



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KAJIADO

ELC CASE NO. 54 OF 2021

PETKAY SHEN MIRITI.....PLAINTIFF/APPLICANT

-VERSUS-

ALEX MUNENE MBAKA.....1ST DEFENDANT/RESPONDENT

ABSA BANK KENYA PLC.....2nd DEFENDANT/RESPONDENT

RULING

This ruling is on the notice of motion dated 12th August, 2021. The said motion which is by the Plaintiff seeks the following orders;

- b. The Court do suspend the implementation of the second Defendant's Auctioneers' 45 days redemption notice dated 4th August, 2021 pending the hearing and determination of this application
- c. A temporary injunction be issued restraining the Defendants by themselves, agents, servants, employees, personal representatives or otherwise howsoever from evicting, entering onto, occupying, destroying, erecting structures, advertising for sale, selling, further charging, transferring, alienating and/or in any manner whatsoever dealing with and/or interfering with the Plaintiff's proprietorship, occupation and use of all that parcel of land known as L.R NGONG/NGONG/13121, situate in Kerarapon Drive within Kajiado County and measuring 0.4 hectares pending the hearing and determination of this application.
- d. An order similar to (c) above pending the hearing and determination of this suit.
- e. An order compelling the second Defendant to disclose and render true accounts and all details of the loan account held by the first Defendant with respect to the suit property herein and outstanding arrears (if any)
- f. Costs of the application be in favour of the Plaintiff.

The application which is under **Order 40 Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A** and Order 63 of the **Civil Procedure Act, Sections 80, 90, 96 and 97** of the Land Act, 2012, and all other enabling provisions of the law is based on eighteen (18) grounds which I summarise as follows;

The Plaintiff is the sole and rightful proprietor of the suit land valued at Kshs. 61, 000,000/= and which he purchased between 1994 and 1996. He and his family reside in the land. He has never sold or transferred the land to any person. However, the first Defendant unlawfully transferred the land to himself and charged it with the second Defendant.

Now the land is due for sale by auction for failure by the first Defendant to service a loan that he obtained from the second Defendant. If the land is sold by auction as scheduled, the Plaintiff stands to suffer irreparable loss because he will be evicted from his own land unlawfully.

In further support of the application, the Plaintiff has sworn an affidavit dated 12th August, 2021 which has one (1) annexure namely a 45 days Redemption Notice dated 1/8/2021 issued to the first Defendant by Regent Auctioneers requiring him to pay the entire loan due to the second Defendant failing which the suit land would be sold.

In the 31 paragraph affidavit, the Plaintiff narrates how first Defendant abused the friendship between them to not only use the suit land as security for a loan of Kshs. 8 million for the Plaintiff but a further 8 million for himself and that he eventually transferred the property to himself.

The application is opposed by the first Defendant who has sworn a replying affidavit comprising of 44 paragraphs and some annexures.

In the affidavit, he says that he bought the suit land from the Plaintiff for Kshs. 50,000,000/= and Plaintiff duly acknowledged receipt of the money. Kshs. 34 million had been advanced to the Plaintiff prior to the agreement for sale of the suit land which is dated 20/3/2017. The balance of Kshs. 16 million which was obtained from the second Defendant was paid directly to the Plaintiff.

Soon after buying the suit land from the Plaintiff, the first Defendant rented it out to the Plaintiff at Kshs. 150,000/= per month. The Plaintiff fell into arrears of rent because the purpose for which he sold the land did not materialize. He lost the race to be the Governor of Tharaka Nithi County.

The first Defendant allowed him to remain on the land because he had no immediate plans for it.

Suddenly, towards the end of the year 2020, the Plaintiff started paying some arrears of rent to the first Defendant. It is only after this case was filed that the first Defendant came to learn that the late payment of the arrears of rent was meant to create the current false narrative that the Plaintiff did not sell and transfer his land to the first Defendant.

The first Defendant prays for the dismissal of the current application with costs to him.

The second Defendant has also opposed the application dated 12/8/2021 and one Samuel Njuguna, its collections and recoveries officer, has sworn a replying affidavit dated 29/1/2021.

In the affidavit, the deponent says that this Court has no jurisdiction to determine this dispute because it relates to mortgages, charges, collection of dues and rents and not land per se and thus it is the High Court which has jurisdiction.

Secondly, it is deposed that the Applicant has no locus standi to seek the orders herein for lack of privity of contract with the second Defendant.

Thirdly, it is the second Defendant's case that the Plaintiff's suit which is based on an equitable claim of a resulting trust must fail because it offends the principle of ex turpi causa non oritur actio (from a dishonorable cause an action does not arise).

It is also the second Defendants case that the Plaintiff not being the registered proprietor of the suit land and having no privity of contract with the second Defendant was not entitled to any statutory notices and such notices were issued to the first Defendant.

In addition to the above affidavits, the second Defendant filed a Preliminary Point of law focusing on the same three issues raised in the replying affidavit of the Collections and Recoveries Officer.

Only the second Defendant filed written submission dated 1st November, 2021. I did not see any submissions by either the Plaintiff or the first Defendant.

The issues raised in the submissions are as follows;

1. Whether this Court has jurisdiction to hear and determine this suit
2. Whether this suit is fatally incompetent as against the second Defendant
3. Whether this Court has jurisdiction to aid an illegal and immoral act

I have carefully considered the application in its entirety including the affidavits, grounds, annexures, case law and the entire record. I find that the following issues come up for determination.

1. Does this Court have jurisdiction to entertain the suit?
2. Has the Plaintiff established a prima facie with a probability of success and has he proved that he stands to suffer irreparable loss regarding his application dated 12th August 2021?
3. Is it fair or just to dismiss this suit at this stage?

On the first issue, I find that this Court has jurisdiction to entertain this suit.

At paragraph 47 (b) of the plaint, the Plaintiff seeks

“A declaration that the Plaintiff is the rightful proprietor and beneficial owner of the suit land”.

Article 162(2) (b) of the Constitution provides

“Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to , land”

Clearly the Plaintiff seeks to be declared as holding lawful title to the suit land.

This is one of the mandates of this Court under **Article 162(b)** of the **Constitution**. It should not be forgotten that the Plaintiff claims privity of contract between himself and the first Defendant who allegedly defrauded him of the land which he now seeks to be restored to him.

If the suit was between the two Defendants herein, then it could be said to relate to mortgages, charges, collection of dues and rents.

On the second issue, I find that the Plaintiff has not established prima facie case with a probability of success or that he stands to suffer irreparable loss not adequately compensated by an award of damages for the following reasons;

Firstly, the Plaintiff is not the registered owner of the suit land. It is the first Defendant who is.

Secondly, the Plaintiff has admitted that in the year 2017, he received Ksh. 8 million from the second Defendant through the first Defendant and he has never paid a single cent. He has not explained how he would receive such a substantial amount without any condition for repayment.

Thirdly, the Plaintiff has not proved that he has any landlord and tenant relationship with the first Defendant and that he has been paying rent as expected.

The two prerequisites to the grant of an order of injunction as per the famous case of **Giella –vs- Cassman Brown (1973) EA 358** have not been met.

I need not consider the third prerequisite of balance of convenience because the first two have not been met.

On the third and final issue, I find that it is neither fair nor just to dismiss this case at this stage.

The pleadings have not been closed. Neither of the Defendants has filed any defence. The Plaintiff has not filed a reply to defence. The pleadings could be amended and introduce new issues that are not yet on record.

The right to a fair hearing under **Article 50(1) of the Constitution** would be violated if the Court were to dismiss this case so prematurely.

Striking out pleadings before all the issues are clear is a draconian move which should not be exercised in a case such as this.

For the above reasons, I dismiss the application dated 12th August, 2021.

I also dismiss the Preliminary Objection dated 20th September, 2021.

Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31ST DAY OF JANUARY, 2022

M.N. GICHERU

JUDGE