



REPUBLIC OF KENYA



KENYA LAW
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**Sidian Bank Ltd v Awadh & 4 others (Environment and Land Appeal
79 of 2021) [2023] KEELC 18117 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18117 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 79 OF 2021
NA MATHEKA, J
JUNE 20, 2023**

BETWEEN

SIDIAN BANK LTD APPELLANT

AND

SHARIFF ABDALLA AWADH 1ST RESPONDENT

AMINA ABDALLA ABEID 2ND RESPONDENT

FAIZA AHMED SALIM 3RD RESPONDENT

JUMA IDDI SALIM 4TH RESPONDENT

KINYUA AUCTIONEERS 5TH RESPONDENT

JUDGMENT

- 1 This is an appeal against the Ruling of the Principal Magistrate ML Nabibya delivered on September 23, 2021 together with the consequential orders made thereunder on the following grounds;
1. That the Learned Magistrate erred in law and in fact by finding and holding that the Respondent got to be registered as the owner of the property known as Subdivision No 14666 (Original No 10403/4) Section I MN (hereinafter "the suit property") together with another.
 2. That the Learned Magistrate erred in law and fact by finding and holding that the 1st Respondent had established a good claim with likelihood of success.
 3. That the Learned Magistrate erred in law and fact by finding and holding that the 1st Respondent stood to suffer irreparable loss that could not be compensated by an award of damages.



4. That the Learned Magistrate erred in law and fact by finding and holding that the loss likely to be suffered by the 1st Respondent if the orders sought were not granted would be more than the loss to be sustained by the Appellant if the Application was allowed.
5. That the learned Magistrate erred in law and fact by failing to appreciate and take into consideration the Appellant's submissions to the effect that:-
 - a. The 1st Respondent was not the registered proprietor of the suit property and could not therefore demonstrate a right which had been infringed or was about to be infringed by the Appellant.
 - b. The suit property was registered in the name of the 2nd Respondent and also charged to the Appellant as security for financial facilities advanced to the 2nd Respondent.
 - c. The 2nd Respondent had defaulted on the covenant to repay the facilities advanced to her by the Appellant in spite of being served with a demand for repayment.
 - d. Since the Appellant had served the statutory notices required by the law upon the concerned parties and the default had nevertheless continued, the Bank's statutory power of sale had arisen.
 - e. If the Appellant was restrained from exercising her statutory power of sale pending suit, the outstanding charge debt due from the 2nd Respondent to the Appellant would continue to accrue further interests, costs and other charges which would in the long run outstrip the value of the suit property securing the charge debt, thereby prejudicing the Appellant.
 - f. Since the Appellant and the 1st Respondent did not enjoy any contractual or other relationship whatsoever in respect of the suit property, the 1st Respondent could not challenge the Appellant's decision to exercise her statutory power of sale over the suit property.
6. That the Learned Magistrate erred in law and fact by misapprehending the facts and or taking into consideration matters which she ought not to have taken into consideration and or by failing to take into account matters which she ought to have taken into account.
7. That given the peculiar circumstances of the matter before the learned Magistrate, and taking all relevant matters into account, the learned Magistrate, in granting the restraining orders sought pending suit, had wrongly exercised her discretion.

The Appellant prays to the Court to;

- a. Allow the Appeal.
 - b. Substitute the impugned Ruling together with the consequential orders with a Ruling of this Court dismissing the 1st Respondent's Notice of Motion Application dated May 21, 2021 in its entirety.
 - c. Award the costs of the 1st Respondent's Notice of Motion Application dated May 21, 2021 together with the costs of this Appeal to the Appellant.
- 2 This court has considered the appeal and submissions therein. This is an appeal from a ruling delivered on September 23, 2021 by Hon Maureen Nabibya Principal Magistrate in Mombasa CM-ELC 76 of 2021 Shariff Abdalla Awadh vs Amina Abdalla Abeid & 4 others. The learned magistrate allowed the 1st



Respondent's application dated May 21, 2021 granting interlocutory injunction against the Appellant from dealing with Land Parcel Subdivision 14666 (Original 10403/4) Section 1 MN pending the hearing and determination of the suit.

3 An order of interlocutory injunction is an equitable relief that is granted at the discretion of the court as guided by the principles set down in *Giella vs Cassman Brown Co. Ltd* (1973) EA 358. As the Appellant court, I will consider whether in allowing the prayer for interlocutory injunction, the learned magistrate properly exercised her discretion or misdirected herself and arrived at a wrong decision. The court is being invited to determine whether the Appellant presented a prima facie case with a probability of success before the magistrate court, whether the irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favour of the Appellant.

4 The first issue to consider is whether the 1st Respondent had proved the existence of an arguable case which raise a serious question to be tried. The Court of Appeal in *Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words;

In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party 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."

5 The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR held that; The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

6 The 1st Respondent demonstrated that she entered into a sale agreement for the sale of a house without land on April 15, 2010 and later varied the terms of the agreement on July 11, 2011. In the said agreement dated July 11, 2011, Faiza Ahmed Salim, the 3rd Respondent the vendor thereon, acknowledged that on April 15, 2010 she had entered into an agreement for the suit property with Shariffa Abdalla Awadh for Kshs 1,600,000/=. During the said agreement of July 11, 2011, the 1st Respondent deponed that Faiza had disclosed that she had bought the suit property from the Juma Iddi Salim on February 22, 2011. There was a reassurance that though transfer was not done, there would be subdivision and issuance of new title deed. On the said reassurance the 1st Respondent paid the balance of the purchase price and occupied the suit property peacefully until 2021 when she was visited by the 5th Respondent who were instructed by the Appellant to attach the suit property in order to exercise the bank's statutory power of sale over the suit property which has since been charged by the registered owner. The 1st Respondent maintained in total disregard of their agreement, on May 13, 2011 Faiza entered into a sale agreement with Amina Abdalla Abeid, the 2nd Respondent over a portion of the suit property for Kshs 2,350,000/=. The 1st Respondent that the transfer executed on September 8, 2022 in favour of 2nd Respondent and the subsequent registration on September 22, 2022 was fraudulent and was meant to deprive her of her beneficial interest over the suit property.



- 7 The learned magistrate found that the 1st Respondent had demonstrated to court *vide* the sale agreements that she had an interest over the suit property. At the interlocutory stage, the 1st Respondent was not required to establish title, all that was needed was the existence of a *bonafide* question of law and facts. The argument sustained by the Appellant that the 1st Respondent was not privy to the contract between the 4th and 2nd Respondent, cannot be upheld on the ground that the 1st Respondent has intimated fraud and illegality in the title of the 2nd Respondent, a question that goes to the root of the title. A question of whether a title was acquired fraudulently is a serious question of law that qualifies as a *prima facie* case at an interlocutory stage.
- 8 On the second issue of irreparable damage, I am guided by the Court of Appeal in Nguruman (*supra*), where it was held that;
- 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 facie*, 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.”
- 9 The 1st Respondent stands to suffer irreparable loss if the Appellant is allowed to exercise its statutory power of sale, reason being the 1st Respondent is in occupation of the suit property, and may be rendered homeless if the sale proceeds and has no way of being part of the said sale since her rights over the suit property are currently unregistered and only equitable as compared the Appellant’s legal interest as the chargor. The 1st Respondent has lived and possibly invested heavily on the suit property since moving in 2011 till date, which has been her home for more than a decade. The Learned Magistrate therefore did not err in law or in facts by finding that the 1st Respondent stands to suffer irreparable injury that cannot be adequately compensated by an award of damages.
- 10 I find that though the 1st Respondent’s investment in the suit property can be qualified, the sale of the suit property to satisfy the Appellant’s power of sale would greatly affect the course of the suit. Since the 1st Respondent is raising fraud and illegality of the title, it is only fair and just for this court of equity to exercise its discretion and tilt the balance of convenience in favour of the 1st Respondent and find the application merited as the learned magistrate did in her ruling. The suit property must be preserved, which will be done by maintaining the status quo until the case is heard and determined. I see no need to interfere with the discretion of the trial court, I find the Appeal devoid of merit and the appeal is disallowed with costs to the 1st Respondent.
- 11 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE

