargor has been adjudged bankrupt, the bankruptcy trustee of the estate of the Chargor.
23. The Plaintiff in his application was clear that the suit property is not matrimonial property. He too is clearly not the chargor. Therefore, he does not qualify under section 103 of the Land Act to file for any of the reliefs under Section 90(3) of the land Act. Equity follows the law.
24. Further, this is a classical case where the Rule in Turquand’s case apply. The Plaintiff insinuates that the Company’s internal procedures were not complied with.
25. As explained by the authors of ‘Palmer’s Company Law’, 22nd Ed. Vol. 1 at page 286, the doctrine of constructive notice as provided under the Rule in Royal British Bank –vs- Turquand (1885) E & B 327 provides:-

“.....That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with..... By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily.”
26. The 1st Defendant, once provided with the minutes and the resolution of the 3rd Defendant Company approving the creation of the charge and issuance of guarantee had no other business inquiring into the indoor management of the 3rd Defendant Company but could assume that its requirements had been complied with.
27. The above notwithstanding, the Plaintiff has not satisfied the principles for the grant of an interlocutory injunction. The law is well settled since the Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358 case. The conditions for the grant of orders of temporary injunction are:
 - a. The Applicant must show a prima facie case.
 - b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not be adequately compensated by an award of damages.
 - c. If the Court is in doubt, it will decide the Application on a balance of convenience.



28. In the case of Nguruman Ltd –vs- John Bonde Nielsen & 2 others [2014] eKLR, the Court of Appeal stated that the three conditions (stipulated in the Giella case) are to be applied as separate, distinct and logical hurdles which are to be surmounted sequentially. Meaning that, an Applicant must establish all the three conditions one after the other.
29. In the case of Nicholas Njeru Muturi -vs- Thome Dynamics Limited & another [2022] eKLR, this court analysed that the essence of the holding in the Nguruman case and held that;

‘...if a prima facie case is not established, the Court need not go farther to consider if the Applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’
30. In this case, the Applicant has not surmounted the 1st condition on prima face case. As I already noted above, the suit property is in the name of the 3rd Defendant; a legal person with its own corporate identity, separate from the Directors or Shareholders. The Plaintiff cannot therefore pretend to file suit on behalf of the 3rd Defendant Company.
31. From the holding in the above cited case, if a prima facie case is not established, the Court need not go farther to consider if the Applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted. The application simply fails.
32. I agree with the submissions by the 2nd Defendant; the 1st Defendant has a right to exercise its statutory right of sale to recover the outstanding amounts.
33. The Plaintiff’s application therefore has no merits. It is dismissed with costs to the 1st and 2nd Defendants.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MAY, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Tole for the Plaintiff/Applicant

Mr. Kabaiku for the 1st Defendant/Respondent and Interested Party

Ms. Muriuki for the 2nd Defendant/Respondent

No appearance for the 3rd and 4th Defendants

Yvette: Court Assistant

M.D. MWANGI

JUDGE

