



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO. 26 OF 2018

NJOGU MAREGWA.....1ST PLAINTIFF

NYAGA IRERI.....2ND PLAINTIFF

-VERSUS-

PETER KARANJA THUO.....1ST DEFENDANT

HANNAH WANJIRU THUO.....2ND DEFENDANT

NATIONAL HOUSING CORPORATION...3RD DEFENDANT

CORAM: Justice R. Nyakundi

Ms. Nganga for the Applicant

The Defendant Counsel

RULING

By an application dated 10/9/2018 and filed in court on 11/9/2018 the Plaintiffs – Njogu Maregwa and Nyaga Ileri seeks orders for interlocutory injunction to be issued restraining the 3rd Defendant/Respondent by itself, agents, servants and or employees or whosoever is acting on its behalf from trespassing, seeking transfer or disposal of LR Kajiado Township Block 1/140 formerly LR W9923/18 pending the decision of the applicant date 19/7/2018. Their second application by way of notice of motion being referred to was stated to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1&2, Order 51 Rule 1 of the Civil Procedure Rules.

The two notices of motion are seemingly similar on both content and declarations being sought by the applicants save that the latter has been triggered for non-adjudication of this earlier motion filed on 26/7/2018. In support of both applications is an affidavit sworn by Njogu Maregwa dated 19/7/2018 and Sheila Nganga dated 10/9/2018. For purposes of the ruling I will treat both motions as having been properly filed. The affidavit of Njogu Maregwa sets out the following grounds as the basis of the orders of interlocutory injunction reliefs. That by himself and Nyaga Ileri they happen to be business partners in an entity duly incorporated as Maganjo & Company in the year 1968 vide registration certificate BN 36953. That in the year 1969 the company acquired land parcel No. 99231/18 with both Njogu Maregwa and Nyaga Ileri registered as tenants in common. Further Njogu Maregwa depones that in the year 2009 the title to the land parcel was reported lost and the same was reported to the police as evidenced by the police abstract marked NM3 (a) (b). That it emerged later that Peter Karanja Thuo and Hannah Wanjiru the 1st and 2nd defendants had applied to the Land Registrar Kajiado for an amendment to be effected on the register by converting Maganjo Partnership into Maganjo Ltd Company as the owner of the same property. Mr. Njogu further depones that the amendment as proposed to be effected by Peter Karanja and Hannah Wanjiru was without their consent or knowledge. That the fraudulent acts became a subject of a criminal prosecution involving Peter Karanja Thuo and Hannah Wanjiru in Criminal Case No. 40 of 2013 still pending determination before Kibera Law Courts. The step taken avers Mr. Njogu Maregwa to preserve the property upon discovering that the conversion of ownership to Maganjo & Co. Ltd had resulted in the property being charged as security to National Housing Corporation.

It was to emerge as deponed by Mr. Njogu Maregwa that the company had defaulted in repaying the debt forcing National Housing Corporation to issue notice through their agencies Keysian Auctioneers to advertise and sell the property to realize the security. That the basis of the advertisement and sale by National Housing Corporation is in contravention of their interest and right of ownership to the same parcel of land.

In reply to the motion dated 19/7/2018 the 1st Respondent Peter Thuo filed a replying affidavit admitting the following facts: That he is a co-director with Hannah Wanjiru Thuo in Maganjo & Co. Ltd. That the company duly incorporated and registered is the owner of Kajiado Township Block 1/140 as supported with annexed title marked as PKT – 2. That the company was advanced a loan from National Housing

Corporation for Ksh. 3,000,000. That the loan remains unpaid as a consequence a notice to sell the security has been issued by National Housing Corporation. That the Plaintiffs Njogu Maregwa and Nyaga Ileri have no right of ownership to the said parcel of land. That the plaintiffs are not directors of Maganjo & Co. Ltd which has interest over Kajiado/Township/Block 1/140.

In the replying affidavit Peter Karanja Thuo prayed that the notice of motion be dismissed. The 3rd defendant National Housing Corporation further contended and filed a replying affidavit sworn by Kennedy Munala, a Legal Officer with the Corporation. In his affidavit the following facts are not in dispute: That on 17/11/2008 Peter Karanja Thuo applied for a loan of Ksh. 1,500,000 which he secured by parcel No. Kajiado Township/Block 1/140. That the applicant Peter Karanja Thuo having satisfied the criteria set in the loan application, the amount applied for was duly disbursed and the Corporation went ahead to register the charge against the title.

According to the affidavit of Kennedy Munala on 9/8/2010 Peter Karanja Thuo applied for a top up of a further advance of Ksh. 1,500,000 which the Corporation readily agreed based on the value of title being offered as security. That on the loan amount Peter Karanja Thuo defaulted in repayments necessitating the Corporation to exercise the statutory power of sale. Mr. Kennedy Munale filed a further replying affidavit dated 14/9/2018 whose contents and material is substantially similar with the earlier affidavit in support of the notice of motion dated 19/7/2018.

In respect to the motion dated 10/9/2018 Peter Karanja Thuo and Hannah Wanjiru Thuo filed grounds of opposition mainly according to the loan agreement with National Housing Corporation as registered owners of parcel No. LR Kajiado Township Block /1 /140.

During the hearing of the application it was agreed that both counsels file brief written submissions on the issues raised in the matter. I acknowledge receipt of the submissions which outlines each counsel stand point on the application for interlocutory injunction. More importantly for me is to consider the applications, affidavit evidence, grounds of opposition together with submissions with a view to establish whether the applicant has discharged the burden of proof for grant of an interlocutory injunction.

Analysis and Resolution

The approach I take of this application on grant of interlocutory injunction is to adopt the threshold principles set out in the celebrated case of **Giella V Cassman Brown & Co. Ltd 1973 EA 358 and the American Cynamid Co. V Ethicon Ltd 1975 1ALLER 504**. In these leading authorities there are three important principles an applicant must satisfy the court in order to support the grant of interlocutory injunction. The first test is that the applicant must show is a prima facie case with a probability of success. Secondly the applicant has to demonstrate that he will suffer irreparable harm which cannot be compensated for in damages. Thirdly, if the court is in doubt on the two tier pronged test it will decide the application on a balance of convenience. I would also hold that besides the above principles the whole of the facts in an application for injunction ought to satisfy the principles articulated by the court of appeal in the case of **Kenleb Cons Ltd v New Gatitu Service Station**. Where the court stated:

“It is trite law that for an interlocutory to succeed an applicant must not only make a full and frank disclosure of the relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by an injunction”

These are the principles that shall apply to the facts of this case. On the first test of a prima facie case Mr. Njogu Maregwa affidavits on the face of it demonstrates that by 4th January, 2013 the registrar of companies in his letter acknowledged existence of a registered entity by the name of Maganjo and company on 24th May, 1968. The shareholders of Maganjo and company recognize in the register are Thuo Karanja and Mbogo Ileri. However, in the same letter the Registrar positively identified a company registered on 13th November 2007 in the name of Maganjo and company ltd with shareholders as Peter Karanja Thuo and Hannah Wanjiru Thuo.

This correspondence from the Registrar General of Companies does contain representations that Maganjo & Company initially a partnership registered on 24th May, 1908 changed its name to Maganjo and Company Ltd on 13th November, 2007. The letter also contains a representation that the incorporation of the said company in 2007 comprised of two different directors from the initial partners Maregwa and Mbogo Ileri.

There is therefore a missing documentation of the sale of Maganjo and company from Maregwa and Mbogo Ileri to the current directors Peter Karanja Tho and Hannah Wanjiru Thuo. Further the applicant Njogu Maregwa disputes that Maganjo and company changed its name and entity to Maganjo and company Ltd at their instigation. One would expect a signed share transfer form assigning the shares to Peter Karanja Thuo and Hannah Wanjiru Thuo. It is not in dispute from the applicant affidavit and the 1st respondent that Land Parcel No. Kajiado/Township/Block 1/140 is leasehold title registered in the name of Maganjo and company ltd on 15th August, 2008.

On the same parcel of land referenced as Kajiado/Township/9923/13 was on 1st October, 1969 registered as a leasehold for 33 years in favour of Mbogo Grent Mwaniki Miano, Thuo Karanja Mbagu Rutere, Nyaga Ileri and Ndambiri Magu as tenants in common in equal shares trading as Maganjo and company.

It is plain that here is the first registration leasehold title dated 1st October, 1969 registered in the names of the above members as tenants in common. It is also the evidence supported with another lease positively identified as lease to title Kajiado/Township/block 1/140 for a period of 66 years with effect from 5th November, 2008 in favour of Maganjo & Company Ltd.

Although Mr. Njogu Maregwa is a partner with Maganjo and company he denies any connection with Maganjo and company Ltd. That the secured lease in 2008 on the same property initially registered in their respective names in 1969. The thrust of Mr. Njogu Maregwa argument as stated in the affidavit is that he is a stranger to the new entity which purport to own the same land.

In the present case both the affidavit evidence by the applicant and respondents confirm the following facts. That there was a loan transaction between the 1st defendant Peter Karanja Thuo and the 2nd defendant National Housing Corporation totalling an amount of Kshs. 3000,000

as at 9th October, 2010. The loan agreement is secured by a charge in respect of title No. Kajiado/Township/Block1/140 initially 9923/18. The transactions do not seem to have involved other tenants in common who had shares in the property.

The loan application was lodged with National Housing Corporation on 2nd December, 2008 immediately after the registration of the new lease of the same land. Mr. Njogu Maregwa has laid emphasis that the transactions on the title constitute a fraud on the part of Peter Karanja Thuo and Hannah Wanjiru Thuo which is currently premised in criminal case No. 40 of 203 Kibera court.

Assuming that the allegations as to the sanctity and indefeasibility to the certificate of title subject matter of this proceedings it will be relevant to the question whether the corporation can enforce the security. The general principles of law are that in respect to properties it is fundamental that a certificate of lease or title is not one that is fraudulently obtained.

There is also the question on the legality of the instrument National Housing corporation is holding on as security for the loan advanced to the 1st defendant. I bear in mind that a mortgagee shall only exercise the statutory power of sale on a legal title to land and nothing else.

I reckon with these facts in mind that grant of an injunction is a discretionally remedy. The principles are as laid down in **Giella v Cassman and the American Cyanamid Case**. In exercise of the court discretion the learned authors in **Halsbury's Laws of England 4th Edition paragraph 863** had this to say as follows:

“Interim injunctions are generally granted only when the applicant has established a serious issue to be tried, damages will not be adequate remedy, the balance of convenience lies in favour of granting the injunction in that it will do more good than harm and the applicant is and will be able to compensate the respondent for any loss which the orders may cause him in the event that it is later adjudged that the injunction should not have been granted.”

It is apparent that the plaintiffs together with the 1st and defendants claim exclusive right to LR. Kajiado Township block 1/140 formerly LR. W9923/18. Determination of the dispute alleged as between the plaintiffs and the defendants depends on the sanctity of this title. As these issues are intertwined in view of the plaintiff's claim of being deprived ownership without notice as registered proprietors is sufficient reason for the court to come to the conclusion that a prima facie case has been established to warrant granting an interlocutory injunction. As regards to the issue of damages the matter being anchored on right to private property protected under Article 40 of the constitution it would not be said that the plaintiffs can be compensated by way of damages. The position taken on both application is that the balance of convenient eminently calls for preservation of the suit property pending the outcome of the main suit.

Accordingly, the notice of motions dated 19/7/2018 and 10/9/2018 succeeds with costs to abide the outcome of the suit.

Dated, delivered and signed in open court at Kajiado this 25th September, 2018.

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R. NYAKUNDI

JUDGE