



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW COURT
ELC CASE NUMBER 835 OF 2015

FIDELITY COMMERCIAL BANK.PLAINTIFF/APPLICANT

=VERSUS=

BEDAN MWAURA IRARI.1ST DEFENDANT/RESPONDENT

CHARLES CHEGE GITAU.....2ND DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Plaintiff/Applicant Notice of Motion dated **28th August 2015**, brought under **Section 1A, 1B and 3A** of the **Civil Procedure Act, Order 40 Rule 1 Order 51, Rule 1 of the Civil Procedure Rules, Section 68 of the Land Registration Act No.3 of 2012**, inherent jurisdiction of this Honourable Court and all other powers and enabling provisions of the law.

The applicant has sought for these prayers.

a. That the 1st and 2nd Defendants whether by themselves or their servants or agents, Advocates or any other persons acting for and/or on their behalf be restrained by a temporary Order of injunction from doing the following acts or any of them; that is to say from further dealing in, disposing off or otherwise howsoever at any other time from this date by completing by conveyance or transfer of any sale concluded by private treaty or leasing ,letting or otherwise howsoever interfering with the ownership of title to and/or interest in all that property known as title number Laikipia /Nyahururu/8672 and or any part and or portion thereof and or more particularly all and/any of its subdivided parcels derived from the same pending the hearing and eventual determination of this suit.

b. That an order be made under section 68 of the Land Registration Act, No.3 of 2012 that during the pendency of this suit All further registration or change of registration in the ownership ,leasing, subleasing ,allotment ,user ,occupation or possession or in any kind of right , title or interest ,in all that parcel of land known as title number Laikipia /Nyahururu/8672 with any Land Registry, Government Department and all other registering authorities be and is hereby prohibited.

c. That the Plaintiff be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.

d. That costs of and occasioned by this application be taxed and paid by the Defendants to the

Plaintiffs.

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of ***Stella Mbuli***. These grounds are:-

- a) ***That at all material times, the Plaintiff and the 1st Defendant maintained an employee/employer relationship where the 1st Defendant was an employee of the Plaintiffs as a Senior Accountant.***
- b) ***That on diverse dates between 20th December 2013 and 8th May 2015 , the 1st Defendant while working for the Plaintiff but without the Plaintiff's knowledge or consent took, obtained and/or fraudulently acquired and converted for his own use or purpose the sum of kshs.8,843,701/= the property of the Plaintiff.***
- c) ***That further the 1st Defendant entered into a sale agreement with the 2nd Defendant for the purchase of 0.096 acres of land to be excised from title number, Laikipia/Nyahururu/8672 owned by the 2nd Defendant.***
- d) ***That the Defendants then opened Bank Account No. [particulars withheld] with the Plaintiff Bank in the name of the 2nd Defendant through which account the sum of kshs.8,843,702/= was fraudulently transferred to the 2nd Defendant by the 1st Defenant.***
- e) ***That the 1st Defendant was charged with criminal offence in CMCC No. 47 of 2015 ad the 2nd Defendants is a material witness in the said criminal case.***
- f) ***Further that the 2nd Defendant has since rescinded the said agreement by issuing a 30 days' Notice to the 1st Defendant and may at any time now proceeds to sell the property to third parties while retaining 50% of the sum illegally paid to him by the 1st Defendant should the 1st Defendant not remit further instalments.***
- g) ***That further substantial loss and damage would result to the Plaintiff, unless the preservative orders sought are granted pending the hearing and determination of this suit.***
- h) ***Further that the property in dispute risks and is in danger of being completely lost/wasted should it be sold and alienated by the Defendants who shall encumber unsuspecting members of the public with tainted titles .***
- i) ***That it is in the interest of justice that the aforesaid orders be granted as prayed.***

In her supporting Affidavit, ***Stella Mbuli***, the Legal Manager of the Plaintiff bank averred that the 1st Defendant was an employee of the bank

until sometime in May 2015, when he was summarily dismissed for gross negligence and was subsequently arrested and arraigned in Court for loss of ***Kshs.8843,702/=*** which he fraudulently acquired and converted for his own use or purpose.

Further that the 1st Defendant had entered into a sale agreement with the 2nd Defendant sometimes in December 2013, for purchase of ***0.096 acres*** of land to be excised from title number ***Laikipia /Nyahururu/8672*** owned by the 2nd Defendant at the purchase price of ***Kshs.9,800,000/=*** .She also averred that the Defendants opened a ***Bank Account No. [Particulars withheld]*** with the Plaintiff Bank in the name of the 2nd Defendant through which Account the sums of ***Kshs.8843,702/=*** were fraudulently transferred to the 2nd Defendant by the 1st Defendant. She also averred that the 2nd Defendant has issued a ***Completion Notice*** to the 1st Defendant in terms of the sale agreement requiring the 1st Defendant to

remit further installment payments or otherwise the agreement would be considered breached.

It was her further disposition that unless the orders of injunction are sought, the Defendants while using the aforesaid fraudulently acquired sums are likely to finalize the sale of the subject property and/or the 2nd Defendant may resell the same to unsuspecting 3rd parties whilst retaining 50% of the sums stolen from the plaintiff, hence the need for urgent restraining orders. She urged the Court to grant the orders sought in the application herein.

The application is contested and 2nd Defendant herein **Charles Chege Gitau** filed a Replying Affidavit on **11th September 2015**, and averred that the Plaintiffs application has no merit /and or substance and is misconceived in so far as he is concerned. He further averred that the Plaintiff has not disclosed any cause of action against him in the suit and in the application to warrant granting of the orders sought in the Instant application.

He further averred that he is aware that the 1st Defendant was employed by the Plaintiff but he is a stranger to the alleged gross negligence allegedly committed by the 1st Defendant and the alleged loss of **Kshs 8,843,702/=**. He also admitted to having entered into an agreement for sale of a portion of title number **Laikipia/Nyahururu/8672** to the 1st Defendant on **20th December 2013**, as evidenced by annexures **CCG 1**. It was his contention the he opened **Account No.0020004518** , after he was advised to do so by the 1st Defendant for ease payment of the balance of the purchase price for sale of a portion of **Laikipia/Nyahururu/8672** that the 1st Defendant was to pay . Further that he was a total stranger to the alleged theft and conversion of the Plaintiff's property by the 1st Defendant.

Further that he is aware of the Criminal case **No.47 of 2015** , against the 1st Defendant and that he recorded his statement with the police but only limited to his transaction with the 1st Defendant in regard to the sale of a portion of **title ,Laikipia /Nyahururu/8672** ,and the payments made by the 1st Defendant to his account. However, he averred that his admission that monies were transferred to his account by 1st Defendant was not an admission that he was aware of any gross negligence, acts of theft and/or conversion of the plaintiff's funds by the 1st Defendant and he is a stranger to such dealings. It was his further contention that the agreement between him and 1st Defendant was above board and all monies paid to his account by the 1st Defendant were in compliance of the terms of the said agreement. Further that he issued a completion notice to the 1st Defendant as alleged and this was due to the breach of the terms of the agreement by the 1st Defendant.

The 2nd Defendant therefore alleged that the Plaintiff is not entitled to the injunction order sought as the Plaintiff has no interest recognized in law over title number **Laikipia/Nyahururu 8672**. It was his further contention that the 1st Defendant has not acquired any right or interest in law over title **Laikipia/Nyahururu/8672** , following his breach of contract and failure to pay the full agreed purchase price hence no right over the property can accrue to the Plaintiff even through its claim against the 1st Defendant. It was his further contention that he has neither committed any fraud nor been aware of any fraud by the 1st Defendant as alleged by the Plaintiff to warrant an inhibition of any dealing in his property. Further that he has no intention of transferring his property to the 1st Defendant until and unless the full purchase price is paid in full compliance of the sale agreement.

He deposed that he is the duly registered proprietor of **Laikipia/Nyahururu/8672** and that the Plaintiff has not demonstrated any ground or reasons for vitiating or annulling his title to the said land. He also contended that as an absolute registered proprietor, he stand to suffer prejudice if the prayers sought by the Plaintiff are granted and he urged the court to dismiss with costs the instant application.

The 1st Defendant did not enter appearance nor file his Replying Affidavit to the instant Notice of Motion. The application was canvassed by way of written submissions. The Law Firm of **Philip Muoka & Co. Advocates** for the Plaintiff filed their written submissions on **8th February 2016** and urged the

court to allow the application entirely. They relied on the cases of **Giella Vs Cassman Brown ,Mrao ltd vs First American Bank of Kenya & 2 Others (2003) KLR 125** and also on **Japhet kaimenyi M'ndatho Vs M'ndatho M'mbwina (2012)ekLR**, where the court held that:-

“ In an application for orders of inhibition , in my understanding , the applicant has to satisfy the following conditions”.

- a. That the suit property is at the risk of being disposed of alienated or transferred to the detriment of the applicant unless preservative order of inhibition are issued .***
- b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.***
- c. That the applicant has arguable case.***

He also relied on the case of **Falcon Properties Ltd Vs Tom Chore Odiara & 2 others(2013) ekLR and Philip Mwangi Githinji Vs Grace Wakarima Githinji (2004) ekLR** where the Court held that:-

“An order of inhibition issued under section 128 of the Registered Land Act is a kin to an order of prohibitory injunction for it restricts the registered owner and any other persons from having their transactions regarding the land in question registered against the title. Before the Court can issue such an order, it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition. Such ground would normally be in form of a sustainable claim over the suit land”.

The Court has now carefully considered the instant application, the annexures thereto, the relevant provisions of law and the written submissions and the court makes the following findings;-

There is no doubt that the suit property herein ***Laikipia/Nyahururu/ 8672*** approximately ***0.096 ha*** was registered in the name of 2nd Defendant herein ***Charles Chege Gitau*** on ***5th December 2013***. The 2nd Defendant being the registered owner, he is deemed to be the absolute proprietor as provided by ***Section 26(1)*** of the ***Land Registration Act*** which provides:-

“ The certificate of title issued by the Registrar upon registration of Land upon a transfer of transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is absolute and indefeasible owner subject to the encumbrances ,easements, restrictions and conditions in the certificate and the title of that proprietor shall not be subject to challenge except;-

- a. On the grounds of fraud or misrepresentation to which the person is proved to be a party or,***
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.***

In the Instant certificate of title held by the 2nd Defendant, there are no restrictions and conditions contained or endorsed in the said certificate. The 2nd Defendant is therefore deemed to be the absolute and indefeasible owner of the suit property.

There is also no doubt that the 1st Defendant and 2nd Defendant entered into a sale agreement dated ***20th December 2013***, for purchase of ***0.096 acre*** from ***Laikipia/Nyahururu/8672*** for a consideration of ***Ksh.9800,000/=*** . From the sale agreement, the purchaser, 1st Defendant was to become a proprietor of the purchased portion of land after a successful completion of the intended subdivision and full payment of the stated purchase price.

There is also no doubt that the 1st Defendant, ***Bedan Mwaura Irari*** was an employee of the Plaintiff herein, ***Fidelity Bank*** having been employment, on ***2nd May 2011***, as a Senior Accountant. Further it is

evident that the 1st Defendant was terminated as an employee of the Plaintiff vide a letter dated 8th May 2015 for reasons stated in the letter of termination of employment among them engaging in theft and serious misconduct.

Thereafter, the 1st Defendant was charged on **20th May 2015**, with an offence of stealing by servant, particulars being that he stole **kshs.9019,503/=** from the Plaintiffs bank. It is also evident that the 2nd Defendant did write a statement in connection to the above theft and he admitted having received **Kshs.8,900,000** as purchase price for sale of a portion of **Laikipia/Nyahururu/8672** to the 1st Defendant in furtherance of the sale agreement dated 20th December 2013. The 2nd Defendant did admit that he opened a business account with Plaintiff Bank, Westlands Branch where the 1st Defendant used to deposit monies as instalment payments for the purchase price earlier agreed on. There is also evidence that the 2nd Defendant has written a completion Notice to the 1st Defendant dated 1st June 2015. It is also not in doubt that due to the stated completion, Notice, the Plaintiff herein filed this suit and the instant application seeking for the orders herein.

The issue now for determination is whether the applicant is deserving of the orders sought.

The applicant has sought for two main prayers – an order of injunction and inhibition or prohibition Order under Section 68 of the Land Registration Act.

For the court to grant an order of temporary injunction, the applicant has to satisfy the threshold principles set out in the classical case of **Giella Vs Cassman Brown Co.Ltd 1973 EA 358**, where the court held that:-

“ First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decidethe application on the balance of convenience”.

The applicant herein firstly needed to establish that it has a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others [2003] klr**, prima-facie case was described as;

“ A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to 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”.

From the above description it is evident that a prima facie case means more than an arguable case. The applicant must show that his/her right has been infringed.

The applicant herein has sought to injunct any dealing on land title **No.Laikipia/Nyahururu/8672**, which is owned by the 2nd Defendant as an absolute and indefeasible owner. The 2nd Defendant got registered as a proprietor of this suit property on 5th December 2013. The approximate size of the land is **0.096 Ha**. There is no evidence that the 2nd Defendant acquired this suit land through fraud or corrupt scheme. Without any evidence of the title having been acquired fraudulently, illegally, irregularly or through misrepresentation, then the 2nd Defendant's title cannot be challenged or defeated and it is conclusive evidence that 2nd Defendant is the absolute and indefeasible owner of the suit property.

Further the 2nd Defendant entered into a sale agreement with the 1st Defendant on **20th December 2013**, for sale of **0.096 acres**, which is a portion of land from **Laikipia/Nyahururu/8672**. The purchase price was **Ksh 9,800,000/=** in which the 1st Defendant had paid through instalments to about **8843,702/=**. The Plaintiff alleged that the 1st Defendant stole this money from the Plaintiff Bank and used the same to pay for the purchase of the portion of land referred to in the sale agreement. The portion of land to be

purchased by 1st Defendant was 0.096 acres from the land owned by 2nd Defendant **Laikipia/Nyahururu/8672**. The 1st Defendant has been charged with a criminal offence which is pending and he has not been convicted yet. The 2nd Defendant has not denied that he did receive money from the 1st Defendant. However, the 1st Defendant has not completed payment of the full purchase price and he is in breach of the sale agreement. The transaction was between the 1st and 2nd Defendants. The Plaintiff herein has no **nexus** to that sale agreement and it cannot claim to have any interest right or claim over title **No.Laikipia/Nyahururu/8672**. There is no evidence that the 2nd Defendant was aware that the money that the 1st Defendant had paid him in installment was acquired fraudulently, or through theft by 1st Defendant.

The Plaintiff herein has no right over the 2nd Defendant's parcel of land. The 2nd Defendant as a proprietor of the suit land has his rights protected under **Section 25(1)** of the **Land Registration Act**, which provides that:-

“ The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto from all other interests and claims whatsoever”.

The rights that such a proprietor enjoys is to deal with the land as he so wishes. The applicant has sought to curtail those rights that the 2nd Defendant so enjoys over his parcel of land but plaintiff has no known interest over this parcel of land, but the Plaintiff has no known interests over this parcel of land so as to obtain the orders sought. The Plaintiff has a claim against the 1st Defendant and 2nd Defendant is its witness and the Plaintiff should not inconvenience the 2nd Defendant at all over its disputes with the 1st Defendant herein. The Court finds that the Plaintiff has not established that it has a prima facie case with probability of success.

On the 2nd issue of whether the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that the amount of money that the 1st Defendant allegedly stole from the Plaintiff is known and can be quantified. It is also evident that the 1st Defendant has been charged over the alleged theft from the Plaintiff. The Plaintiff can quantify its loss and seek for compensation from the 2nd Defendant.

If there is a breach of contract, then that is between the 1st and 2nd Defendant. The 2nd Defendants has not alleged that he will not refund the purchase price already paid to him in case such an order is made by the Court. The issue of recovery of the money allegedly stolen from Plaintiff by 1st Defendant should not be used to encumber the 2nd Defendant's parcel of land and there is no evidence that the 2nd Defendant knew that the money paid to him was allegedly stolen money. The Court finds that the loss allegedly suffered by the applicant can be compensated by an award of damages. See the case of **Wairimu Mureithi Vs City Council of Nairobi Civil Appeal No.5 of 1979**, where the Court held that:-

“However strong the Plaintiff's case appear to be at the stage

of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant

would be in a financial position to pay them”.

On the third principle of if the court is in doubt to decide on a balance of convenience, the court finds that it is not in doubt herein. However if the court is called to decide on the balance of convenience, the same tilts in favour of the 2nd Defendant, who owns **Laikipai/Nyahururu/8672**, but had only sold a portion of it to 1st Defendant. Even if the Plaintiff is entitled to recover the portion that the 1st Defendant how allegedly bought from the 2nd Defendant, then there is no justification why the whole portion of the 2nd

Defendants land should be curtailed. The Plaintiff therefore cannot injunct the whole portion of land for the 2nd Defendant because of its claim against the 1st Defendant. The court finds that the balance of convenience herein tilts in favour of the 2nd Defendant. The applicant is therefore not entitled to injunction order sought herein.

On the second order of prohibition under Section 68 of the Land Registration Act, the court finds that it has power to issue inhibition, but on deserving cases Section 68(1) provides as follows:

“ The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event or generally until a further order, the registration of any dealing with any law, lease or charge”.

The applicant has asked the court to prohibit any further registration of any dealing on the suit property ***Laikipia/Nyahururu/8672*** until this suit is heard and determined. There are various cases decided on the threshold for granting of inhibition orders. As quoted by the applicant in the case of ***Japhet Kaimenyi M’ndatho vs M’ndatho M’mbwiria (2012)eklR***, the Court held that;-

“In an application for orders of inhibition in my understanding, the applicant has to satisfy the following conditions;-

a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.

b. That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.

c. That the applicant has an arguable case”.

It is also evident that the power to grant the prohibitory order is discretionary which is only granted where there is a very good reason to preserve the suit property and stay any further dealings. From the available evidence herein, the Plaintiff has a claim against the 1st Defendant who had only purchased a portion of land from the 2nd Defendants land. There is no evidence that the 2nd Defendant has intention of disposing of the whole suit land, being ***Laikipia/Nyahururu/8672***. The Plaintiff herein may only be interested in the portion of land that was to be transferred to the 1st Defendant. That interest is not good enough to warrant this court to issue an inhibition order on the whole portion of land that is owned by the 2nd Defendant who is the absolute and indefeasible proprietor.

The order sought herein is supposed to prohibit any dealing on the suit property and preserve the same but is it justifiable?. In the case of ***Philip Mwangi Githinji Vs Grace Wakarima Githinji (2004) eklr, Okwengu J*** (as she then was) held that:-

“ An order of inhibition issued under section 128 of the Registered land Act is a kin to an order of prohibitory injunction for it instructs the registered owner and any other person from having their transactions regarding the land in question registered against the title. Before the court can issue such an order, it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition. Such grounds would normally be in the form of a sustainable claim over the suit land”.

The plaintiff herein has no good grounds for seeking for such orders as it seeks to prohibit the whole suit land whereas its claim is over the portion of land allegedly sold to the 1st Defendant. In any event, the Plaintiff can seek to recover the amount paid to the 2nd Defendant as purchase price by 1st Defendant without having to inhibit any dealing on the suit property. The Plaintiff herein has not established any cause of action against the 2nd Defendant and the Court herein cannot exercise its discretion in favour of the Plaintiff/Applicant in the instant applicant.

Having now carefully considered the instant application, the Court finds it not merited and it is dismissed

entirely with costs to the 2nd Defendant herein.

It is so ordered.

Dated, Signed and Delivered this **16th** of **September, 2016**.

L.GACHERU

JUDGE

In the presence of ;-

None appearance for the Plaintiff/Applicant though served with Ruling Notice.

None appearance for the 1st Defendant/Respondent

M/s Busima holding brief for Mwangi for the 2nd Defendant/Respondent

Court Clerk : Hilda

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above advocate and absence of the 1st Defendant and the Plaintiff/Applicant though duly served with Ruling Notice.

L.GACHERU

JUDGE