



**Duncan & 2 others v Family Bank Limited & another (Environment & Land Case E026 of 2021) [2023] KEELC 15902 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15902 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E026 OF 2021  
MN GICHERU, J  
FEBRUARY 27, 2023**

**BETWEEN**

**CATHERINE WAMBUI DUNCAN ..... 1<sup>ST</sup> PLAINTIFF  
MIKE WAKABA KINUTHIA ..... 2<sup>ND</sup> PLAINTIFF  
MONICA WANJIKU KINUTHIA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**FAMILY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT  
TA AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is on the Notice of Motion dated 28/4/2021. The motion which is by the Plaintiff is brought under Order 40, Rules 1(a), 2, 3 and Order 51, Rule 1, *Civil Procedure Rules*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Article 159 of the *Constitution* of Kenya and all enabling provisions of the law.
2. The motion seeks that a conservatory order in form of an injunction be issued against the Defendants jointly and severally restraining them, their agents, workmen or any other person acting on their instructions from carrying out the intended public auction on 13<sup>th</sup> May, 2021 at the second Defendants premises or by private treaty transferring, leasing, charging, with the quiet occupation, possession and enjoyment of LR No Ngong/Ngong/59915 the substration of the suit registered in the name of Erick Kinuthia Wakaba until the hearing of this suit.
3. The motion is supported by an affidavit sworn by the first Plaintiff dated 28/4/2021, three grounds and five annexures.

The gist of the above material is that the Plaintiffs are the wife and the children of Eric Kinuthia Wakaba who is registered owner of LR Ngong/Ngong/59915 (suit land). The registered owner has no other



wife. The suit land is scheduled for sale on 13<sup>th</sup> May, 2021 and unless the court stops the intended sale, the Plaintiffs will become destitute as their only family land and the first Plaintiff's matrimonial home will be sold due to fraudulent activities perpetuated by third parties.

Secondly, the suit land mutated from LR Ngong/Ngong/6316 which is registered in the name Monica Njeri Wakaba who is deceased and there have never been any succession proceedings relating to her estate anywhere in the Republic of Kenya.

Finally, the registered owner of the land, Eric Kinuthia Wakaba has been uncooperative hence the filing of this suit and also the reason why the first Plaintiff had to caution the suit land and also report the problem to the DCIO in Nairobi.

The first Plaintiff's husband is an influential man in Ngong location.

4. The motion is opposed by the Respondents and the legal officer of the first Defendant, Sylvia Wambani, has sworn a replying affidavit dated 21/5/2021 which has five main annexures. The reasons for opposing the motion are as follows.

Firstly, when the registered owner obtained a loan of Kshs. 10 million with the first Defendant, his spouse Faith Wanjiru Ndwegwa executed a spousal consent dated 31/7/2014. The 1<sup>st</sup> Plaintiff is therefore a stranger to the bank and the charge.

Secondly, the registered owner who was to pay Kshs. 253, 934.27/= per month has defaulted on the loan agreement payments and is in arrears.

Thirdly, all the requisite notices required by the law to be issued to the registered owner of the suit land have been issued.

Fourthly, the court has already decided on similar applications in ELC Numbers 562 of 2017 both of which were dismissed.

Fifthly, the Plaintiffs have deliberately refused to join the registered owner of the suit land in this suit yet he is the only one in a position to respond to some of the allegations that they have made.

Finally, the registered owner of the suit land continues to default in repayment of the loan.

5. Only the Applicants' counsel filed written submissions on 20/9/2022. Though not clearly identified, the following issues can be discerned from the said submissions.
  - i. Whether the title deed to LR No 59915 was fraudulently acquired?
  - ii. Whether this court should refer the matter to other agencies to investigate the alleged fraud?
  - iii. Whether the order of injunction is merited?

6. I have carefully considered the application dated 28/4/2021 in its entirety including the affidavits, grounds, annexures and submissions. I make the following findings.

On the first issue, I find that it is too early to know whether the title deed to the suit land was acquired fraudulently or not. The burden of proof is on the Applicant and it is a heavy one as it is above proof on a balance of probabilities. This is trite law.

On the second issue, I find that this court has no obligation to refer the matter to any other authority for investigation. This is the duty of the Plaintiffs.

On the third issue, I find that a case for an order of injunction has not been made out by the Plaintiffs for the following reasons.



Firstly, the first Plaintiff has not proved that she is the wife to the registered owner. This was especially important because it has been shown by the Respondent that when the suit land was charged, the chargor's spouse Faith Wanjiru Ndegwa executed the necessary consent by spouse. The first Plaintiff should therefore have proved that she is the lawful spouse and Faith Wanjiru Ndegwa was not. She had not done so. She has not even filed a supplementary affidavit to prove this critical issue. Without proof that she is a spouse of the chargor, the first Plaintiff, and by extension the other Plaintiffs have not proved that they are related to the chargor. They have not therefore made out a prima facie with a probability of success.

Secondly, the Plaintiffs having failed to prove their relationship with the chargor cannot prove that they stand to suffer loss that cannot be adequately compensated with an award of damages.

Thirdly, the Plaintiffs have not even proved that they are in actual occupation of the suit land. They have not annexed any pictures of what they have on the suit land.

Finally, the fact that the Plaintiffs are claiming through the chargor who has already filed a similar application in Case No 566 of 2017 and lost further weakens the Plaintiffs' notice of motion.

For the above stated reasons, I find no merit in the application dated 28/4/2021 and I dismiss it with costs to the Respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**M.N. GICHERU**

**JUDGE**

