



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND

AT THIKA

ELC NO. 53 OF 2021

HANSON DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

SIGNATURE PROPERTIES LIMITED.....1ST DEFENDANT

INSPECTOR GENERAL OF POLICE..... 2ND DEFENDANT

RISHAD HAMID AHMED.....3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

RULING

1. The Plaintiff/Applicant filed the instant application seeking Orders THAT;

a. Spent.

b. Spent.

c. This Honourable Court do grant an order restricting the 1st and 2nd Defendant/Respondent from interfering with the quiet possession of the Plaintiff/Applicant on its parcel of land Ruiru/Ruiru Block 7/86 pending the hearing and determination of the suit herein.

d. The Honorable Court grants an order requiring the 4th Defendant party to remove the restriction on the suit property.

e. The costs of this Application be provided for.

2. The application is based on the grounds on the face of it and supporting affidavit sworn by **Daniel N. Kihiko** on 10/5/2021. The gist of the application is that the Applicant is the registered owner of land parcel known as **Ruiru/Ruiru Block 7/86** (*hereinafter referred to as the suit property*) having purchased the same from the 3rd Respondent vide a sale agreement dated 2/5/2018. That the 3rd Respondent held purchaser's interest and completion documents in his favor from the 1st Respondent. Upon successful transfer of the suit property to the 3rd Respondent, he offered the same for sale to the Applicant who accepted and paid the purchase price of Kshs. 35M.

3. The applicant contends that sometime on 8/7/2019, the applicant's directors were summoned by the 2nd respondent to record statements on an ongoing investigation. That the investigation was in respect of the suit property transfer between the 1st and 3rd respondents prompting the 2nd respondent to place a restriction on the suit property. That the Applicant's directors were later variously charged in connection with the suit land to wit; forceful detainer, malicious damage to property and stealing. That the applicant is now apprehensive of losing his proprietary rights over the suit land hence the application.

4. The 2nd and 4th Respondents did not file any responses. The 3rd respondent supports the Application vide the Replying and Supplementary Affidavits sworn on 24/5/2021 and 23/7/2021 respectively.

5. The 1st respondent strongly opposes the application. The 1st respondent's director, **Kuldip Singh** swore a detailed Replying Affidavit on 9/7/2021 and avowed that it was in occupation of the suit property contrary to the Applicant's averments. He accused the Applicant and the

3rd respondent for fraud and forgery of relevant transfer documents of the suit land that is valued over Kshs. 350M. That the 1st respondent is the bona fide owner of the land known as **Ruiru/Ruiru East Block 7/866** and has never offered it or sold to the 3rd respondent. That its certificate of title was solely used as a loan security for the sum of Kshs. 1M obtained from the 3rd respondent in 2016.

6. The 1st respondent asserted that pursuant to the advanced loan, the 3rd respondent fraudulently transferred the suit land and he was accordingly charged with forgery and uttering false documents. That in any event, the 3rd respondent having obtained the suit land ownership marred by fraud, he could not pass any good title to the applicant. He urged the Court to dismiss the application with costs.

7. The application was canvassed by way of submissions. Only the 1st and 3rd respondents filed submissions through the firms of **Mugo & Associates Advocates** and **Aguko, Osman & Co. Advocates** respectively.

8. The 1st respondent argued that the applicant is in possession of the Property which it only managed to take possession of the suit property when Mr. Kuldip was away. That the applicant has failed to meet the threshold for granting temporary injunction. He beseeched the Court to dismiss the application with costs.

9. Conversely, the 3rd respondent submitted that he was rightfully registered as the owner of the suit land and validly sold it to the Applicant on 2/5/2018. That the applicant took peaceful occupation and currently in physical possession of the suit property contrary to the 1st respondent's averments. Further that, the applicant has fully satisfied the condition for granting injunctive reliefs as outlined in the case of **Giella vs Cassman Brown And Co. Ltd (1973) EA 358**.

10. The main issue for determination is whether the application is merited.

11. The application is premised under Sections 1A, 3A, 3B and Section 80 of Civil Procedure Act; Order 14, 22 Rule 22 Civil Procedure Rules.

12. Order 14 Civil Procedure Rules provides for production and impounding and return of documents while Order 22 rule 22 deals with stay of execution. The same are not applicable to the prayers sought in the application.

13. **Order 40 rule 1** Civil Procedure Rules provides for temporary injunctions and interlocutory orders that;

“Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

14. As rightly submitted by the respondents the test for granting a temporary injunction was set in the case of **Giella vs Cassman Brown And Co. Ltd (1973) EA 358** that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience.

15. The Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123**, defined a prima facie case as:

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

16. Injunctive reliefs are equitable orders granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others vs Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

17. It is trite that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law but rather that the Court will take into account that it is not supposed to decide the disputed issues with finality. All that the Court is supposed to do is to determine whether the Applicant is deserving of the orders sought based on the criteria laid down in the case of **Giella case** above.

18. From the affidavit evidence on record, the suit land became registered in the name of the 1st Defendant on the 5/10/2010. It was the case of the 3rd Respondent that the suit land was pledged by Kuldip Singh, a director of the 1st Defendant to cover the sum of Kshs 10 million borrowed from him and that on default he transferred the land to himself and was issued with a title on the 22/6/2018. That he later sold the suit land to the Plaintiff. The Plaintiff holds a title issued on the 20/7/18.

19. It is the Plaintiffs case that it is the duly registered proprietor of the suit land and has come to Court for protection against the alleged interference of its quiet and peaceful possession by the 1st and 2nd Respondents. The 1st Defendant contends in its lengthy affidavit that it did not sell its land to the 3rd Respondent. It however admits that the title was held by the 3rd Respondent as security for the payment of a loan in the sum of Kshs 1 Million advanced to Kuldip Singh (Director of the 1st Defendant) by the 3rd Respondent. The 3rd Respondent on the other hand contends that he caused the title to be transferred to his name pursuant to the loan agreement dated the 29/7/2016 which arrangement was within the knowledge and consent of the 1st Defendant.

20. As to whether the transfer of the suit land from the 1st Respondent to the 3rd Respondent and onto the Plaintiff is lawful or not, cannot be resolved now but only through calling evidence at the trial. Though **Section 26(1)** of the **Land Registration Act** provides that a **Certificate** of title issued to a proprietor is deemed to be prima-facie conclusive evidence that such proprietor is the absolute and indefeasible owner, such proprietorship can be challenged if the same was acquired through **fraud, misrepresentation, unprocedurally, illegally** or through a **corrupt scheme**. The process of determining any challenge to title is the due process set out in Article 40 (6) of the Constitution. On the face of the affidavit evidence it is therefore not in dispute that the land is currently registered in the name of the Plaintiff.

21. Secondly it is admitted in evidence by the 1st Respondent that the Plaintiff is in possession of the suit land since 2018. This position was supported by the Plaintiff as well as the 3rd Respondent.

22. Thirdly according to the material before Court, both the applicant and 1st respondent are claiming ownership of the suit property. So serious is the dispute that the help of Director of Criminal Investigation was sought as conceded by the parties and it caused a restriction to be placed on the suit land. **Paragraph 14** of the Applicant's Supporting affidavit disclosed that the applicant was summoned by the 4th respondent for a hearing on the alleged fraudulent transfer of the suit land and was to be heard on 12/5/2021 at Ruiru Land registry. The outcome of that hearing if at all, has not been highlighted.

23. In answering the question whether the Plaintiff has established a prima facie case, the Court relies on the decision in **Suleiman vs Amboseli Resort Ltd (2004) eKLR 589**, where the Court held that:-

“...Counsel for the Defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella vs Cassman Brown in 1973 cast in stone and no new element may be added into that position. I am not with respect in agreement with counsel in that point for the law was always kept growing to greater level of refinements as it expands to cover new situations not exactly foreseen before, Justice Hoffman in the English case of Films Rover international made this point regarding the grant of injunctive relief (1986)3All ER 722 at Page 780-781 ‘A fundamental principle is that the Court should take whichever course appears to carry the lower risk of injustice if it should always opt for the lower risk of injustice’.”

24. Further in the case of **Exclusive Estates Ltd vs Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004** where the Court held that:-

“A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter.”

25. From the totality of the evidence and material before Court including the various arguments and counterarguments surrounding the title, it is the view of the Court that the lower risk of injustice in the circumstances is to proceed under Order 40 rule 1 for purposes of the preservation of the suit property pending the hearing and determination of the same.

26. I am guided by the decision in **Kenya Airline Pilots Association Vs. Cooperative Bank of Kenya Limited & Another (2020)eKLR** where the Court stated:-

“By maintaining the status quo, the Court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

27. Further in the case of **Texaco Ltd Vs. Mulbery Ltd (1972)I WLR 814** the Court stated that status quo orders are also issued as a case management strategy to prevent prejudice as between parties pending the hearing and determination of suit as it is proportionate and appropriate without prejudicing one party.

28. In the upshot the Court grants status quo by restraining the parties from wasting, damaging, alienating, selling, removing and disposition of the suit land pending the hearing and disposal of the suit.

29. Costs shall be in the cause.

30. It is ordered

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF FEBRUARY, 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms. Okello for the Plaintiff

1st Defendant – absent

2nd Defendant – absent

Aguko for the 3rd Defendant

4th Defendant – absent