



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO.133 OF 2021

COAST IRON ENGINEERING LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NOORJAHAN EBRAHIM ADAM.....1ST DEFENDANT/RESPONDENT

SBM BANK (K) LTD.....2ND DEFENDANT/RESPONDENT

KEYSIAN AUCTIONEERS.....3RD DEFEDNDANT/RESPONDENT

RULING

The application is dated 12th July 2021 and is brought under Section 13 and 19 of the Environment and Land Court Act, Article 40 of the Constitution of Kenya 2010, Sections 1A,1B, 3, 3A and 63(e) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rule 1, 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010 Laws of Kenya, Sections 24 and 25 of the Land Registration Act 2012, Laws of Kenya, Section 16 of the Environment and Land Court Act and seeking the following orders;

1. That this Application be certified urgent and service be dispensed with in the first instance.
2. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents herein either by themselves, their agents, assignees, servants auctioneers, and/or third parties from disposing, selling and/or dealing, charging and/or interfering in whatsoever manner with all that parcel of land known as Title CR 67477 Mainland North Section 1/20247 Apartment No. 22 Block B2, 2nd Floor pending hearing and determination of this application and the suit herein accordingly.
3. That this Honourable Court be pleased to Order that the Plaintiff/Applicant herein has acquired proprietary interest of the subject property being Title CR 67477 Mainland North Section 1/20247 Apartment No. 22 Block B2, 2nd Floor.
4. That the Honourable Court be pleased to order/direct that pending the hearing and determination of the instant application and suit, the Applicant do proceed to take possession and use of the subject property as the beneficial owner accordingly.
5. That the Honourable Court be pleased to order/direct the Respondents jointly and severally to proceed and release the Original Title document with duly executed transfer instruments and discharge of charge and all other completion documents to the Applicants within a period of seven (7) days from the date of the issuance of the Order(s).
6. That in the alternative to prayer No. 5 hereinabove, the Honourable court be pleased to order/direct the Deputy Registrar to proceed and execute all the transfer instruments transferring the subject property to the Plaintiff/Applicant respectively.
7. That the Honourable Court be pleased to Order the Land Registrar Kilifi to proceed and Register the Plaintiff as the Registered owner and consequently to proceed and issue him with title document forthwith without gazettelement.
8. That the OCS of the nearest Police Station do ensure compliance with the orders herein in that the Plaintiff enjoys quite possession and use of the subject property being Title CR 67477 Mainland North Section 1/20247 Apartment No. 22 Block B2, 2nd Floor thereof with the developments accordingly.
9. That the costs of this Application be in the cause.

It is based on the grounds that the Applicant entered into a sale agreement with the 1st Respondent for sale of Title CR 67477 Mainland North Section 1/20247 Apartment No. 22 Block B2, 2nd Floor. That the 1st Respondent did mention to the Applicant that he was indebted by the by the 2nd Respondent hence the request for payment of 10% deposit hence the need to dispose off the suit property. That it was the term of the said agreement that the Applicant would pay the 1st Respondent 10% of the Purchase price being Kshs. 50,000,000/=. That the balance of the purchase price would be paid by the Applicant to the 1st Respondent on successful registration and transfer of the title document in favour of the Applicant. That the Applicant has paid the said sum of Kshs. 5,000,000/= which the 1st Respondent has acknowledged receipt. That the 1st Respondent is in breach of the said agreement as he has refused, failed and/or neglected to complete the said transaction by failing to release the completion documents to enable the suit property be transferred in favour of the Applicant. That the 2nd Respondent through the 3rd Respondent has advertised the said property for sale and in the circumstances has issued 45 days redemption Notice for sale of the said property. That unless restrained and the 1st Respondent compelled to complete the transaction by this Honourable Court, the Respondents will proceed to sell and/or dispose the suit property to third parties albeit unlawfully. That the Applicant now invokes clause 10.1 of the agreement. That unless restrained by this Honourable Court, the Applicant will suffer loss as it will lose the amount paid and the suit property. That it is in the interest of justice that the orders sought herein are granted as prayed. That the Respondents will not suffer any prejudice if this Application is allowed as prayed.

The respondents submissions are that the 2nd Defendant advanced a facility to the 1st Defendant/Respondent for Kenya Shillings Forty Million (Kshs. 40,000,000/=) vide a Letter of Offer dated 14th April, 2015. (Annexed as DM-l(a) in the Replying Affidavit). That the aforesaid term loan facility was repayable in equal monthly instalments of Kenya Shillings One Million Seven Thousand and Fifty-Four (Kshs. 1,007,054/-) for a period of sixty (60) months. That the 1st Defendant defaulted in their repayment obligations prompting the 2nd Defendant Bank to issue them with the requisite statutory notices which the 1st Defendant/Borrower refused and declined to heed. Consequently, and after following due process, the 2nd Respondent Bank vide a letter dated 7th September, 2020 (Annexed as DM-l(a) in the Replying Affidavit) proceeded to instruct Keysian Auctioneers to proceed and sell the property by way of public auction. That however, without the knowledge nor written consent of the 2nd Defendant/Respondent, the 1st Defendant proceeded to negotiate a sale agreement with the Plaintiff herein. That on the basis of the sale agreement dated 10th May, 2021, the Plaintiff now seeks injunctive orders against the 2nd Respondent Bank to prevent them from exercising their accrued statutory right of sale. That it is from the foregoing series of events that this Application stems.

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 facility was disbursed to the 1st Defendant/Respondent. It is a not in dispute that there is a duly registered charge in favour of the 2nd Defendant/Respondent and that the 1st Defendant is in default and that the facility remains outstanding. The 2nd Respondents had serviced the requisite statutory notices upon the 1st Defendant. I find that the 2nd Defendant is a stranger to the sale agreement dated 10th May, 2021 negotiated between the Plaintiff and the 1st Defendant and cannot be bound by it. Again on the purported sale of the suit property by the 1st Defendant to the Plaintiff and as per clause 4.1.10 of the charge instrument which provides that the chargor will not without prior consent in writing of the chargee part with the possession of, transfer, sell, assign, lease or give a license to utilize or otherwise dispose of any interest in the charged property. The 2nd Respondent denies giving any such consent. For those reasons 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 22ND DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE