



REPUBLIC OF KENYA



KENYA LAW
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**Kirigo & 9 others v Kanyi & 2 others (Environment & Land Case
E022 of 2023) [2024] KEELC 5812 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E022 OF 2023**

EK MAKORI, J

JULY 24, 2024

BETWEEN

MARY MUTHONI KIRIGO 1ST PLAINTIFF
DENNIS JINALI MWAMUYE 2ND PLAINTIFF
VERONICA WANJERI OGOLLA WAYAYI 3RD PLAINTIFF
GRACE WAVINYA KIAMBA 4TH PLAINTIFF
ABDI RAZAK YUSUF 5TH PLAINTIFF
SIMON MWANIKI MWATHI 6TH PLAINTIFF
DINAICE MALEMBA MWANIKI 7TH PLAINTIFF
CHARLES MAINA 8TH PLAINTIFF
TONNY KIMUTAI CHERUIYOT 9TH PLAINTIFF
SUSAN MENGO WANJUHI 10TH PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT
STANBIC BANK KENYA LIMITED 2ND DEFENDANT
THE LAND REGISTRAR 3RD DEFENDANT

RULING

1. The Plaintiffs' Notice of Motion Application dated 11th September 2023 brought under Certificate of Urgency and pursuant to Article 40 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A and 63



- (c) & (e) of the [Civil Procedure Act](#) and Order 40 of the Civil Procedure Rules, the application, among other things, seeks the following reliefs:
- a. The 2nd defendant by itself, agents, assignees, and servants be restrained from trespassing, advertising for sale, auctioning, or offering for auction the 1st, 4th, and 10th plaintiffs Maisonette No. 15, 8, and 2, respectively, or from in any manner dealing with the suit premises pending the hearing and determination of this application.
 - b. The 2nd Defendant by itself, agents, assignees, and servants be restrained from advertising for sale, auctioning, or offering for auction the 1st, 4th, and 10th Plaintiffs Maisonette Nos. 15, 8 and 2, respectively or in any manner dealing with the suit premises pending the hearing and determination of this suit.
 - c. Pending the hearing and determination of this application, the 1st Defendant, any auctioneer, or any other bank or financial institution be restrained from advertising, offering for sale, auctioning any of the Plaintiff properties referred to as Maisonette No. 15 on Subdivision Number 343 and Maisonette Nos. 15, 16, 1, 9, 8, 24, 6, 21 and 2 on subdivision 454/IV/MN belonging to the 1st to 10th Plaintiffs respectively.
2. The application is supported by the annexed affidavit sworn on 12 September 2023 by Mary Muthoni Kirigo on behalf of the other Plaintiffs and the grounds set in the body of the application. The 2nd Respondent has opposed the application via a replying affidavit deposed by one Edna Omangi on November 1, 2023.
 3. The Applicants assert their legal and actual ownership of houses erected on sub-division No. 454 Original No. 442/13 Mainland North and houses erected on sub-division No. 343 in Bamburi. The 2nd to 10th Plaintiffs are the legal owners of Maisonatte No. 1,7.9.8, 24,6,21, and 2, respectively. The Plaintiffs bought those houses from the 1st Defendant and invested their money to have the homes built. They all claim purchasers' interest in the suit properties.
 4. They state that the 1st Defendant has neglected to register leases in their favor and has declined to transfer the subject properties to them. He fraudulently registered the leases under his name and used them to obtain credit facilities from various banks.
 5. The Plaintiffs were shocked and deeply aggrieved to find statutory notice of sale issued by the 2nd Defendant for the intended sale of the suit properties affixed to their doors. They assert that the interest of the 1st Defendant ceased to exist immediately after he received the purchase money from them and handed over possession. He had no right to charge those properties. It amounted to fraud and theft on his part. He had no propriety interests in transferring to himself or charging after 2018 since he had received all the purchase monies by then.
 6. The Plaintiffs further state that the 1st Defendant did not disclose that he had taken loans using the titles of those properties he had already sold to them. They live on those properties, and any intended eviction would be unlawful and mean losing their homes, a prospect that fills them with dread and anxiety.
 7. Searches done on 1 August 2023 and 31 August 2023 reveal that the properties are encumbered by long-term leases created in favor of the 1st Defendant, yet his ownership rights ceased well after receiving the purchase price. The 1st Defendant did not obtain consent from them while encumbering the properties.
 8. The Plaintiffs contend that the 1st Defendant has further loans with banks [which they did not specify], and they fear he may not pay to their detriment at the end of the day.



9. The properties have now been advertised for sale. They seek an injunction to restrain the 2nd Defendants from selling them. They joined the Land Register to cancel the illegal charges against their properties.
10. The Plaintiffs believe that the intended sale will negate their proprietary ownership rights as enshrined in Article 40 of *the Constitution*. They will suffer irreparable damages if the orders sought are not granted, hence the orders sought.
11. The 2nd Defendant-Respondent contends that the 1st Respondent obtained financing from it for the total sum of KShs. 63,400,000/-vide the Facility Letter and Letter of Amendment dated 5th June 2018 and 27th July 2018, respectively. Part of the amount advanced by the facility described in the letters above is in the sum of KShs. 38,400,000/= was secured by a first-ranking legal charge created by the 1st Defendant in favor of the Bank over several properties, including Maisonette Number A15 (lease number C.R. 71153) on sub-division Number 343 of Section I Mainland North and Maisonette Number 15 (Lease Number CR 71567), Maisonette Number 8 (Lease Number CR 71568) and Maisonette Number 2 (Lease Number CR 71569) on sub-division Number 454 of Section IV Mainland North - the suit properties. The loan amount balance was secured by other properties offered by the 1st Respondent, as enumerated in Clause 7.2 of the facility letter. The purpose of the charge was to secure repayment of the said principal amount and all other monies accruing thereon pending payment in the prescribed manner. Before the facility was advanced to the 1st Defendant, the 2nd Defendant had undertaken a robust and scrupulous due diligence exercise, which involved thorough ascertainment to confirm the ownership of the suit properties and the existence of any encumbrances attached to it. The properties were registered in the name of the 1st Respondent, and no encumbrance(s) were noted on the title document.
12. The Bank engaged Axis Real Estate Limited, the Valuers, to value the suit properties as a further due diligence exercise. The exercise culminated in the preparation of several valuation reports for the properties, all dated 29th June 2018, which reports are annexed to the replying affidavit.
13. The Court directed parties to canvass the application through written submissions. The Plaintiffs-Applicants and the other defendants-respondents did not file any submissions, but the 2nd Defendant-Respondent did comply.
14. Looking at the materials and submissions placed before me, the issues I frame for this Court's determination are whether an injunction can be issued at this stage, whether this Court has jurisdiction to entertain the matter, and who should bear the costs of the application. Once a jurisdictional issue is raised, the Court should handle it immediately. As held in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
15. The 2nd Respondent is of the view that prayers (b), (c), (d), and (f) of the Plaintiffs' notice of motion application seek to injunct the 1st and 2nd Respondents from advertising for sale, auctioning, or offering for auction Maisonette No. 15 on sub-division Number 343 and Maisonette Nos. 15, 16, 1, 9, 8, 24, 6, 21 and 2. Notably, the Applicants want to stop the 2nd Respondent from exercising its Statutory Power of Sale, which was occasioned by the 1st Respondent's default on several loan facilities advanced to him. The question, then, is whether such a dispute should be within the purview of this Court's jurisdiction. The 2nd Respondent is of the view that Section 13 of the *Environment and Land Court*



Act clothes this Court with original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and in accordance with the provisions of the said Act or any other law applicable in Kenya relating to environment and land, it does not confer jurisdiction to this Court to hear matters relating to charges, mortgages, collection of dues and rent, which fall exclusively within the jurisdiction of the High Court. The 2nd Respondent cites the decision of the Court of Appeal in *Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR, followed with approval by this Court (Ombwayo J.) in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR.

16. The 2nd Respondent believes that the Plaintiffs, in their application dated 11th September 2023, seek to stop the 2nd Respondent from exercising its Statutory Power of Sale. See prayers (b), (c), (d), and (f) therein. The Applicants conceded that they were duly served with a 40-day Statutory Notice by the 2nd Respondent. Therefore, the issue before this Court revolves around issuing the 40-day Statutory Notice and exercising the 2nd Respondent's Statutory Power of Sale. From the 2nd Respondent's preceding argument, it is submitted that the Applicants have approached the wrong Court. As captured in the Applicants' pleadings, the dispute should have been placed before the High Court for determination. The 2nd Respondent, therefore, submits that this Court lacks jurisdiction to entertain and determine this suit.
17. I have considered the views taken by the 2nd Respondent on the issue of jurisdiction. I agree with the decisions cited as representing the correct position on reckoning the jurisdiction of this Court on matters relating to charges, mortgages, collection of dues, and rent, which fall exclusively within the jurisdiction of the High Court as stated in the two decisions *The Court of Appeal in Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 Others* [2017] held thus:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues, and rents which fall within the civil jurisdiction of the High Court.

18. In the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, Ombwayo J., having analyzed the averments in the plaint in a matter before him, stated as follows:

“The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settle by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR where the court held as follows.....”

He further proceeded to state:

“The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of



the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

19. From the plaint and the averment by the Plaintiffs- Applicants, whereas they seek injunctive orders restraining the 2nd Respondent from exercising its Statutory Power of Sale, they argue that they are legal and actual owners of houses erected on sub-division No. 454 Original No. 442/13 Mainland North and house erected on sub-division No. 343 located in Bamburi, the 2nd to 10 Plaintiffs are the legal owners of Maisonatte No. 1,7.9.8, 24,6,21 and 2 respectively. The Plaintiffs bought those houses from the 1st Defendant. By the time the Plaintiffs bought those houses through off-plan payment from the 1st Defendant, the houses had not been developed. The Plaintiffs used their own money to have the houses built by the 1st Defendant for them. The copies of the agreement show purchases were made between 2015 and 2016. They state that the 1st Defendant fraudulently registered under his name the same properties he had sold and used to obtain credit facilities from various Banks. They claim that the interest of the 1st Defendant ceased to exist immediately after he received the purchase money from them and handed over possession to them. He had no colour of right to charge those properties. It amounted to fraud and theft on his part. He had no proprietary rights to transfer to himself or charge after 2018. Having received all the purchase monies by then. They live on those properties, and any intended eviction will be unlawful. They have joined the Land Register to cancel the illegal charges over their properties. The Plaintiffs believe that the planned sale will negate their property ownership rights as enshrined in Article 40 of the Constitution and that they will suffer irreparable damages if the orders sought are not granted; hence, the orders sought.
20. From the averments aforesaid, the predominant feature in the Plaintiffs’ case will not necessarily be the exercise of Statutory Power of Sale by the 2nd Defendant-Respondent but rather ownership of the suit properties, the Plaintiffs had purchased from the 1st Defendant who put them in possession before charging the same properties to the 2nd Defendant and whether the creation of the charge over those properties was illegal, null, and void, for overlooking the purchasers’ interest of the Plaintiffs-Applicants. In my humble view, that is the province of this Court.
21. That brings me to the issue of whether to issue an interlocutory injunction at this stage. The 2nd Respondent has cited several authorities to show that, at this point, it will be premature to issue an injunction. Significant from the submissions is that under the Land Laws, before a charged property is disposed of in the exercise of a Chargee’s Statutory Power of Sale, numerous mandatory processes have to be undertaken, and several Statutory Notices issued to the defaulting party, namely the 90 days’ notice to redeem, the 40 days’ notice to sell and an additional 45 days’ Auctioneers notice to redeem. While the Plaintiffs attached the 40 days statutory notice to their supporting affidavit, they did not demonstrate that the Auctioneers’ 45 days notice had been served upon the 1st Defendant, valuation of the suit properties undertaken, and the Suit Property advertised for sale in the dailies. There is, therefore, no imminent threat currently to warrant the grant of the orders sought.
22. For an injunction to be issued, the threshold to achieve before the grant of the same is as held in the *Giella v Cassman Brown* [973] EA on page 358:

“The Applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages, and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”



23. The first issue to determine then is whether the Applicant has proved a prima facie case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125 as follows:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

The principles stated in *Giella’s* case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraha Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

24. the Plaintiffs-Applicants have demonstrated a prima facie case citing purchasers’ interest in the suit properties. Secondly, if the sale were to happen, they would suffer irreparable loss—their purchasers’ rights would be up in smoke.

25. But as correctly stated by the 2nd Defendant-Respondent, the various mandatory processes to be undertaken before sale have not been activated by the 2nd Defendant-Respondent. The Auctioneers’ 45-day notice is yet to be served upon the 1st Defendant, nor has a valuation of the suit properties been undertaken, and the suit properties advertised for sale in the dailies. There is, therefore, no imminent threat currently to warrant the grant of the orders sought—the balance of convenience tilts in favour of the 2nd Defendant-Respondent. The Plaintiff-Applicants should, for now, sit pretty and move the Court when such process is put in motion.

26. The upshot is that the application dated 11th September 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 24TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Wafula for 2nd Defendant

Court Clerk: Happy

In the absence of:

Mr. Muthuri, for the Plaintiffs

Ms. Lutta, for the 3rd Defendants

