



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.463 OF 2017

AMAZING TOURS & TRAVEL LIMITEDPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED1ST DEFENDANT

GARAM INVESTMENTS.....2ND DEFENDANT

ELICONA HOLDING LIMITED3RD DEFENDANT

RULING

Background

1. On 9th July 2018, the 2nd defendant placed an advertisement in the Daily Nation Newspaper for sale, by public auction, of LR No. 12251/13 Swara Safari Hotel Karen- Nairobi, (hereinafter “**the Suit Property**”). The auction was slated for 10th July 2018 at 11am at Western Heights, Westlands Nairobi.

2. The suit property was then registered the name of the plaintiff who had defaulted in repaying the loan facility advanced to it by the 1st defendant. The auction did not take place at 11am as scheduled as the plaintiff obtained an interim order to stay the sale until 3pm on the same day to enable it comply with the court order. The plaintiff did not comply with the court order and at 3pm the 3rd defendant’s representative one **Mr. Andrew Chibole Korir** was declared the successful bidder of the suit property at the said auction having placed the highest bid of Kshs 80,000,000.

3. The 3rd defendant complied with the terms of the Memorandum of Sale executed on 10th July 2018 after which the 1st defendant undertook to transfer the suit property to the purchaser pursuant to the said auction. The suit property was thereafter registered in the 3rd defendant’s name after which the 3rd defendant secured financing from Credit Bank PLC through the registration of a charge against the said title.

Application

4. This ruling is in respect to the application dated 16th April 2019 in which the 3rd defendant seeks orders that:

1. Spent

2. That this Honourable court be pleased to issue a declaration that the actions of the plaintiff/respondent of harassing and evicting the 3rd defendant/applicant and subsequently taking possession and occupation all that property known L.R. No. 12231/13 I.R. 58071 is irregular, illegal, unlawful, fraudulent and thus null and void.

3. Spent

4. That this Honourable court be pleased to issue Temporary Injunctive Orders restraining and or prohibiting the plaintiff/respondents by itself, its agents and servants and/or whomsoever acting on its behalf or upon its instruction from harassing , evicting, alienating, claiming or interfering with the 3rd defendant/applicant’s quiet and peaceful enjoyment/occupation of all that parcel of land known as LR No. 12231/13 I.R. 58071 measuring approximately Nought Decimal Four Nought Nought Nought of Hectare (0.4000 Ha) located in Karen pending inter-parties hearing of this suit.

5. That the costs of this application be in the cause.

5. The application is supported by the affidavits of the 3rd defendant director and is premised on the grounds that:

a) The 3rd defendant/applicant is the legal and registered owner of all that property known L.R. No. 12231/13 I.R. 58071 measuring approximately Nought Decimal Four Nought Nought Nought of Hectare (0.4000 Ha) located in Karen.

b) The said property was previously owned by the plaintiff/respondent and charged with the 1st defendant/respondent but it was later put up for auction by the 2nd defendant/respondent because of the plaintiff/respondent's failure to offset amounts it owed to the 1st defendant/respondent.

c) The 3rd defendant/applicant purchased the aforesaid property on 10th of July 2018 through a public auction held at the offices the 2nd defendant/respondent offices at Western Heights, Westlands, Nairobi after it was declared the highest bidder at the fall of the hammer at the bid price of Kenya Shillings Eight Million (Kshs 80,000,000).

d) On 10th of July 2018 the 3rd defendant/applicant paid a deposit of Kshs 20,000,000 receipt of which was acknowledged by the 2nd defendant/respondent and the balance of the purchase price was remitted within 30 days from 10th July 2018 and in accordance with the Memorandum of Sale.

e) Having paid the entire purchase price, the 1st defendant/respondent thereafter undertook to transfer the said property L.R. 12251/13 I.R. 5807 to the 3rd defendant/applicant vide a transfer pursuant to purchase by a public auction dated the 26th of September 2018.

f) On or about the 5th of April 2019, the plaintiff/respondent by itself, its agents and servants and/or whomsoever acting on its behalf or upon their instruction without color of right or any court order began interfering with quiet, exclusive and continuous occupation of the 3rd defendant/applicant by harassing and threatening its agents and or servants who were on the property known L.R. No. 12231/13/I.R. 58071.

g) On the 11th April 2019, after continuous harassment, the plaintiff/respondent with the help of the police fraudulently, irregularly and illegally evicted the agents and or servants of the 3rd defendant/applicant from the suit property on false allegations that the property belonged to the plaintiff/respondent who had leased to the National Police Commission for a period of 6 years.

h) The action of the plaintiff/respondent of harassing and evicting the 3rd defendant/applicant and subsequently taking possession and occupation of all that property known as L.R. No. 12231/13/I.R. 58071 was not only fraudulent irregular, illegal and unlawful but also a deprivation and restriction of the 3rd defendant/applicant protection of right to property, enshrined in the Constitution.

i) The 3rd defendant/applicant will suffer irreparable harm and grave prejudice and injustice should the plaintiff/respondent continue to be in occupation and possession of the property which it no longer owns unless the Honourable court intervenes forthwith, in the manner prayed in the application presented herewith.

j) It is in the interest of justice for the Honourable court to move with alacrity to make an urgent and expeditious order directed at the plaintiff/respondent declaring that their actions were unlawful, illegal and fraudulent and a further order restraining and prohibiting them from harassing, evicting, claiming or interfering with the 3rd defendant/applicant quiet and peaceful enjoyment/occupation of the property.

k) This court has an inherent jurisdiction to review the exercise by the plaintiff/respondent and grant the orders as prayed to avoid the prejudice which will ultimately be visited on the 3rd defendant/applicant if the orders are not issue.

6. The plaintiff opposed the application through the Grounds of Opposition dated 20th June 2019 wherein it set down the following grounds:

1. That the instant application is fatally incompetent and defective as the same does not meet the threshold for the grant of an interim injunction as enunciated in Giella Vs Cassman Brown [1973] EA 358.

2. That the alleged transfer dated 26th September 2018 to the 3rd defendant/applicant is void ab-initio as it offends the mandatory provisions of Section 37(2) of the Lands Registration Act No. 3 of 2012.

3. That the prayers sought in the instant application are incapable of implementation as the plaintiff is not currently in occupation of the suit property as the same was leased to the National Police Service Commission on the 18th December 2018 for a period of 6 years.

4. That since the alleged transfer of the suit property purportedly on the 26th September 2018 and purportedly registered on the 12th November 2018, the 3rd defendant has never been in possession of the suit property.

5. That the 3rd defendant's Notice of Motion application dated 16th April 2019 is a mere afterthought and constitutes a flagrant abuse of the court process.

7. The plaintiff also opposed the application through the replying affidavit of its Director **M/S Roda Wambui Kariuki** who avers that the 3rd defendant is not the registered proprietor of the suit property as the alleged transfer of 26th September 2018 offends the mandatory provisions of Section 37(2) of the Land Registration Act as the same was never registered.

8. She contends that the suit property is still registered in the plaintiff's name and that pursuant to a lease dated 18th December 2018, the plaintiff leased the said property to the National Police Service Commission (NPSC) as shown in annexure marked "**RWK-2**". She states that she has personally been in occupation of the suit property before and after the alleged transfer of 26th September 2018 and that the 3rd defendant has not been in occupation or taken possession of the said property.

9. She further avers that the National Police Service Commission has been in occupation of the suit property since December 2018, in which case, the alleged eviction of the plaintiff would not have taken place. She reiterates that no valid transfer of the suit property took place on 26th September 2018 and adds that this is not a proper case for the grant of interim injunction.

10. Parties filed their respective written submissions to the application which I have carefully considered.

11. The main issue for determination is whether the 3rd defendant has made out a case for the granting of the orders of injunction sought in the application.

12. Order 40 Rule 1(a) of the Civil Procedure Rules stipulates as follows:

Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree...the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

13. The principles governing the granting of injunctive reliefs were set out in the celebrated case of **Giella v Cassman Brown Company Ltd** [1973] EA 353 as follows:

a) The applicant had established a prima facie case with probability of success;

b) The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and

c) If the court was in doubt, the application would be determined on a balance of convenience.

Prima facie case.

14. The Court of Appeal discussed what amounts to a prima facie case in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 as follows:

"A prima facie in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."

15. In **Nguruman Ltd v Jan Bonde Nielsen & 2 Others**, [2014] eKLR the Court of Appeal stated:

".....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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleged. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

16. In the present case, it was not disputed that the plaintiff's suit property was put up for sale by public auction after the plaintiff defaulted in repaying the loan facility that was advanced to it by the 1st defendant. It was further not disputed that the 3rd defendant was the successful bidder in the auction and that the 3rd defendant complied with all the conditions of the sale including the payment of the full purchase price of Kshs 80,000,000. The 3rd defendant was duly issued with a memorandum of sale and certificate of sale.

17. Having regard to the undisputed facts that I have highlighted hereinabove, I am satisfied that the 3rd defendant has established a prima facie case against the plaintiff.

Irreparable loss.

18. Halsburys Laws of England 3rd Edition defines irreparable loss/injury as:

“Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subject matter in question.”

19. Flowing from my determination on the issue of prima facie case and having found that 3rd defendant established that it paid Kshs 80 million towards the purchase of the suit property, which it subsequently charged to Credit Bank PLC for Kshs 50 million, I find that the expenditure of a colossal sum of Kshs 80 million places the 3rd defendant in a precarious position of suffering irreparable loss should it be kept away from the property that it has lawfully acquired.

Balance of convenience.

20. In the circumstances of this case, I find that the balance of convenience tilts in favour of the 3rd defendant who innocently purchased the suit property at a public auction following the plaintiff’s default in repaying the debt. The balance of convenience is more pronounced considering that the plaintiff has not denied that it defaulted to repay the loan and did not comply with the court order thereby leading to the sale of the suit property by public auction.

21. My above findings on the prayer for injunction would have been sufficient to determine this matter but I am still minded to address the issues raised by the plaintiff regarding the registration of the 3rd defendant as the owner of the suit property and the alleged leasing of the suit property to the National Police Service Commission.

22. On whether or not the 3rd defendant has been registered as the owner of the suit property, I find that the plaintiff’s proprietary rights to the suit property were extinguished at the fall of the hammer during the auction. My humble view is that the case before this court is not whether the 3rd defendant is the registered owner of the suit property but whether the 3rd defendant validly purchased the said property at the auction. Section 99 of the Land Act provides protection to purchasers of charged property in exercise of the chargee’s statutory power of sale as follows:

“This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser;

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

23. I find that in the present case, all that the 3rd defendant did was to comply with the conditions of sale and after winning the bid. I therefore find that it enjoys protection under the Law. I am guided by the decision in *Nationwide Finance Co. Ltd v Meck Industries Ltd*, (2005) eKLR, wherein it was held as follows:

“The Applicant was an innocent purchaser at a public auction. There is no suggestion that the purchaser had any notice of any irregularity or impropriety in the exercise of the power of sale so as to lose the protection provided by Section 69B of the Transfer of Property aforesaid.”

24. Similarly, in *Captain Patrick Kanyagia v Damaris Wangechi & Others*, Civil Appeal No. 150 of 1993, the Court of Appeal held that:

“When does the title pass; putting it another way: when does the right of redemption vested in the mortgagor come to an end?... It is clear therefore that Muchemi’s equity of redemption came to an end when the Kanyagias signed the contract of the sale and not later. However, it is not in dispute that even registration of the title of the Suit Property in favour of the Kanyagia’s has also been effected”.

25. As I have already stated in this ruling the suit property was sold to the 3rd defendant at the auction and I find that the moment the 3rd defendant was issued with the Memorandum and Certificate of Sale, the sale of the suit property was perfected and actualized. That being the case, the plaintiff lost all the rights to the suit property and cannot purport to lease the same property to a third party.

26. I note that the lease agreement produced by the plaintiff as annexure “RWK2” is between **Swara Safari Hotel Ltd** as the lessor and the National Police Service Commission. It is therefore my finding that the plaintiff is not only not the lessor of, but that the said Swara Safari Hotel Ltd is also not the proprietor of the suit property so as to be in a position to lease it to anyone.

27. For the reasons that I have stated in this ruling, I find that the application dated, 16th April 2019 is merited and I therefore allow it in the following terms.

a) A declaration is hereby issued that the actions of the plaintiff/respondent of harassing and evicting the 3rd defendant/applicant and subsequently taking possession and occupation all that property known L.R. No. 12231/13 I.R. 58071 is irregular, illegal, unlawful, fraudulent and thus null and void.

b) A temporary Injunction is hereby issued to restrain and or prohibit the plaintiff/respondents by itself, its agents and servants and/or whomsoever acting on its behalf or upon its instruction from harassing , evicting, alienating, claiming or interfering with the 3rd defendant/applicant's quiet and peaceful enjoyment/occupation of all that parcel of land known as LR No. 12231/13 I.R. 58071 measuring approximately Nought Decimal Four Nought Nought Nought of Hectare (0.4000 Ha) located in Karen pending inter-parties hearing of this suit.

c) The costs of the application shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 31st day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Gachomba for the plaintiff.

Miss Murimi for the 1st and 2nd defendants.

Court Assistant – Sylvia