



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 33 OF 2021

**NDORO CHAKA CHENGO (*suing as the Administrator and Personal Representative of
Estate of the late CHAKA CHENGO MBEGA - DECEASED*).....PLAINTIFF**

VERSUS

1. MORE THAN CONQUERORS LIMITED

2. GULF AFRICAN BANK LIMITED

3. THE LAND REGISTRAR

4. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

The application is dated 28th July 2021 and is brought under Section 1A, IB, 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 rule 1 and 2, Order 51 Rule 1 seeking the following orders.

1. That this Honourable court may be pleased to certify this Application as urgent and service hereof be dispensed with in the first instance.
2. That this Honourable court may be pleased to issue temporary orders of injunction restraining the Defendants/Respondents by themselves, their servants, agents, and/or an person acting under them from disposing, selling, subdividing, alienating, developing, constructing, occupying, auctioning, cultivating, farming and/or in any way dealing with the Applicant's property Title Number Kilifi/Kadzonzon/Madzimbani/1189 pending hearing and determination of this Application.
3. That this Honourable court may be pleased to issue temporary orders of injunction restraining the Defendants/Respondents by themselves, their servants, agents, and/or an person acting under them from disposing, selling, subdividing, alienating, developing, constructing, occupying, auctioning, cultivating, farming and/or in any way dealing with the Applicant's property Title Number Kilifi/Kadzonzon/Madzimbani/1189 pending hearing and determination of this suit.
4. That costs of this Application be provided for.
5. That this Honourable court may be pleased to issue any other order it may deem fit in the circumstances.

It is based on the grounds that the Plaintiff is the legal and beneficial owner of Plot Number Kilifi/Kadzonzon/Madzimbani/1189 having inherited the same from his late father. That sometime in 2018 the Plaintiff and the 1st Defendant entered into an agreement for sale of 15 acres of the parcel of land at the price of Kshs. 6,000,000/= per acre. That it was agreed that the Plaintiff would process letter of Administration and have Title changed in his name and the 1st Defendant was to give the Plaintiff Kshs. 2,000,000/= to facilitate the same however the 1st Defendant did not give the Plaintiff the said sum. That subsequently and without any colour of right and illegally so, the 1st Defendant fraudulently transferred Title to the entire parcel of land to itself without having paid the purchase price. That the 1st Defendant fraudulently obtained Title to the entire parcel of land and not the 15 acres agreed and further failed to pay the purchase price for the suit property. That the 1st Defendant further charged the suit property to the 2nd Defendant albeit illegally and obtained funds. That the Plaintiffs property is thus in danger of being disposed and/or attached and the 1st Defendant may dispose off the Plaintiff's property. That it is imperative that this Honourable Court be pleased to issue temporary injunction to preserve the suit property. That it is in the interest of justice that the Application be allowed as prayed.

The 1st Defendant stated that every step taken by the 1st Defendant with regard to the property herein was with the full knowledge and sanction of the Applicant and thus allegations of fraud are not founded nor can they be the basis of granting a Temporary injunction. That the Applicant, having consciously participated on all the processes with regard to the sale of the property herein has not laid any basis with regard to the satisfaction of the conditions with regard to the issuance of an order for temporary injunction. That in any event, if the applicant has any claim against the 1st Defendant with regard to the agreement for sale, which is not admitted, the said amount, if any, is quantifiable and can, once proved, be awarded and thus damages would be an adequate remedy.

The 2nd Defendant stated that the Plaintiff is not entitled to the injunction he seeks because he voluntarily signed the documents that led to the transfer of Title No. Kilifi/Kadzonzo/Madzimbani/1189. The Suit Property is presently lawfully in the name of the 1st Defendant. The charge was registered on 9th December 2019. The Plaintiff has inexplicably waited for more than fourteen (14) months to question the charge and a further four (4) months to seek to stop the 2nd Defendant from exercising its statutory power of sale. That it is unfair in the circumstances, to stop the 2nd Defendant from exercising its statutory power of sale, as and when the circumstances demand, upon issuance of the appropriate statutory notices. That additionally, the Plaintiff did in fact sell and transfer the Suit Property to the 1st Defendant, whether wholly or partially. There was therefore a quantification of the value of the Suit Property. Therefore, any loss that he may suffer can be adequately compensated by an award of damages. That if the Plaintiff is minded to have the Charge discharged, he needs to pay the amounts due and owing to the 2nd Defendant. The 2nd Defendant will then unconditionally discharge the Charge and leave the Plaintiff and the 1st Defendant to resolve their issues, to which the 2nd Defendant is a stranger.

The 3rd and 4th Respondents/Defendants stated in their grounds of opposition that the orders of injunction sought therein cannot be issued as against the 3rd and 4th Respondents/Defendants as per section 16 of the Government Proceedings Act, CAP 40, Laws of Kenya and Order 29 Rule 2(2)(d) of the Civil Procedure Rules. That the Applicant/Plaintiffs has not disclosed reasonable cause of action against the 3rd and 4th Respondents/Defendants.

This court has considered the application and submissions therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd* 1973 E.A 358 and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial*
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
- 3. If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the Applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity. That the Plaintiff/Applicant stated that the 1st Defendant fraudulently transferred Title to the entire parcel of land to itself without having paid the purchase price. That the 1st Defendant fraudulently obtained Title to the entire parcel of land and not the 15 acres agreed and further failed to pay the purchase price for the suit property. That the 1st Defendant further charged the suit property to the 2nd Defendant albeit illegally and obtained funds. That the Plaintiffs property is thus in danger of being disposed and/or attached and the 1st Defendant may dispose off the Plaintiff's property. The respondents submit that the Plaintiff is not entitled to the injunction he seeks because he voluntarily signed the documents that led to the transfer of Title No. Kilifi/Kadzonzo/Madzimbani/1189. The Suit Property is presently lawfully in the name of the 1st Defendant. I find that there is a sale agreement on record to confirm the same. I find that the applicant has failed to establish a prima facie case with a probability of success at the trial. I find this application has no merit 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