



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 224 OF 2021

JANE GAKII MARETE.....PLAINTIFF/APPLICANT

VERSUS

AHMED ABDALLA MWIDAU

PRIME BANK LIMITED.....DEFENDANT/RESPONDENTS

RULING

The Application is dated 3rd November 2021 and is brought under Order 40 Rule 1, 2 and 3, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified as urgent and be heard *ex parte* in the first instance.
2. That this Honourable Court be pleased to issue a temporary injunction against the Defendants restraining them either by their from any trespassing agents, servants employees and/or in transferring, disposing and/or onto themselves, off, their employees from manner interfering with the Plaintiff's quiet possession on the property known as Plot L.R. Subdivision No. 2544 (Original No. 1508/5) Section I Mainland North pending the hearing and determination of this application.
3. That this Honourable Court be pleased to issue an injunction against the Defendants restraining them either by themselves, agents, servants transferring, and/or disposing off, trespassing onto and/or in any manner interfering with the Plaintiff's quiet possession on the property known as Plot L.R. Subdivision No. 2544 (Original No. 1508/5) Section I Mainland North pending the hearing and determination of this suit.
4. That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to grant.
5. That costs of this Application be provided for.

It is based on the grounds that the Plaintiff is the beneficial owner of all that parcel of land known as Plot L.R. Subdivision No. 2544 (Original No. 1508/5) Section I Mainland North as from the year 1998 vide an agreement dated 4th June, 1998. That at the time of purchase of the suit property by the Plaintiff from the 1st Defendant the same was mortgaged with the 2nd Defendant which property was to be discharged by the 1st Defendant and thereafter have the same transferred to the Plaintiff. That the Plaintiff has been in actual possession of the suit property since the year 1998 and after having paid in full the agreed purchase price up to now and has carried out several improvements thereon despite the fact that the property is still mortgaged with the 2nd Defendant. That the 1st Defendant has never discharged the suit property from the 2nd Defendant and his whereabouts are unknown. That the Plaintiff has on several occasions approached the 2nd Defendant and made offers of repaying off the debt owed by the 1st Defendant on the property so that the same can be Discharged and ultimately be transferred to the Plaintiff but the 2nd Defendant has rejected the said offers without assigning any cogent reasons thereto. That the Defendants have now through their agents and/ or employees threatened to evict the Plaintiff from the suit land which will cause irreparable loss and damage to the Plaintiff.

The 2nd Defendant stated that the orders sought are misconceived and untenable in law and the Plaintiff's Supporting Affidavit is replete with falsehoods. That as the Plaintiff correctly acknowledges, the property known as Plot L.R. Subdivision No. 2544 (Original No. 1506/5) Section I Mainland North is charged to the 2nd Defendant in respect of which the 2nd Defendant obtained a Decree in August 2007. Exhibit 'HS-1', is a true Photostat copy of the Decree and Certificate of Costs. That the property is also the subject of a charge which continues to subsist and it is untrue that the 1st Defendant cannot be found as is alleged by the Plaintiff. The 1st Defendant has been in touch with the 2nd Defendant through his Advocates, Abdulaziz & Company, Advocates of Nairobi as recently as 14th September 2021. That the Plaintiff has also been less than candid in failing to disclose that this Honourable Court has already deliberated on the matters now being raised, albeit in an Originating Summons application filed by the 2nd Defendant against the Plaintiff for removal of Caveat No. 15351/6 she caused to be

registered against the title to the suit property. Exhibit 'HS-2', a true photostat copy of the Judgement of this Honourable Court delivered on 20th January 2017. That it is not true that the Plaintiff has approached the 2nd Defendant with a view to redeeming the mortgage debt outstanding. Nor has any evidence been produced before this Honourable Court to support the allegations made as against the 2nd Defendant. That the documents relied upon by the Plaintiff to justify her prayer for relief in her Supporting Affidavit are also deceptively misleading. It is apparent from the application filed that not only is the Plaintiff acting with complete lack of candour and in a discordant manner but that she surreptitiously seeks to obtain Orders from this Honourable Court that clog the 1st Defendant's equity of redemption and impede the 2nd Defendant's statutory right of recovering of the Mortgage debt. That this Honourable Court dismiss the Plaintiff's present application with costs to the Defendants. In any event, the Plaintiff states she is ready, willing and able to pay off and should pay the mortgage debt which stood at KShs.21,591,606.25 in terms of the Decree issued as stated above if she is willing so to do on account of the 1st Defendant.

This court has considered the application and submissions therein. In the case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358 the principals for granting an injunction are stated as follows:

1. First an applicant must show a prima facie case with a high probability of success;
2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
3. If the Court is in doubt, it will decide an application on the balance of convenience.

It is a finding of fact that the Applicant herein does not dispute that, the property known as Plot L.R. Subdivision No. 2544 (Original No. 1506/5) Section I Mainland North is charged to the 2nd Defendant in respect of which the 2nd Defendant obtained a Decree in August 2007. Exhibit 'HS-1', is a true Photostat copy of the Decree and Certificate of Costs. It is also a finding of fact that in an Originating Summons application filed by the 2nd Defendant against the Plaintiff for removal of Caveat No. 15351/6 she caused to be registered against the title to the suit property. Exhibit 'HS-2', a true photostat copy of the Judgement of this Honourable Court delivered on 20th January 2017. I find that the Plaintiff/Applicant has not established a prima facie case with a high probability of success. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23rd DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE