



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CAUSE NO. 25 OF 2020

TAZMIN SHIFFIQUE ALLIBHAI.....PLAINTIFF/APPLICANT

-VERSUS-

SHAFFIQUE ALLIBHAI.....1ST DEFENDANT/RESPONDENT

AL-MIRAJ GARDENS LIMITED.....2ND DEFENDANT/RESPONDENT

I&M BANK KENYA LIMITED.....INTERESTED PARTY

RULING

There are two matters for determination one is the Notice of Preliminary Objection by the Interested Party dated **30th April 2020** and the Notice of Motion Application dated **22nd April 2020**, by the Plaintiff Applicant seeking for orders that;

1. Spent

2. Spent

3. Spent

4. Spent

5. THAT this Court be pleased to issue an interim order that the status quo be maintained pending the hearing and determination of the suit herein.

6. THAT in the alternative to (5) above, an injunction do issue stopping, baring and/or restraining the interested party whether by itself, its servants, employees or agents from advertising for sale, selling by private treaty, public auction or otherwise, leasing, alienating, disposing off, transferring to a 3rd party, evicting, dealing and or interfering in any manner with the plaintiff's quiet, peaceful enjoyment, possession all that land known as LR NO. 9104/121, pending the hearing and determination of the suit herein.

7. THAT the cost of this application be provided for.

The application is premised on the grounds that the 2nd Defendant/Respondent fraudulently and illegally obtained the registration of the suit property. That the Plaintiff/Applicant and the 1st Defendant/Respondent jointly purchased the suit property during the subsistence of their marriage and that 1st Defendant/Respondent has never contributed or paid to them any consideration thereof.

That the applicant and the 1st Defendant/Respondent obtained a loan facility from the interested party for purchase of a home, which monies were utilised to procure the suit property jointly by them as husband and wife. That they made the suit property their family home and jointly repaid the said loan. Further that soon thereafter, the Applicant and the 1st Respondent separated and decided to reserve the suit property as family property. However, 1st Defendant/Respondent has unlawfully registered the suit property in the name of the 2nd Defendant/Respondent, a limited liability company where he is the sole director/shareholder.

That upon the completion of the sale, the 1st Defendant/Respondent fraudulently omitted the names of the applicant during the registration of the suit property, and fraudulently registered his company, the 2nd defendant/shareholder. That shortly thereafter, the 1st Defendant/Respondent obtained a loan facility from the interested party to the tune of **30,000,000/=** only and charged the suit property as collateral for the same.

It was further contended that the 1st Defendant/Respondent conspired with the interested party and procured the said loan without the Applicant's spousal consent and obtained an illegal charge over the said property whereas it was within its foreseeable knowledge that the suit property was jointly owned by the applicant and the 1st Defendant/Respondent. That the said charge was registered on **30th March, 2009** the same day that the suit property was registered in the names of the 2nd Defendant/Respondent. That the 1st Defendant/ Respondent has defaulted in servicing the terms of said loan pursuant to the said charge and the same stands at **kshs.48,422,333.28/=**. That owing to the said default, the interested party intends to sell the suit property by way of public auction or private treaty.

Further that vide a letter dated **3rd March, 2020**, the Interested party through its agents **Keysian Auctioneers** issued the 2nd Defendant/ Respondent with **45 days** notification of sale of the suit property by public auction for default in the said loan repayment, which period shall laps on **25th April, 2020**. It was further contended that the applicant stands to suffer irreparable loss, if the suit property is sold over an illegal charge as the 2nd Defendant/Respondent holds it interest in the suit land subject to any unregistered interests and right which accrued against the suit land, before it obtained the proprietorship of the suit land.

That the Applicant's right and claims against the suit property overrides the 2nd Defendants/ Respondent interest in the suit property. It was further contended that there exists no written contract for the sale between the previous proprietor of the suit land and the 2nd Defendant/Respondent as required by the law of contracts Acts. Hence the 2nd Defendant/Respondent could not attain any interest in the suit land. That the 2nd defendant/respondent obtained registration of the suit land though misrepresentations, unlawful and illegal acts without paying consideration for the same and that the applicant got knowledge of the said charge suit land on the **2nd July, 2019**. That owing to the fact that the charge is contra-statute, then the interested party cannot be allowed to redeem its monies under the lawful procedure, since the charge has no basis in law.

In her Supporting Affidavit, **Tazmin Shaffique Allibhai**, reiterated the contents of the grounds on the face of the Application and further averred that unless the Interested Party is restrained by this Court, it shall proceed to sell the suit property by the way of private treaty and/or public auction and she stands to suffer irreparable loss and damage. It was her further contention further that she has a **prima facie** case with high chances of success as the 1st Defendant/Respondent hold an equitable trust over the suit property as granting the orders sought herein shall not occasion any prejudice to the interested party, and if any, the same can be compensated as damages. That it is in the interest of justice and all fairness that orders sought be granted.

The Application is opposed and the Interested Party filed a Replying Affidavit through its legal Manger **Andrew Muchina**, who averred that the bank extended a credit facility to the Plaintiff/Applicant and the 1st Defendant/Respondent to which they executed the **letter of offer** and a charge was further executed over **L.R No.9104/121** by the 2nd Defendant. That upon settlement of the said loan facility, the bank discharged the charge. Further, pursuant to a letter of offer dated **5th September 2016**, the bank extended another credit facility to KM Plus Africa Limited who executed the offer letter and duly accepted the terms. And as a security, the 2nd Defendant executed a first legal charge dated **5th September 2016**, over the suit property and following breach, the bank issued the requisite notices and it is therefore entitled to exercise its statutory power of sale as the borrower is indebted to it upon defaulting.

He contended that the Plaintiff's remedy lies in damages against the 1st Defendant as the bank stands to suffers irreparable loss. Further, that the bank had no obligation to seek consent from Plaintiff as the Plaintiff has not adduced evidence to show that the charged property was owned jointly with the 1st Defendant. He further averred that the Plaintiff has not shown any evidence of contribution to the charged property as the wife to the 1st Defendant/Respondent to warrant the need for spousal consent. He contended that the bank conducted due diligence and that the Plaintiff/Respondent has no legal interest in the suit property and therefore lacks **locus standi**. That the Plaintiff's interest is subject to the banks interest and the bank's interest as chargee ranks in priority and that the default in the loan having been admitted, the bank should be allowed to exercise its statutory power of sale.

The Interested Party filed a **Notice of Preliminary Objection** dated **30th April 2020**, on the grounds that the Court has no jurisdiction to entertain this Application and the entire suit as the jurisdiction exclusively lies with the High Court. Further that the Plaintiff lacks **locus standi** to seek relief against the Interested Party as Chargee, as she is not recognized in law as one of the persons to seek relief under **section 103 of the Land Act 2012**. Further that the Plaintiff has no legal interest in the charged property and the bank's interest ranks in priority to the Plaintiff's interest.

The two Applications were canvassed by way of written submissions which the Court has now carefully read and considered. The issues for determination are;

1. Whether the Notice of Preliminary Objection by the Interested Party is merited.

2. Whether the Plaintiff is entitled to the Orders sought

1. Whether the Notice of Preliminary Objection by the Interested Party is merited.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

Further Sir **Charles Nebbold, JA** stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

The above being the description of a **Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or, when the court is called upon to exercise judicial discretion.

Further, in the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Before the Court embarks on determining the merit of the **Notice of Preliminary Objection**, it has to first determine whether what has been raised herein satisfy the ingredients of a **Preliminary Objection**. As the Court determines whether what the Interested Party has filed amounts to a Preliminary Objection or not.

It will also be persuaded by the findings in the case of **Oraro...Vs...Mbaja(2005) 1KLR 141**, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

The Interested Party has submitted that the Court has no **jurisdiction**. Further that the Plaintiff has no *locus standi* to institute the instant suit. It is not in doubt that the issue of jurisdiction and the question of locus standi are pure points of law. Therefore, it follows that the said limbs are Preliminary Objection as without jurisdiction and *locus standi* the Court has no option but to down its tools.

The Interested Party has further averred that the bank’s interest ranks in priority over the Plaintiff. It is the Court’s opinion that for the Court to find which party has the highest priority, there must be ascertainment of facts and if ascertainment of facts is required, then the said point as raised is not a Preliminary Objection.

The Court will then determine whether it has jurisdiction to deal with the matter. It is trite that Jurisdiction is everything and without the Court has no option but to down its tools. It is the Interested Party’s submission that the instant suit falls within the jurisdiction of the High Court. It is not in doubt that the dispute in question involves whether the charge is valid given that the land was allegedly transferred fraudulently and the process of sale by the Interested Party. Therefore, the court finds that the same involves use and the process of acquisition of land, which falls within the Jurisdiction of the Environment & Land Court. . See the case of **Lydia Nyambura Mbugua ... vs...Diamond Trust Bank Kenya Limited & another [2018] eKLR** where the Court held that

It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of Stephen Kibowen –vs- Agricultural Finance Corporation (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”

Taking into account the fact of this case and being persuaded by the above decided case, the Court finds and holds that it has jurisdiction to deal with this matter.

The second issue raised by Preliminary Objection is whether the Plaintiff has *locus standi*. *Locus standi* has been defined In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, where the Court held that;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

Further in the case of **National Environmental Tribunal... Vs... Overlook Management Limited & 5 Others (2019) eKLR** the Court held that

“In determining a person’s capacity to sue, the Court had to be satisfied that the action was justifiable and a dispute between the parties existed”.

Further the Court quoted the case of:-***Elendu...Vs...Ekwoaba(1998)12 NWLR (Pt.578)320*** where the Court held that;

“that in determining whether a person has locus standi or not, the following factors may serve as guidelines;

- i. For a person to have locus standi in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed.***
- ii. The fact that a person may not succeed in an action does not have anything to do with whether or not he has a standing to sue.***
- iii. Whether a person’s civil rights and obligations have been affected, depends on the particular facts of the case.***
- iv. The court should not give an unduly restrictive interpretation to the expression locus standi.***

The question that the Court must then determine is whether the Plaintiff/ Applicant has any legal interest over the charge or the suit property. It is the Plaintiff’s contention that the 1st Defendant/Respondent fraudulently transferred the suit property to the 2nd Defendant without her permission. Further that the 1st Defendant charged the suit property to the Interested Party without seeking spousal consent. Though the Plaintiff has alluded to having interest over the suit property, it is not in doubt that the suit property is registered to **Kifaru investments Limited**, a Limited liability Company. The Plaintiff has not provided any evidence that she is the owner of the suit property. Further the Plaintiff/ Applicant has not provided any evidence that links her to the charge. For the above reasons it cannot be said that any dispute has arisen between her and the Respondents. Though the Plaintiff has provided proof of marriage, the suit property is not registered in the name of the 1st Defendant/Respondent but a Limited Liability Company. Even if the Plaintiff was a Director of the Company, she still could not bring any suit on behalf of the Company which being a limited liability company is a juristic person that can sue and be sued on its own behalf.

Consequently, the Court finds and holds that the Plaintiff does not have *locus standi* to bring this suit.

For the reasons stated above, the Court finds that the Preliminary Objection dated **30th April 2020** is merited and the same is upheld.

2. Whether the Plaintiff is entitled to the Orders sought

The Court is called upon to determine whether the Applicant is deserving of injunctive orders based on the usual criteria laid down in the case of ***Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358***, and which were also stated in the case of ***Kibutiri ... Vs ...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR***, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

The Court must first then determine whether the Plaintiff/Applicant has established a prima facie case with chances of success. In the case of ***Mrao Ltd....Vs.....First American Bank of Kenya***, the Court held that

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

As already held above, the Plaintiff/ Applicant does not have *locus standi* to bring this suit. Without *locus standi*, then the Plaintiff has not established a prima facie with probability of success at the trial.

All the limbs as set out in the case of ***Giella ...Vs...Cassman Brown***, (supra) must be established. The fact that one has collapsed, it automatically follows that the rest collapse too. Therefore, this Court finds and holds that having held that the Plaintiff does not have *locus standi*, then she is not entitled to the orders sought.

Having now carefully considered the available evidence and the written submissions, the Court finds that the **Notice of Preliminary Objection** dated **30th April 2020**, is merited and the same is **upheld** on the ground that the Plaintiff/Applicant has no *locus standi* to bring this suit. Consequently, the Plaintiff/ Applicant’s suit is dismissed entirely together with the **Notice of Motion** Application herein dated **22nd April 2020** with costs to the Interested Party.

It is so ordered.

Dated, signed and Delivered at Thika this 18th day of June 2020.

L. GACHERU

JUDGE

18/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

Antony Kago Advocates for the Plaintiff /Applicant

No consent for Defendants/Respondents

Wamae & Allen Advocates for interested party

L. GACHERU

JUDGE

18/6/2020