



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**ELC CASE NO. 02 OF 2017**

**FORMERLY MACHAKOS ELC NO.196 OF 2016**

**FORMERLY NAIROBI ELC NO.1412 OF 2016**

**BONIFACE KIVINDYO MUTISYA .....PLAINTIFF**

**-VERSUS-**

**ALRED KAVILAKIVINDYO .....1<sup>ST</sup> DEFENDANT**

**CONSOLIDATED BANK OF KENYA.....2<sup>ND</sup> DEFENDANT**

**ALMA SOLUTIONS LIMITED.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

By his application dated 14<sup>th</sup> November, 2016 and filed in court on 16<sup>th</sup> November, 2016 the applicant prays for an order of injunction to issue pending hearing and determination of the suit herein to restrain the second defendant/respondent, its agents and/or assigns or any of them from disposing of selling or otherwise interfering with all those parcels of land known as Mbooni/iiani/107 and Mbooni/iiani/884 with costs of the application being borne by the respondents.

The application is expressed to be brought under Order 40 rules 1(a), 2 and 4(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and is predicated on the grounds on its face. It is also supported by the supporting and further affidavits of the applicant sworn on the 14<sup>th</sup> November, 2016 and 22<sup>nd</sup> February 2017 respectively.

It is opposed by the second respondent vide the replying affidavit sworn by Jeremiah Simba, its Recoveries Officer, the said affidavit having been sworn on the 23<sup>rd</sup> January, 2017.

By consent of the parties, the court directed on the 3<sup>rd</sup> April, 2017 that this application be disposed off by way of written submissions.

Both the applicant and the second respondent are agreed that this application is to be determined on the principles espoused in *Giella vs Cassman Brown & Co. Ltd [1973] EA 358* on the grant of injunction.

On the principle of a prima facie case with a probability of success, the applicant's counsel has submitted that the applicant has stated in his affidavit in support of the application that he is the absolute registered owner of the suit premises and that a charge was fraudulently registered in favour of the second respondent against the suit properties without his knowledge and consent. The counsel went on to submit that the applicant has further deposed on oath that the first respondent coerced him into believing that he was signing documents for safe keeping of his title deeds by the second respondent and as such, the legality of the charge registered in favour of the second respondent is disputed. The counsel went on to submit that the second respondent did not consider the provision of Section 79(3) of the Land Act 2012 before charging the properties and pointed out that the applicant and his wife have established matrimonial home on land parcel number Mbooni/iiani/107 while carrying farming on the other parcel number Mbooni/iiani/884. In view of the foregoing, the counsel submitted, the charge registered in favour of the second respondent was illegally and fraudulently registered and as such this is the issue for determination by the court and added that the applicant has established a prima facie case in his favour. The counsel went on to submit that assuming that the charge was legally registered, which the applicant highly disputes, the second respondent failed to follow the due procedure provided under the Land Act, 2012 in exercising its powers of sale. The counsel went on to submit that under Section 90(1) of the Land Act, where there is a default on the part of the chargor, the chargee may serve the chargor with a notice before the chargor exercises his power of sale. The counsel pointed out that in the instant case, the applicant denies ever receiving such notice from the second respondent.

The counsel added that although there is a notice annexed to the second respondents replying affidavit purportedly served upon the applicant

dated 12<sup>th</sup> April, 2016 and addressed to the applicant and the 1<sup>st</sup> respondent, service of the same is denied. The counsel added that even though it is indicated that the notices were served through registered post, no certificate of postage has been annexed to prove that mode of service.

The counsel further submitted that under Section 96(1) of the Land Act, the plaintiff/applicant was to be served with 45 days statutory notice of sale before the sale takes place. The counsel pointed out that the plaintiff/applicant was only served on the 1<sup>st</sup> November, 2016 when the sale had been scheduled to take place on the 16<sup>th</sup> November, 2016 although the notice was backdated in the applicant's presence to indicate that the service was done within the statutory timeline.

The counsel further submitted that the 2<sup>nd</sup> defendant/respondent ought to have ensured that a forced sale valuation is undertaken by a valuer before exercising the right of sale as provided for under Section 97(2) of the Land Act and he referred the court to the case of **Koileken Ole Kipolonka Orumoi vs Mellech Engineering and Construction limited and 2 others [2015] eKLR**.

The 2<sup>nd</sup> respondent's counsel summarized the replying affidavit as follows:-

- a) The first respondent executed letter of offer dated 16<sup>th</sup> December, 2013 and duly accepted all the terms.
- b) The applicant offered land being LR No. Mbooni/iiani/884.
- c) The bank's statutory power of sale of land had arisen after service of the statutory notices under the Land Act.

Regarding the rebuttal of the applicant's affidavit, the counsel submitted that the applicant in his capacity as the chargor has admitted to executing the legal charge dated 17<sup>th</sup> April, 2012.

That he guaranteed to pay the 2<sup>nd</sup> respondent on demand all the monies and discharge the Debtor's obligations without deduction, set off, or counterclaim together with interest thereon from date of such demand and together with costs and expenses. The counsel went on to submit that the applicant is personally liable to the tune of Kshs.1,800,000.00 or its equivalent pursuant to the Deed of Guarantee and Indemnity dated 16<sup>th</sup> December 2013 and pointed out that it is correct to state that no security was created to secure the indebtedness of the guarantor. The counsel added that all advances were made with the consent of the applicant and he is estopped from denying that they duly executed the legal charge in support of the facility letter dated 16<sup>th</sup> December, 2016 and that the applicant has misled the court when he alleges that he was unaware of the legal charge. The counsel went on to submit that the legal charge was duly executed and registered.

Regarding the applicant's allegation in his submissions that he was not served with statutory notices, the second respondent's counsel referred the court to the certificate of postage in the second respondent's list of documents. The counsel went on to submit that the applicant's allegation that he was coerced into executing the legal charge by the first respondent is an afterthought created with the sole aim of defrauding the Bank the sums advanced. The counsel added that the applicant has not discharged the burden of proof provided under Section 107(1) and 109 of the Evidence Act. He referred the court to the cases of **Coast Brick and Mrao** which were adopted in the case of **Al-Jalal Enterprises Limited vs Gulf African Bank Limited [2014] eKLR and King'orani Investments Co. Ltd -vs- Kenya Commercial Bank Limited & Another [2007] eKLR** in support of his submissions.

The second respondent's counsel went on to submit that the applicant has suppressed the fact that he also executed a Deed of Guarantee and Indemnity where he unconditionally guaranteed to pay the second respondent on demand all monies and discharge the Debtor's obligations without deduction set off, or counterclaim together with interest thereon from the date of such demand together with costs and expenses.

The counsel added that the applicant is guilty of material non-disclosure and he referred the court to the case of **Orion East Africa Ltd -vs- Ecobank Kenya Ltd & Another [2015] eKLR**.

On the principle of whether or not the applicant will suffer irreparable injury which would not be adequately compensated by an award of damages, if the order sought is not granted, the applicant's counsel submitted that the suit properties are the only properties the applicants has. The counsel further submitted that the applicant has a homestead on land parcel number Mbooni/iiani/107 where he lives with his wife while carrying out farming activities on the other land parcel number Mbooni/iiani/884 which he contends to be their sole source of their livelihood. The counsel added that if the orders sought are not granted, and his only properties are sold to recover the amount advanced to the third defendant, the applicant and his wife will be rendered homeless and will suffer irreparable injury because his right to own property will be prejudiced.

Regarding the third principle, the applicant's counsel submitted that if the applicant who was not a party to the fraudulent transaction will be inconvenienced if his properties are sold.

On the other hand, the counsel for the second respondent submitted that the applicant has not satisfied the principles espoused in the **Giella vs Cassman Brown case** and urged the court to dismiss the application with costs of the second respondent.

Having read the application, the supporting and further affidavits, the replying affidavit and all the annexures thereto and having read the submissions that were filed, I wish to point out the three principles espoused in **Giella vs Cassman Brown's case** are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially as was held in the case of **Commercial Finance Co. Ltd -vs- Afraha Education Society [2001] Vol. EA 86**.

On the issue of whether or not the applicant has a prima facie case with probability of success, the applicant contends that the charge was

registered in favour of the second respondent illegally and fraudulently while the second respondent maintains that the legal charge was executed by the applicant in the presence of an advocate of the High Court of Kenya who certified that the applicant appeared before him. The applicant further states that he was not served with the statutory notices while the second respondent maintains that the opposite is true. These are issues which cannot be determined at interlocutory stage and would require substantive hearing. In my view, therefore, the applicant has established prima facie case with probability of success.

On the issue of irreparable injury that cannot be compensated by an award of damages, the applicant states that he has established matrimonial home in Mbooni/iiani/107 while carrying out farming activities in Mbooni/iiani/884. He further stated his right own property will be prejudiced if the two properties are sold. That indeed seems to be the case in this application. On the Issue of balance of convenience, the same tilts in favour of the applicant. Suffice it to say, the application has merits and in the circumstances, I will grant prayer 3 and 4 subject to the substantive suit being determined within a period of 12 months from today or else the injunction herein shall lapse.

**Signed, Dated and Delivered this 16<sup>th</sup> day of June, 2017.**

**MBOGO C. G.,**

**JUDGE.**