



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1023 OF 2015

WILSON ANKAINI KISEMEI.....PLAINTIFF

VERSUS

MERCBIMA INTERNATIONAL LTD.....1ST DEFENDANT

HON. JOE MUSYIMI MUTAMBO.....2ND DEFENDANT

EQUITORIAL COMMERCIAL BANK LTD.....3RD DEFENDANT

RULING

The Plaintiff brought this suit against the Defendants on 16th October 2015 seeking among others, a permanent injunction to restrain the Defendants from trespassing onto, remaining upon, developing, alienating, selling, auctioning, transferring or in any manner whatsoever interfering with the Plaintiff's proprietorship and/or peaceful enjoyment of all those parcel of land known as L.R. No. Kajiado/Kitengela/46021 and L.R. No.Kajiado/Kitengela/46022 (hereinafter "the suit properties"). Contemporaneous with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 15th October 2015 seeking a temporary injunction to restrain the Defendants from trespassing onto, remaining upon, developing, alienating, selling, auctioning, transferring or in any manner whatsoever interfering with the Plaintiff's proprietorship and/or peaceful enjoyment of the suit properties pending the hearing and determination of the suit.

The application was brought on the grounds set out on the face thereof and on the affidavit and supplementary affidavit of the Plaintiff sworn on 15th October 2015 and 7th December 2015 respectively. The Plaintiff's case against the Defendants was that without the Plaintiff's knowledge the 1st and 2nd Defendants caused the Plaintiff's titles for the suit properties to be deposited with the 3rd Defendant as a security for the loan which the 3rd Defendant had advanced to the 1st Defendant.

The Plaintiff contended that he had given the 1st and 2nd Defendants the title deeds for the suit property at their request to enable them show a bank the site where they were to undertake quarry mining operations. The Plaintiff contended that at no time did he approach the 3rd Defendant for a financial facility on the security of the suit properties. The Plaintiff contended that he had also never agreed to stand guarantor for the loan which the 1st and 2nd Defendants had sought from the 3rd Defendant. The Plaintiff contended that with a view to deprive him of the suit properties, the Defendants had attempted to create a fraudulent charge over the suit property. The Plaintiff stated that on the strength of the purported guarantee which the Plaintiff is alleged to have extended to the 3rd Defendant for the loan facilities

advanced to the 1st and 2nd Defendants, the 3rd Defendant was making preparations to put up the suit properties for sale to recover the debt which was owed to the 3rd Defendant by the 1st and 2nd Defendants. The Plaintiff stated that apart from the lease and an aborted agreement for sale which he had entered into with the 2nd Defendant in relation to the suit properties, he had not entered into any other arrangements with the 1st and 2nd defendants concerning the suit properties. The Plaintiff stated that upon learning about the purported guarantee which he was said to have given to the 3rd defendant as a security for the 1st and 2nd Defendants' indebtedness to the 3rd Defendant he made a complaint to the police.

The Plaintiff withdrew its claim against the 3rd Defendant on 28th October 2015 after the 3rd Defendant confirmed to the court that it had no charge over the suit properties and that it had returned the title deeds for the said properties to the 2nd Defendant. The Plaintiff's application was opposed by the 1st and 2nd Defendants (hereinafter "the defendants") through a replying affidavit sworn by the 2nd Defendant on 18th November 2015. The Defendants stated that the title deeds for the suit properties were delivered to the 2nd Defendant on the strength of an agreement for sale dated 6th May 2014 between the Plaintiff and the 2nd Defendant. The Defendants stated that under the said agreement, the Plaintiff had agreed to sell to the 2nd Defendant the suit properties at a consideration of Kshs.28,000,000/= of which amount the 2nd Defendant had already paid to the Plaintiff a sum of Kshs. 3,000,000/= as a deposit. The Defendants contended that the balance of the purchase price was to be obtained by the 2nd Defendant through a bank loan and the Plaintiff had agreed to have the suit properties charged to the bank as a security for the balance of the purchase price aforesaid.

The Defendants stated that the title Deeds for the suit properties were given to the 1st and 2nd Defendants by the Plaintiff after they paid to the Plaintiff more than 10% of the purchase price for the suit properties. The Defendants stated that the Plaintiff failed to complete the said agreement for sale by refusing to provide the completion documents. The Defendants denied that the suit properties had been charged to the 3rd Defendant to secure the loan that had been advanced to the 1st and 2nd Defendants. The Defendants stated that the suit properties could not be charged to the bank because the bank was not able to trace the survey maps for the suit properties. The Defendants stated that the Plaintiff was well aware of the transaction and had even promised to look into the issue of the survey maps. The Defendants contended that the Plaintiff's application has no merit.

The application was argued by way of written submissions. I have considered the application together with the affidavits filed in support thereof. I have also considered the Defendants' replying affidavit in opposition to the application. The parties' respective submissions and authorities cited in support thereof have also been considered. An applicant for a temporary injunction must show a prima facie case with a probability of success and must also demonstrate that he will suffer irreparable harm which cannot be compensated by an award of damages if the order is not granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience. See, the case of Giella vs- Cassman Brown & Co. Ltd. (1973) E. A. 358.

On the material before me, I am satisfied that the Plaintiff has met the conditions for grant of the orders sought. The Plaintiff's case against the 1st and 2nd Defendants as I have stated above is that the 1st and 2nd Defendants had used the title deeds which they obtained from the Plaintiff on the pretext that they were going to use the same to show the bank where they were to conduct quarry mining activities as a security to secure a loan from the 3rd Defendant without the Plaintiffs consent or knowledge. The Plaintiff contended that the 3rd defendant had threatened to sell the suit properties to recover the debt owed by the 1st and 2nd Defendant on the strength of a purported guarantee which the Plaintiff had given to the 3rd defendant to secure the loan facility which the 3rd defendant had advanced to the 1st and 2nd Defendants. The Plaintiff has demonstrated that he had given the 1st and 2nd Defendants the title deeds for the suit properties and that the 1st and 2nd Defendants had taken the same to the 3rd Defendant to secure a loan facility in favour of the 1st Defendant. The Plaintiff has demonstrated that the 1st and 2nd Defendants attempted to create a charge over the suit properties. The Plaintiff has also demonstrated that there was a

purported guarantee which was allegedly given by the Plaintiff to secure the 1st Defendant's indebtedness to the 3rd Defendant. The 1st and 2nd Defendants placed before the court a facility letter dated 12th November 2013 from the 3rd Defendant to the 1st Defendant which contains the terms under which the 3rd defendant had agreed to grant to the 1st Defendant credit facilities of Kshs. 105,017,000/= and US\$ 899,000/=. Among the securities set out in that letter which were to be provided by the 1st Defendant was a legal charge over the suit properties. The Plaintiff also placed before the court evidence that a charge was drafted by the 3rd Defendant's advocates in respect of the suit properties. The Plaintiff placed before the court a letter from the 3rd Defendant dated 3rd March 2014 which was copied to the Plaintiff as a guarantor of the 1st Defendant in which letter the 3rd Defendant stated that it would not release the title deeds for the suit properties unless the 1st Defendant paid a sum of Ksh. 1,166,695/=.

There is no doubt from the tone of the said letter dated 3rd March 2014 that the title deeds for the suit properties were held by the 3rd Defendant as security for the credit facilities that were granted by the 3rd Defendant to the 1st Defendant. The Plaintiff's case was that all these arrangements were done by the Defendants behind his back and that the same were intended to deprive him of the suit properties. In his replying affidavit, the 2nd Defendant has made contradictory statements on the circumstances under which the Plaintiff's title deeds came into his possession and how the same reached the 3rd Defendant. The 2nd Defendant contended that the title deeds for the suit properties were forwarded to him by the Plaintiff on 24th May 2013 to enable him acquire funds from any bank and that the Plaintiff had authorized him to use the same as security for the said funds. In the same affidavit, the 2nd Defendant also stated that the title deeds for the suit properties were given to him by the Plaintiff pursuant to the agreement for sale dated 16th April 2014 and that the 1st and 2nd defendants were to use the same to obtain funds to pay the balance of the purchase price to the Plaintiff. It is not clear how the Plaintiff could have forwarded to the 1st Defendant title deeds in the year 2013 pursuant to an agreement for sale which was made in the year 2014. The Plaintiff placed before the court a report from a forensic document examiner which concluded that the purported letter dated 24th May 2013 under cover of which the 1st Defendant claimed that the Plaintiff had forwarded to him the title deeds, as containing a forged signature of the Plaintiff. The 1st and 2nd Defendants did not contest this report. I have also noted that there is no indication in the facility letter dated 12th November 2013 that the credit facilities given to the 1st Defendant were to be used to purchase the suit properties. The draft charge over the suit properties also tells a different story. If indeed the 1st and 2nd Defendants intended to use the suit properties to obtain funds to purchase the same, they would have been the chargors. The draft charge shows that the Plaintiff was to be the chargors.

The account given by the 1st and 2nd Defendants of the reasons they were given the title deeds for the suit properties and how the same ended up with the 3rd Defendant does not add up. I am satisfied that the Plaintiff has proved on a prima facie basis that the 1st and 2nd Defendant dealt with the title deeds for the suit properties contrary to the purposes for which the same were given to them and that their actions were aimed at depriving the Plaintiff of the suit properties. The Plaintiff's apprehension that the 1st and 2nd Defendants may proceed and deal with the suit properties in a manner inconsistent with his interest in the said properties is therefore not farfetched.

On whether the Plaintiff would suffer irreparable harm unless the orders sought are granted, I am again satisfied that, that would be the case. If the 1st and 2nd Defendants proceed to dispose of the suit properties, the same would be put beyond the reach of the Plaintiff. There is no evidence that the 1st and 2nd Defendants would be able to compensate the Plaintiff for the value of the suit properties.

In the final analysis, I am satisfied that a case has been made out to warrant the grant of the orders sought against the 1st and 2nd Defendants. Consequently, the Plaintiff's Notice of Motion dated 15th October, 2015 is allowed as against the 1st and 2nd defendants in terms of prayer (c) thereof. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 26th day of July, 2017

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

Mr. Okoth for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant