



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 34 OF 2018

HENRY SIMON NYANGAU.....PLAINTIFF/APPLICANT

VERSUS

EDNA CHERONO BORE.....1ST DEFENDANT/RESPONDENT

SPIRE BANK LIMITED.....2ND DEFENDANT/RESPONDENT

PAMPA CHURRASCARIALTD.....3RD DEFENDANT/RESPONDENT

JOSEPH M. GIKONYA T/A

GARAM INVESTMENT AUCTIONERS.....4TH DEFENDANT/RESPONDENT

RULING

1. By an application dated 22/3/2018 the plaintiff/applicant sought the following orders:-

(a) That pending the hearing and determination of this application inter partes an order of injunction be issued restraining the 2nd and 4th defendants by themselves, their agents, servants, nominees, officers or otherwise from selling, alienating, disposing or anyway dealing or interfering with the plaintiff's property known as LR NO 2116/1050 Kibomet are, Kitale Municipality, Trans-Nzoia County pending hearing and determination of this case.

(b) That an order of injunction be issued restraining the 2nd and 4th defendants by themselves, their agents, servants, nominees, officers or otherwise from selling, alienating, disposing or anyway dealing or interfering with the plaintiff's property known as LRNO 2116/1050 Kibomet are, Kitale Municipality, Trans-Nzoia County pending hearing and determination of this case.

(c) That costs of the application be provided.

2. The grounds on which the said application is made are as follows:-

(1) The plaintiff/applicant is the husband (spouse) to the 1st defendant having married in 2009.

(2) The property known as LR NO 2116/1050 (IR NO 52527) is a family property.

(3) That as a family the plaintiff/applicant being the spouse was neither consulted nor his consent obtained at the time the purported guarantee was given.

(4) The applicant and 3 issues risk to suffer prejudice if the suit property is sold.

(5) The applicant states that the guarantee purportedly given by the 1st defendant in favour of Pampa Churrascaria Limited is illegal null and void for lacking a spousal consent.

(6) The purportedly guarantee solely given by the 1st respondent was made contrary to the mandatory provisions of the Matrimonial Property Act.

(7) The plaintiff/applicant assert that the respondent did not obtain consent to charge from the Land Control Board as is required by law.

(8) The 1st respondent and the issues of the marriage stand to suffer irreparable losses.

3. The application is supported by the affidavit of the applicant. In that affidavit the grounds set out hereinabove are reiterated and fleshed out to a small degree. The deponent states that his marriage to the 1st defendant took place on the 5th December 2009 and exhibits a copy of the certificate of marriage to that effect. He avers that the couple owns 11 acres of land situate in the Kibomet area of Kitale and states that the land is registered in the name of the 1st defendant. He alleges that their matrimonial home is built on the suit land. The deponent also alleges that he has injected millions of shillings to effect developments on the suit land. He exhibits a copy of an advertisement vide which the 4th defendant recently put up the suit property for sale. The advertisement is not dated and there is no way of knowing when he first came to know of it. He also states that he has become aware that the 1st defendant, alongside two other guarantors, guaranteed the 3rd defendant who was pursuant to that guarantee granted a loan of Ksh 50,000,000/= and a Ksh 10,000,000/= overdraft. However the 1st defendant is said to have failed to seek his input, and the family never got any benefit out of the transaction. He states that he has been advised by his counsel that his consent to the transaction ought to have been sought and that it was not and that the failure on the part of the 1st respondent to obtain the plaintiff's consent renders any subsequent action illegal; therefore a valid charge could not have been created over the suit property. He also avers that the 2nd defendant has not attempted to recover the debt from the actual beneficiaries in spite of the directors of the 2nd defendant (and I think here he meant the 3rd defendant) having executed personal guarantees. He suspects collusion between the bank and the borrower to deprive his family of his hard earned property and discredits the intended sale thereof as illegal, null and void.

4. In reply to the application the 2nd defendant/respondent filed a replying affidavit of John Wageche its Senior Legal Officer dated 20/4/2018. The deponent avers that the allegation that the 1st defendant is the plaintiff's wife is false. He points at the title document that names her as the wife of one *Amos Kipkirui Arap Bore*. He avers that the 1st defendant presented herself as the wife of *Amos Kipkirui Arap Bore* and that it can not be possible that she is married to two men as Kenyan law prohibits polyandry. As further evidence that the 1st defendant could not possibly be married to the plaintiff, the deponent points to the fact that she has retained the name "Bore". He castigates the copy of marriage certificate exhibited by the plaintiff as a fraud and accuses the plaintiff of coming to court only after the 1st respondent has exhausted her options in challenging the realization of the security in **Kitale ELC 59 Of 2016, Edna Bore Vs ECB, Pampa Churrascaria Ltd And Garam Auctioneers** and **Kitale ELC MISC 14 of 2016, Edna Bore Vs Spire Bank Ltd And Garam Auctioneers** and he avers that the instant application is similar to those other applications filed in those other proceedings mentioned which decisions have never been appealed. He terms it as curious that the plaintiff has rushed to court only recently yet the recovery process began in the year 2015. It is his position that the charge has never been nullified and that therefore the applicant's application can not succeed. Further he states that the plaintiff has not demonstrated any discernible interest in the suit property. He posits that even if the purported marriage between the 1st defendant and the plaintiff was contracted in the year 2009 the property subject matter of this suit was acquired in the year 1990 and can not therefore be deemed as matrimonial home. He states that the suit property is being used as a school and that it can not be deemed as matrimonial property. He believes that the plaintiff is merely a proxy to the 1st defendant and prays that the instant application be dismissed with costs.

5. The plaintiff filed his submissions on 13/6/2018. The 2nd defendant had filed his submissions on 29/5/2018. I have considered those submissions.

6. The issues that arises in the instant application are whether:

a. The plaintiff has demonstrated that he has a prima facie case with probability of success.

b. Whether he would suffer irreparable loss that may not be compensable by way of damages if the orders sought do not issue.

(a) The plaintiff has demonstrated that he has a prima facie case with probability of success.

7. I have noted that this is the third in a trilogy of cases that relate to the realization of security comprised of in the suit property. The delay in coming to court on the part of the plaintiff is decried by the 2nd defendant and must be addressed. In the first two dismissed cases the 1st defendant acted alone and without the input of the plaintiff herein. Having examined the plaintiff's affidavit evidence, it is difficult to believe that all this long the plaintiff never knew that his wife was battling against the realization of the security comprised in her land which the plaintiff now describes as family property. In my view, it would take more evidence than that currently on the record to do so. The kind of notoriety that a sale of such a property would generate could not have escaped the plaintiff especially if he has been involved in developing and running the school that has been, as I must now believe, erected on the suit premises. The complaint of lack of a good explanation for the delay which issue has been raised by the 2nd defendant is therefore valid.

8. Secondly even if they were a married couple, I do not have any evidence whatsoever, this allegation is also countered by the statement of the 2nd defendant stating that the land is purely commercial in nature, that the suit land hosts the matrimonial home of the 1st defendant and the plaintiff.

9. Thirdly, the other two proceedings filed by the 1st defendant were all decided against her. In **Kitale ELC 59 of 2016**, an application was made by one of the defendants urging that this was matter in which summons were not served by the plaintiff. It was averred that after obtaining the orders of injunction the plaintiff failed to prosecute the matter. The suit by the plaintiff therein who is the 1st defendant herein was for that reason dismissed.

10. In **Kitale Misc Application No 14 of 2017**, the 1st respondent therein filed a Notice of Preliminary Objection dated 17/10/2017 in which

it raised the following grounds of objection to the Miscellaneous Application:-

(i) That the application offends Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya as the issues have been litigated in Kitale ELC No. 59 of 2017 - Edna Cherono Bore -vs- E.C.B and 2 Others.

(2) The application is fatally defective for having moved the court in a manner not prescribed by law contrary to Order 3 Rule 1 of the Civil Procedure Rules 2010.

(3) The application be struck out with costs.

11. This court dismissed that miscellaneous application for not being founded on a suit.

12. It is quite disturbing that in the midst of a claim to marriage a couple would let their affairs go this far without any evidence of open collaboration from the start. If indeed they are married as alleged, and I am not determining this issue, this court can not tell what kind of relationship in and outside of their home that the 1st defendant and the plaintiff herein have such that mutual discussions that would have enabled the plaintiff to come to court in the year 2015 at the time of commencement of the recovery process was impossible. The only consequence that ensues is that this court is that an element of doubt is cast on the alleged matrimonial relationship between the plaintiff and the 1st defendant such that even the allegation of the existence of a matrimonial home on the suit property is rendered doubtful with the effect that the probability of the plaintiff establishing a prima facie case is seriously damaged.

13. Further, in my view, it is not proper for the court to investigate such an alleged matrimonial relationship in a situation where the 1st defendant, who is clearly the main loser in the event sale takes place, has not even bothered to file anything for or against the suit herein. It is noted that by an affidavit of service sworn by one Godfrey Masinde in this matter on 11th April 2018 the 1st defendant is believably said to have been served with the summons, plaint and application in this suit and she is yet to enter appearance to date. The 2nd defendant has only made an allegation without proof, but in the above described circumstances, it is probable that the plaintiff could be the 1st defendant's proxy or agent in these proceedings just as is alleged by the 2nd defendant.

(b) Whether he would suffer irreparable loss that may not be compensable by way of damages if the orders sought do not issue.

14. It is apparent from what I have said while addressing the issue of the existence of a prime facie case hereinabove that the plaintiff has not demonstrated that he has an interest in the property to the satisfaction of this court to warrant the grant of an injunction as prayed. For that reason I also find that there is no evidence that the plaintiff could suffer any irreparable damage were the orders sought in the instant application not granted.

15. I therefore dismiss the application with costs.

Dated, signed and delivered at Kitale on this 4th day of July, 2018.

MWANGI NJOROGE

JUDGE

4/7/2017

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Picoty

Ms. Mufutu holding brief for Karani for applicant

N/A for the respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

4/7/2018