



**Njenga v Ngigi & 2 others (Civil Case 34 of 2022)
[2024] KEHC 13313 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 34 OF 2022
HI ONG'UDI, J
OCTOBER 31, 2024**

BETWEEN

TERESIAH NYAMBURA NJENGA PLAINTIFF

AND

ESTHER WANGECHI NGIGI 1ST DEFENDANT

SAMUEL NJENGA KARIUKI 2ND DEFENDANT

RAFIKI MICROFINANCE BANK 3RD DEFENDANT

RULING

1. By the Notice of Motion dated 5th July, 2022 the applicant prays for the following orders;
 - i. Spent.
 - ii. That the 3rd defendant, its auctioneers, servants and or agents be restrained from selling the suit land title No. Subukia/Subukia West Block 1/813 pending the hearing and determination of this application.
 - iii. That the 3rd defendant, its auctioneers, servants and or agents be restrained from selling the suit land title No. Subukia/Subukia West Block 1/813 pending the hearing and determination of this suit.
 - iv. Costs of this application be provided for.
2. The application is premised on the grounds on its face as well as the affidavit of the plaintiff/applicant. She deponed that the 2nd defendant/respondent is her husband and the registered owner of title No. Subukia/Subukia West Block 1/813. Further, that the property has been their matrimonial home since the year 1983 and she lived there with the 2nd respondent together with their disabled daughter.



- She added that the 2nd defendant/respondent without seeking her consent used the said property as collateral for a loan and the 3rd defendant/respondent caused a charge to be registered against its title.
3. She deponed further that she had been advised by her advocate on record that the charge was illegal as it contravened section 79 (3) of the Land Act No. 3 Laws of Kenya. Additionally, that she had since come across a redemption notice dated 23rd July 2022 from Saddabri Auctioneers threatening to sell the collateral unless the 2nd defendant pays the sum of Kshs.2, 221,810.65/=.
 4. She went on to depone that she, the 2nd defendant/respondent and their disabled daughter have nowhere else to live. She stated that the 3rd defendant/respondent should go after the 1st defendant/respondent for the default and the intended sale of the suit property by the aforementioned auctioneers be suspended until the case is heard.
 5. The 3rd defendant/respondent in response filed a replying affidavit sworn on 27th July 2022 by its debt recovery manager. She averred that sometime in February 2015, the 1st defendant/respondent applied for a loan facility from the bank in the sum of Kshs. 1,500,000/=. That by a letter of offer dated 11th March 2016, the 3rd defendant/respondent granted the loan facility. Further, that as a pre-requisite to the loan disbursement, the 2nd defendant/respondent executed a deed of guarantee and indemnity, agreeing to pay on demand all monies due to the 3rd defendant/respondent in the event of default by the 1st defendant/respondent.
 6. She further averred that the loan facility to the 1st defendant/ respondent was to be secured by a legal charge over property known as Title No. Subukia/Subukia West Block 1/813 and the said charge was to be registered in favour of the 3rd defendant/respondent. She stated that there was no indication whatsoever from the 2nd defendant/respondent, at the execution of the Charge instrument and the deed of guarantee, that the suit property was matrimonial in nature.
 7. She further averred that the 3rd defendant/respondent had issued the 1st statutory notice pursuant to Section 90 (1)(2)(3) (e) of the Land Act, No. 6 of 2012 requiring the 1st and 2nd defendants/respondents to regularize the account by clearing the total outstanding arrears of Kshs. 1,640,109.30/= but they did not react to the said letter and continued to default. Further, that when the breach persisted, the 3rd defendant/respondent proceeded to issue instructions to Zenith (Management) Valuers Limited to value the property for purposes of sale to recover the outstanding loan arrears.
 8. Additionally, that the issue of the spousal consent raised by the plaintiff/applicant was a smokescreen tactic to prevent and/or delay the 3rd defendant/respondent from exercising its statutory power of sale as the plaintiff/applicant had never raised any concern or complaint regarding the same until the 3rd defendant/respondent commenced the recovery process. Therefore, that the orders sought in the application were unwarranted and a gross abuse of the court process since the 3rd defendant/respondent continues to suffer irreparable harm. She urged the Court to dismiss the application in its entirety.
 9. The applicant filed a further affidavit sworn on 15th October, 2023. She reiterated the averments in her supporting affidavit and deponed that it was a misinterpretation of the law for the 3rd defendant/respondent to suggest that her consent as spouse and occupant of the property was not necessary as this was in contravention of the provisions of Section 79(3) 93(3&4) of the Land Act No. 6 of 2012 and Section 12 (5) of the Matrimonial Property Act No. 49 of 2013.
 10. She further deponed that the charge was illegal, null and void and that she is a spouse of the 2nd defendant/respondent and the suit property is her matrimonial home but her consent was not sought. She added that she had both sentimental and proprietary interests on the suit property which could not be adequately compensated for by an award for damages.



11. The application was canvassed by way of written submissions.

Plaintiff's/applicant's submissions

12. These were filed by S.L.M.H. Muhia advocates and are dated 19th October, 2022. Counsel submitted that Under Section 28 (a) of the Land Registered [Act No. 3 of 2012](#) the applicant has an overriding interest in the land which did not require to be on the register. Further, that the duty of ensuring that spousal consent has been obtained before accepting the property as security was squarely on the 3rd defendant/respondent as the chargee. This was by virtue of section 93 (3) & (4) of the [Land Act](#) No. 6 of 2012 which states that where a spouse who holds a land or dwelling house undertakes a charge of that house, the Lender shall be under a duty to inquire whether the other spouse has consented to the charge and if the lender is misled by the chargor that spousal consent has been given while it was not, the charge will be rendered void at the option of the non-consenting party.
13. Counsel further submitted that S 79 (3) of the said [Land Act](#) declares that charge of a matrimonial home shall be valid only if any document or form used for applying for the charge is executed by the chargor and any spouse of the chargor living in the matrimonial home or there is evidence from the document that it has been assented to by all such persons. Additionally, that it was evident that consent of the plaintiff/applicant was a prerequisite for the charge of her matrimonial property. The court's attention was drawn to the cases of *Mrao Ltd v First American Bank of Kenya Ltd and 2 others* [2003]KLR 125, *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 Others* [2015]KLR as cited in *Habib Bank AG Zurich v Euge Marion Yakub CA No. 43 of 1982* and [Nguruman United v Jan Bonde Nielsen & 2 Others CA No. 77 of 2012](#).
14. On whether the plaintiff/applicant is the spouse of the 2nd respondent, counsel submitted that common law marriages are recognized by long cohabitation and reputation. Further, that the chief's letter confirmed that the plaintiff/applicant is the wife of the 2nd defendant/respondent and that they live together and they have 8 children. She urged the court to grant the injunction orders as sought in her application.

3rd Defendant's/respondent' submissions

15. These were filed by S.I. Mwaura & Company Advocates and are dated 2nd November, 2022. Counsel gave a brief background of the case and identified one issue for determination, which is whether the plaintiff/applicant has met the threshold for grant of injunctive orders. She cited order 40 rule 1 of the Civil Procedure Rules 2010 and the case of *Giella v Cassman Brown Limited 1973 EA 358*.
16. She submitted further that the 3rd defendant /respondent had not in any way infringed the rights of the plaintiff /applicant. That it was common ground that there existed a contract between the 2nd defendant/respondent and the 3rd defendant/respondent presented as a legal charge. She added that there were obligations that flowed from the contract and for which each of the parties was responsible for.
17. She further submitted that the affidavit of spousal consent was duly sworn and executed by the plaintiff/applicant and the charge instrument thereto is valid, proper and legally tenable. Thus, the 1st defendant/respondent was bound to repay the loan and the plaintiff/applicant could not compel this Court to stand in the way of enforcement of the contract. She added that the court should not issue injunctive orders over a loan agreement voluntarily entered into between the 1st, 2nd defendants/ respondents and the 3rd defendant /respondent. That by granting the orders sought the court would be interfering with private agreements between parties.



18. The court's attention was drawn to the provisions of section 99 (4) of the *Land Act*, No. 6 of 2012 and the decisions in *Andrew M. Wanjohi v Equity Building Society & Another* [2006] eKLR and *Kisimani Holdings Limited & Another v Fidelity Limited* [2013] eKLR. He urged the court to dismiss the application with costs to the 3rd defendant/respondent.

Analysis and determination

19. I have carefully considered the application, the affidavits, both parties' submissions. the issue I find falling for determination is whether the applicant has made out a case for issuance of the restraining orders sought.
20. The principles of interlocutory injunction are now well settled. They were set out in *East African Industries vs Trufoods* [1972] EA 420 and *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002* set them out as follows:-
- a. A prima facie case with a probability of success at trial;
 - b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
 - c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
 - d. The conduct of the applicant meets the approval of the court of equity.
21. Similarly, in *Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No. 360 of 2001*, the court held as follows: -
- “The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity.”
22. On the first limb of establishing a prima facie case with a probability of success at trial, I wholly rely on what is set out in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
23. It is not in dispute that the the 2nd defendant/respondent who is a spouse to the plaintiff/applicant guaranteed the 1st defendant/respondent a loan facility advanced by the 3rd respondent. Further the applicant does not dispute that the loan facility was not repaid and the 1st defendant continues to be in default. I find nothing much to argue on this point, as the debt is owing and should be paid.
24. The second limb is whether the plaintiff/applicant is likely to suffer an injury, which cannot be adequately compensated in damages.



25. In *Maithya vs Housing Finance Co. of Kenya & Another* [2003] 1 EA 133 at 139 where Honourable Nyamu J, stated as follows:-

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities....Loss of the properties by sale is clearly contemplated by the parties even before the security is formalised. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the respondent cannot pay damages should it become necessary.”

26. Thus, in this case has the plaintiff/applicant demonstrated that she will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? She submitted that she risked losing the suit property which is her matrimonial home in the event the 3rd defendant/respondent is allowed to exercise its statutory power of sale. Considering all the facts of this case, I opine that the plaintiff/applicant by merely stating that she risked losing the suit property did not demonstrate that she is likely to suffer irreparable injury.

27. Moving to the third limb, which is the balance of convenience, it is worth noting that the applicant has not met the requirement as to a prima facie case and has also failed to show how she stands to suffer irreparable harm. The 3rd defendant/respondent is a reasonably sound financial institution which stands better chances to compensate the plaintiff/applicant should the plaintiff/applicant succeed in the trial. If an injunction is granted to restrain it from exercising its statutory power of sale, the amount of debt shall continue to rise and the security may prove to be insufficient to cover the ultimate balance. Thus, the balance of convenience tilts against granting of the interlocutory injunction.

28. Lastly, on whether the conduct of the plaintiff/applicant meets the approval of the court of equity. She has not denied that her spouse the 2nd defendant/respondent and the 1st defendant/respondent are indebted to the 3rd defendant/respondent. Even the 1st defendant/respondent who benefitted from the loan has not filed any response to show why she has not repaid the money. She is the one to explain to the plaintiff/applicant why this is happening. The plaintiff/applicant admits in her supporting affidavit of being aware of the transaction but could have been misled since she was old and illiterate. In my view, the plaintiff/applicant together with the 1st and 2nd defendants/respondents have not come to court with clean hands. I make reference to the case of *Daniel Kamau Mugambi vs Housing Finance Company of Kenya Ltd* [2006] eKLR the court quoted with approval the Court of Appeal decision in *Francis J.K Icbatha vs Housing Finance Company of Kenya, Civil Application No. 108 of 2005* as follows:-

“A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity.....”

29. Having observed as above, I find that the applicant has not met the threshold for the grant of an injunction as required by the law. The only way out for her and her husband (2nd defendant) and 1st defendant is to settle the debt owed to the 3rd defendant. The upshot is that the application lacks merit and is hereby dismissed with costs.



Orders accordingly

DELIVERED VIRTUALLY, THIS 31ST DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

