Case Number:	Civil Suit 203 of 2019
Date Delivered:	11 Feb 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Maureen Akinyi Odero
Citation:	Maheshkumar Popatlal Shah v Highgrove Holdings Limited & another [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of motion ordered
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 203 OF 2019

MAHESHKUMAR POPATLAL SHAH.....PLAINTIFF

VERSUS

HIGHGROVE HOLDINGS LIMITED.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **26th August 2019** by which **MAHESHKUMAR POPATLAL SHAH** (the Plaintiff/Applicant) seeks the following orders:-

"1. SPENT

2. SPENT

3. THAT an order be issued restraining the 2nd Defendant, its servants, agents, employees and/or any person acting through them from advertising for sale, selling, trespassing, evicting the Plaintiff from or in any way dealing in House No. 14 that is situated on all that property known as L.R. No. 209/4892 pending the inter partes hearing and determination of this suit.

4. THAT the costs of this application do abide the

outcome of the suit."

The application which was premised upon **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act**, and **Orders 40 Rule 1 and 4** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** was supported by the Affidavit of even date sworn by the Plaintiff/Applicant.

(2) **I & M BANK LIMITED** (the 2nd Defendant/Respondent) filed a Replying Affidavit dated **11th September 2019** sworn by **ANDREW MUCHINA** a Legal Manager with the Bank in opposition to the application. The 1st Defendant **HIGHGROVE HOLDINGS LIMITED** did not file any Reply to the application. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **28th October 2019** whilst the 2nd Defendant/Respondent filed its submissions on **6th November 2019.**

BACKGROUND

(3) The 1st Defendant is the registered proprietor of the property known as **L.R. No. 209/4892**, Highgrove Village located in the Lower Kabete area of Nairobi County. Pursuant to a letter of offer dated **10th January 2017**, the 2nd Defendant ("**the Bank**") extended to the 1st Defendant (as "**borrower**") credit facility being an overdraft facility in the amount of **Kshs. 1,106,000,000/-** to enable the 1st Defendant finance the construction/development of 24 residential town houses on the property known as **L.R. 29998**. As security for this facility the 1st Defendant executed a first legal charge dated **15th April 2015** over **L.R. No. 29998** (Original No. **4928/5** and **2951/54**) in favour of the Bank.

(4) Sometime in the year **2011** the Plaintiff/Applicant entered into an agreement with the 1st Defendant for the sale and purchase of **House No. 14** (hereinafter "**the suit premises**") at a price of **Kshs. 55,000,000/-**. The Plaintiff paid the full purchase price to the 1st Defendant and took possession of the suit premises. However as it transpired the 1st Defendant had concealed from the Plaintiff the fact that **L.R. No. 29998** was encumbered on account of the legal charge created and held by the 2nd Defendant Bank over the said property.

(5) As it transpired the facility extended to the 1st Defendant by the Bank fell into arrears and the Bank through its Advocate issued the 1st Defendant with demand letters dated **22nd February 2017** and **25th July 2017** calling for settlement of the outstanding amount of **Kshs. 1,131,458,684.70** and **USD 188,637,37**. There being no move by the 1st Defendant to settle the outstanding amounts, the Bank proceeded to issue the 1st Defendant with the requisite statutory notices under the **Land Act**. The Bank in the aforesaid statutory notices expressed its intention to exercise its statutory power of sale over the charged property and it is this that led to the filing of this present application.

ANALYSIS AND DETERMINATION

(6) The Plaintiff/Applicant avers that it is the proprietor of the suit premises having paid the full purchase price of **Kshs. 55 million** and having taken possession of said premises. The Plaintiff further avers that it is a stranger to the charge between the 1st and 2nd Defendants and was unaware of the existence of said charge as this fact was concealed by the 1st Defendant.

(7) The Applicant is aggrieved that despite having paid the full purchase price for the suit premises the 1st Defendant failed to apply those funds to partially discharge the suit premises. The Plaintiff asserts that it is a bonafide purchaser for value without notice and as such is entitled to protection of the law.

(8) On its part the 2nd Defendant Bank contends that the sale of the suit premises by the 1st Defendant to the Plaintiff without the consent of the Bank is illegal, null and void ab initio. That given that the property in question was charged to the Bank the 1st Defendants interest is subject to the Banks interest as chargor, which ranks in priority to any interest purportedly acquired by the Plaintiffs from the 1st Defendant.

(9) The Bank further contends that the Plaintiff was negligent and failed to conduct due diligence on the suit premises before completing the alleged sale agreement and paying to the 1st Defendant the full purchase price. That in any event the Bank is a stranger to the alleged Sale Agreement between the Plaintiff and the 1st Defendant as well as to any payments allegedly made by the Plaintiff as the consent of the Bank was never sought and/or obtained. That as such the Bank should not be held liable nor should it be restrained from exercising its statutory power of sale on the basis of an unenforceable contract to which it was not privy.

(10) The Plaintiff/Applicant herein is seeking interlocutory orders. The only question is whether the Applicant has met the legal threshold for grant of the interlocutory injunction being sought. In the case of **GIELLA –VS- CASSMAN BROWN & COMPANY LIMTIED [1973]E.A. 385** it was held as follows:-

"The condition for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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 would 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."

(11) A prima facie case was defined by the Court of Appeal in the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA AND 2 OTHERS (2003)KLR 125** as follows:-

"A prima facie case in Civil Case includes but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the Court; a tribunal property directing itself 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

PRIMA FACIE CASE

(12) In urging the Court to grant the interlocutory orders sought, the Defendant/Applicant submits that the Plaintiff/Respondent concealed the fact that the suit premises was the subject of a charge in favour of the Bank. The Applicants submit that having paid the full purchase price for the premises and having taken up possession of the same, they ought to be taken to be innocent purchasers for value. The Applicants contend that it is only at a full hearing of the suit that the question of whether the Bank benefitted from the purchase price paid by the Applicants can be interrogated and whether if so the suit property ought to be partially discharged.

(13) **Section 25(1)** of the **Land Registration Act** provides as follows:-

"25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject-

(a) To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register." [own emphasis]

(14) This provision clearly makes the rights of any proprietor **subject to** any charges registered against the property in question. It is not in dispute that prior to entering into a Sale Agreement with the Applicants, the 1st Defendant did execute a legal charge in favour of the Bank over **L.R. No. 29998** together with the buildings and improvements erected thereon (see page **14-32**) of the Replying Affidavit dated **11th September 2019**.

(15) **Section 88(1) (g)** of the **Land Act 2012** provides:-

"1. There shall be implied in every charge covenants by the chargor with the chargee binding the chargor …

(g) not to transfer or assign the land or lease orpart of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld." [own emphasis]

This clearly means that it is implied that the chargor will not transfer or assign or lease any charged property without first obtaining the consent of the chargee (Bank).

(16) **Section 87** of the **Land Act** and **Section 59** of the **Land Registration Act** are both pertinent pieces of legislation in such situations. **Section 87** of the **Land Act** provides:-

"If a charge contains a condition, express or implied that charge prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar."

Whilst **Section 59** of the **Land Registration Act** provides-

"Lender's consent to transfer"

"If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar."

(17) The above two provisions above made it mandatory for parties to seek and obtain the consent of the chargee before an Agreement for sale of a charged property is entered into and concluded. There can be no doubt that the 1st Defendant is the villain of the piece. They acted dishonestly in failing to disclose the existence of the charge over the suit premises to the Applicant. However the Applicant equally had an obligation to conduct due diligence before entering into the Sale Agreement and paying the purchase price. (A copy of the said charge appears at page 14-13 of the Replying Affidavit dated **11th September 2019)**. If the applicant had conducted due diligence as required I have no doubt that they would have uncovered this fact. The Applicant cannot

rely on the fact that it was a stranger party to the charge agreement, as a ground to avoid the legal requirements that consent of the Bank had to be obtained, before the property could be sold.

(18) In **OPA LIMITED –VS- SPEEDDWAY INVESTMENTS LTD & ANOTHER [2010]eKLR** a case which is on all fours with the present one the Court held as follows:-

"When faced with similar suit my colleague, Justice Kimaru stated in the case of Millicent W. Mughi Vs. Speedway Investment Ltd & CFC Stanbic Limited, Milimani HCCC No. 768 of 2009 as follows:

"In the present application it is apparent that the plaintiff is predicating her application on the agreement that she entered with the 1st defendant on 30th May, 2007. As is evident from the facts of this application, to be valid and enforceable, the said agreement for the sale of the suit property had to be consented to by the mortgagee, the 2nd defendant. As a mortgagee, the 2nd defendant had an interest in the suit property because it had advanced money to the 1st defendant for the construction of the flats on the said property. The 1st defendant could not, in law, part with possession of the suit property without the consent or the approval of the 2nd defendant.

Can the Plaintiff enforce the said agreement she had with the 1st Defendant, as against the 2nd Defendant. As has been stated earlier in this Ruling, it was clear that the 2nd Defendant was not a party to the agreement between the Plaintiff and the 1st Defendant. The Plaintiff was aware that for the said agreement to be valid and enforceable, the 2nd defendant had to give its consent. The Plaintiff cannot plead ignorance because page 13 of the agreement clearly provided that without consent of the 2nd Defendant, the agreement would be invalid. The Plaintiff's visit to the 2nd Defendant's offices is further proof that the Plaintiff was aware that the sale of the suit property would not be valid without the 2nd Defendant's consent. Having evaluated the facts of this application, it was apparent to this Court that, if the Plaintiff has any case in connection with the debacle relating to the determination of the purchase consideration of the suit property, then the party that she should pursue is the 1st Defendant. The 2nd Defendant, as the Americans would say, had nothing to do with it.

This Court is not therefore persuaded by the Plaintiff's argument that the agreement that is the subject of this suit is such that it can be enforced against the 2nd Defendant to enable the Plaintiff obtain ownership and possession of the suit property. The 2nd Defendant was a stranger to the said agreement. If the Plaintiff will suffer any damages, such damages are quantifiable. This Court was not convinced that the Plaintiff will suffer irreparable damage that cannot be compensated by an award of damages if the injunction sought is not granted. The balance of convenience tilts in favour of the 2nd Defendant who is being kept from recovering the sums that it had advanced to the 1st Defendant."

(19) Similarly in **MECHANISED CLEARING & FORWARDING CO. LTD & 2 OTHERS –VS- TULIP APARTMENTS LIMITED & ANOTHER [2000]eKLR** the Court held as follows:-

"The Plaintiffs may be purchasers for value and may be they were acting in good faith but any fraud perpetuated against them by another party cannot interfere with the rights of the bank since the legal estate had passed to the Bank as mortgagee. See the case of *Pitcher v Rawlings* (1872) Ch 259. The Plaintiffs as purchasers ought to have taken the trouble to make a search to ensure that the property they were buying was available and free from encumbrances. They did not do so. During the hearing of this application it was contended that the Plaintiffs have expended a sum of Ksh 26 million on the suit property and that to minimize their looses they have made an offer to the Bank of Kshs.7.5 million. The Plaintiffs remained victims of their own negligence which amounts to sheer recklessness. It has not been explained how the Plaintiffs who were represented by a counsel could proceed to spend the alleged amount without first checking the status of the property." [own emphasis]

(20) Finally on this point in the case of **PAUL GATETE WANGAI –VS- CAPITAL REALTY LTD & ANOTHER [2020]eKLR** the Court held as follows:-

" It is trite that the bank being the holder of the charge would have first priority over the suit property as long as the land remains charged. In *HCCC No. E035 of 2020: Monica Waruguru Kamau & Anor vs. Innercity Properties Ltd*., Tuiyott, J. in dismissing the claim for an injunction quoted with approval the case of *Innercity Properties Limited vs. Housing Finance & 3 others- HCCC No. E030 of 2020* where Majanja, J. held as follows:

"The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour…" [own emphasis]

(21) Likewise in the present case there is no evidence that the Bank consented to the sale of the houses in question to the Plaintiffs. The Bank as opposed to the Plaintiff had a registered interest in the suit property. **Section 36(5)** of the **Land Registration Act** provides:-

"Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed:

Provided that where an instrument is prepared in the registry, it shall be deemed to have been presented on the date which the application as made to the Registrar."

The Plaintiff having no registered interest in the suit property cannot seek to defeat the banks right as charge, which right was duly registered against the Title.

(22) Finally on the issue of a prima facie case as has been rightfully pointed out the Applicant was not a party to the charge Agreement between the Bank and the 1st Defendant. In the circumstances given the doctrine of privity of contract, the Applicant would have no '**locus standi'** to sue in respect of said charge. In **NAIROBI MAMBA VILLAGE –VS- NATIONAL BANK OF KENYA [2002]1 E.A**, the Court held thus:-

"In my Judgment the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the chargor."

(23) In **TULIP APARTMENTS LIMITED V SOUTHERN CREDIT BANKING CORPORATION [2000]EKLR** the High Court dismissed a Purchaser's application for an injunction to stop the bank from exercising its statutory power of sale and held that the conditions for granting the injunction had not been met as the bank had not consented to the sale of the suit property to the Plaintiff therein. The Court held:-

"The properties were sold to the purchasers without the knowledge of the Bank and there was no representation by the bank encouraging the purchasers to expend any monies on the property which would be reimbursed by the bank. The purchasers chose to expend monies on a charged property without the consent and or knowledge of the charge in which case they have only themselves to blame and should not turn to the charge for redress in the name of unjust enrichment." [own emphasis]

(24) Since the bank was not privy to the purported Agreement between the Plaintiff and the 1st Defendant it cannot held liable under it. Therefore it is only the 1st Defendant who can seek to injunct the Bank from exercising its statutory power of sale. The Plaintiffs remedy in law lies against the 1st Defendant **and not** as against the Bank. Based on the foregoing I find that the Defendant/Applicant has failed to establish a prima facie case with a probability of success.

IRREPARABLE HARM

(25) In order to qualify for an interlocutory injunction under the heading of irreparable harm the Defendant/Applicant must demonstrate that the harm it may suffer as a result of the injunction cannot be quantified in monetary terms. **In NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 OTHERS [2014]eKLR** it was held:-

"On the second factor, that the applicant must establish that he *"might otherwise"* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is

issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "*adequately*" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

(26) The suit premises is a residential house. Its value is quantifiable and in my view damages would suffice as compensation in the event that the Applicant is successful at trial. Therefore I find that this limb of irreparable harm has not been proved.

(27) The Bank has submitted that the debt owed to it continues to accrue interest and has indeed outstripped the value of the security. In the circumstances the balance of convenience tilts in favour of the 2nd Defendant. For the above reasons I find no merit in this application. The Notice of Motion dated **26th August 2019** is hereby dismissed in its entirety with costs awarded to the 2nd Defendant/Respondent.

(28) Following the consent entered into on **6th February 2020** between the parties in **HCCC No. 203 of 2019** this Ruling shall apply mutatis mutandis to the Notice of Motion dated **23rd April 2020** in **HCCC No. 203 of 2019.**

It is so ordered.

Dated in **Nairobi** this **11th** day of **December, 2020**.

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MAUREEN A. ODERO

JUDGE