



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 456 OF 2005

**FRANCIS MUREITHI GITUKU.....PLAINTIFF/
APPLICANT**

-VERSUS-

**PATRICK KIARIE KAGWANJA1ST
DEFENDANT/RESPONDENT**

BARCLAYS BANK OF KENYA LTD.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

**KANGERI WANJOHI T/A KINDEST AUCTIONEERS4TH
DEFENDANT**

R U L I N G

INTRODUCTION

1. The application before court is a **Notice of Motion** dated **30th July, 2014** filed by the Plaintiff and it is filed in Court under Certificate of Urgency on **30st July, 2014**. It is filed under Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 40 Rule 1 and 4 and Order 51 (4) of the Civil Procedure Rules and all enabling provisions of the Law and is supported by a detailed Affidavit sworn by **Francis Mureithi Gituku** on **30th July, 2014**, the Applicant herein.
2. The 1st Defendant also opposed the application by his replying affidavit sworn on 5th November 2014. In this application the 1st Defendant also relies on his defence and counter-claim filed herein.
3. The Application seeks for Orders that a Temporary Injunction be issued to restrain the Defendants herein, by themselves, their servants and or agents from alienating, selling or otherwise disposing of all that parcel of land known as **L.R. No. 12489/23 Karen** while pending the hearing and determination of this suit. In the alternative, the Application seeks that an Order be made under the inherent jurisdiction of the Court to preserve the suit premises until the suit is heard and determined. The Application also seeks for an order that Highlands Valuers be granted access to the suit property to evaluate the current state of the suit premises and to give a report on the current market value of the same.
4. The 1st Defendant herein filed a Notice of Preliminary Objection dated **9th September, 2014**, to

oppose the Application on the grounds that the issue raised is *res judicata* and that the Plaintiff's/Applicant's rights lay in damages as the 1st Defendant's/ Respondent's Title could not be attacked as the same was absolute and indefeasible. The other Defendants have not filed any documents to oppose the Application and the presumption is that either they do not oppose the Application and/or they are indifferent.

5. The 1st Defendant also opposed the application by his Replying affidavit sworn on 5th November 2014. In this application the 1st Defendant also relies on his defence and counter-claim filed herein.

THE PLAINTIFF/APPLICANT'S CASE

6. The Applicant herein was the registered owner of parcel of land known as L.R. No. 12489/23 situated in Karen-Langata Nairobi (herein referred to as the suit premises). He acquired the property on 10th April, 1986. It was a two and a half (2½) acre parcel of land, on which he erected a 5 bed-roomed double storey house with Servant Quarters for two and a garage. It is on this land that the Applicant settled with his family and called his home until they were evicted on 6th August 2005, by the 1st and 4th Defendant, while accompanied by the Officer Commanding Station, Hardy Police Station, one, Mr. Julius Ikamati Kanake. They raided the suit premises at dawn and while the OCS stood guard, removed the doors to the house including the main door allegedly because the Plaintiff was in rent arrears of Kshs. 465,000 for the period December 2004 to July 2005.
7. The 2nd Defendant/Respondent advanced the Applicant various sums of money on diverse dates in the years 1996, 1997 and 1998. The money borrowed was secured by way of Charge registered against the suit premises (L.R. No. 12489/23 Karen) and the Applicant's other property known as Title No. Nyandarua/Ol Joro-Orok Salient/ 20. The Applicant experienced some financial constraints and fell in arrears of servicing those facilities, whose payments were secured by a charge over the plaintiff's two properties, i.e. L.R. No. 12489/23 Karen and Title No. Nyandarua/Ol Joro-Orok Salient/ 20.
8. The Applicant entered into negotiations with the 2nd Defendant whereof it was mutually agreed that the amount needed to liquidate his debt with the 2nd Defendant was a sum of Kshs. 12.5million only. They also agreed that on full payment of the Kshs. 12.5 million, the 2nd Defendant would discharge the suit premises and the second property known as Title No. Nyandarua/Ol Joro-Orok Salient/ 20.
9. The Applicant herein entered into negotiations with a Limited Liability Company called Highlands Plants Limited whereof the Company agreed to purchase the property known as Title No. Nyandarua/Ol Joro-Orok Salient/20 at an agreed price of Kshs. 22 million, which was more than adequate to settle the aforesaid debt of Kshs. 12.5 million.

While the agreement between the Applicant herein and the 2nd Defendant was still subsisting, the 2nd Defendant without any Notice as to its change of mind or otherwise, entered into a sale agreement, of the charged property, with the 1st defendant, on or about 12th January, 2005. The 1st defendant was eventually registered as the owner, thereof, on 21st July, 2005. In other words, the 2nd Defendant sold the Plaintiff's aforesaid property to the 1st Defendant by Private Treaty, without any Statutory Notice and or recall to the Plaintiff. It is also alleged that the 2nd Defendant sold the suit premises without following the procedure prescribed by law for the realization of securities. The 2nd Defendant failed to serve the Plaintiff/ Applicant with the requisite Statutory Notice before conducting the sale, thereby prejudicing the Plaintiff's interest in the suit premises. Similarly, the Plaintiff was not served with a Notice under the Auctioneers Act and Rules. Further, the suit premises was sold by Private Treaty and secretly by the 2nd defendant, which demonstrates the fraud, conspiracy and collusions that was between the 1st, 2nd and 4th Defendant's whereby the 1st Defendant acquired the suit premises at a throw away price of Kshs. 9 million while the property was worth at least Kshs. 20 million at the time as per the valuation dated 20th April, 2005. Therefore, the suit property was sold at a gross under value. The said

Valuation Report is dated 20th April 2005 by Land Mark Valuers Ltd and is in the Plaintiff's bundle of documents.

THE 1ST DEFENDANT'S/RESPONDENT'S CASE

10. The 1st Defendant raised a Preliminary Objection to the application on the points of law on the grounds that a similar application for injunction by the Plaintiff against the 1st Defendant and on the same suit property was ruled by Justice Kasango on 19th August 2005 in which the Judge dismissed the application for injunction. In this regard Mr. Githinji for the 1st Defendant submitted that the issue of injunction here is *res judicata* and that this court has no jurisdiction to entertain the same. Mr. Githinji cited the case of **Uhuru Highway Development Ltd. – Vs – Central Bank of Kenya & 2 others [1996] e KLR** in which the Court of Appeal stated as follows:

“The long and short of all this is that once an Application for Injunction within a suit has been heard and determined under the principles as laid down in Giella -VS- Cassman-Brown a similar Application cannot be brought unless there are new facts, not brought before Court after exercise of due diligence, which merit a re-hearing and possible departure from the previous Ruling. Such cases of course, must be very few and far in between. In the result the Appeal must fail and is hereby dismissed with costs.”

(Uhuru Highway Development Ltd -VS- Central Bank of Kenya & 2 others - (1996) eKLR).

It was the 1st defendant's position that the Plaintiff's Application is incurably defective and the same must fail, as the same is *ultra vires* section 7 of the Civil Procedure Act and the same is *Res Judicata*.

11. The 1st Defendant further submitted that although the Plaintiff has since been amended there is nothing new in the Amended Plaintiff to warrant a new application for an injunction. In the plaintiff's Amended Plaintiff filed on the **13th of November 2006**, the plaintiff under his particulars of malice, fraud, illegality and conspiracy on the part of the 1st and 2nd defendant alleged that;

aa The 2nd defendant (Barclays Bank) did not give and/or serve the plaintiff with any Notice, of the intended sale of the suit premises to the 1st defendant as mandatory required under the provisions of the law.

dd The suit premises was sold by Private Treaty which sale was fraudulent and a conspiracy by the 1st and 2nd defendants for the 1st defendant to acquire the plaintiff's property at a throw away price while secretly and clandestinely benefiting the 2nd defendant officials.

12. The 1st Defendant submitted that those issues were before the court, and that the issue of Statutory Notice was canvassed and the court found that the same was indeed issued.

13. It was further submitted that if dissatisfied, the plaintiff was to have sought a Review of the Orders granted or in the alternative file an Appeal. His only option now is to await the determination at the trial, which is currently ongoing. The amendments in the Plaintiff do **not** justify a hearing of a fresh Application for an Injunction.

14. In response Mr. Machira counsel for the Plaintiff/Applicant submitted that the principle of *res judicata* did not apply in this matter on the grounds that the situation has dramatically changed since 19th September 2005 when the Plaintiff's application for injunction was dismissed. Counsel cited the Court of Appeal in **Mburu Kinyua – Vs – Gachni Tuti [1978] 69 KLR** where the Applicant can only successfully file a second application if it is based on facts not known to him at the time the first application was made. Counsel submitted that there are material facts or evidence pursuant to the Amended Plaintiff which present different case scenario from the one prevailing when the Applicant's application for injunction was dismissed on 19th September 2015. The

counsel provided the examples as follows:

There are new and detailed particulars of malice, fraud, illegality and conspiracy between the 1st, 2nd and 4th Defendant to defraud the Plaintiff of his suit premises known as L.R. NO. 12489/23 SITUATE IN KAREN in the Amended Plaintiff (see paragraph 6A of the Amended Plaintiff). The Amended Plaintiff presents a very different case from the previous case.

The particulars of malice, fraud, illegality and conspiracy in the sale of the Plaintiff's aforesaid suit premises known as L.R. NO. 12489/23 SITUATE IN KAREN is that, the 2nd Defendant did not give and/or serve the Plaintiff with any Statutory Notice of the intended sale of the suit premises to the 1st Defendant as mandatorily required under the Provisions of the law. (See paragraph 5B of the Amended Plaintiff).

Whereas the 2nd Defendant had agreed to allow the Plaintiff to sell his aforesaid property known as TITLE NO. NYAHURURU/ OL JOROROK SALIENT/20 at a price of about Kshs. 22 million, so as to liquidate the said sum of Kshs. 12.5 million, the 2nd Defendant changed its mind abruptly without any Statutory Notice to the Plaintiff and proceeded to sell the Plaintiff's suit premises aforesaid to the 1st Defendant herein, and worse by Private Treaty.

15. Mr. Machira submitted that the 2nd Defendant, through its Officials acted maliciously and fraudulently by dissuading the said Company known as HIGHLAND PLANTS LIMITED from buying the Plaintiff's aforesaid property (i.e. TITLE NO. NYAHURURU/ OL JOROROK SALIENT/20) while confiding in the said Company that there was no need of buying the Plaintiff's aforesaid property at the price of Kshs. 22 million since the same would be sold by Public Auction by the 2nd Defendant at a far much lower price. The price at which the property was sold also points to the fraud. The 1st Defendant paid a paltry sum of Kshs. 9 million for the entire piece of land i.e. two and a half (2 ½) acres plus a five bedroom house. Later on, sometimes in the year 2011, the 1st defendant sold a portion of one (1) acre of the suit premises to one Fredrick Olunga and Lilian Margaret Anyango Okidi, at a price of Kshs. 22 million. Mr Machira submitted that this Court should therefore allow this Application because issues of fraud, illegality and conspiracy between the 1st, 2nd and 4th Defendant's to defraud the Plaintiff of his suit premises known as L.R. NO. 12489/23 SITUATE IN KAREN have been clearly demonstrated, a fact which was not there in the earlier Application, submitting that when the Plaintiff's Injunction Application was dismissed on 19th September 2005, the 1st Defendant/Respondent had not sold any portion of the suit premises as he has done now. Counsel cited the case of **Simon Towett Maritim v. Jotham Muiruri Kibaru [2006] e Klr**, where the Court made Orders directing the Land Registrar to rectify the Titles as the properties in question had been acquired through fraud. Counsel submitted that it is trite law that if this Honourable Court came to the conclusion that the 1st Defendant acquired the suit premises through fraud, then the Court will nullify the 1st Defendant's registration.

Counsel also submitted that damages are not adequate remedy to the Applicant. He stated that the Plaintiff has a strong *prima facie* case with a probability of success and therefore, the Plaintiff's/Applicant's rights do not lie in damages. Counsel cited the case of **Kanorero River Farm Ltd and 3 others V. National Bank of Kenya Ltd Civil Suit No. 699 of 2001**, whereof it was held that, ***"I will not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."***

16. I have carefully considered the application in the light of the objection by the 1st Defendant. In my view there are only two issues for determination:-

- i. ***Whether the application herein is res judicata.***
- ii. ***If the application is not res judicata, can the same be granted on its own merit.***

17. On the first issue, Section 7 of the Civil Procedure Act on res judicata states that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

18. In regard to the issue of *res judicata*, I have looked at the Plaintiff's original application for injunction and the prayers therein. I have also looked at the amended Plaintiff on 10th November 2007. There are numerous amendments which have significantly changed the nature of the Plaintiff's claim. There are allegations of malice, fraud, illegality and conspiracy in the sale or purchase of the suit property involving the Defendant. There are issues of the property being sold by Private Treaty without any Notice to the Plaintiff. There is also the issue of under pricing. Although Justice Kasangao established and determined the issue of notice, the myriad allegations of conspiracy, fraud, price fixing, illegality have been introduced in the Amended Plaintiff. Significantly, also are the prayers in the Amended Plaintiff. Prayer cc of the Amended Plaintiff, if allowed by this court would have the effect of restoring the suit property to the Plaintiffs, and that is not a small issue. For the 1st Defendant, now being aware of a prayer most likely to restore the property to the Plaintiff if successful, still to go ahead to dispose off the same property, is an act made in utmost bad faith, especially considering that the matter is being heard in court. While there are no orders restraining him from dealing with the suit property as he wishes, the fact that the matter is being heard, and may be concluded soon, should itself restrain the 1st Defendants from taking any adverse action on the suit property, in fact, the taking of an action which amounts to disposing off the suit property lends credible evidence to the allegations by the Plaintiff that the sale of the suit property to the 1st Defendant was tainted with conspiracy, price fixing, fraud and illegality. It is therefore my finding that the Amended Plaintiff is substantially different in terms of new provisions and prayers to enable the Plaintiff to sustain the current application. Therefore, the principle of *res judicata* does not apply to this application and the 1st Defendant's preliminary objection is dismissed for lacking merit.
19. As regards the issue number two, that is, whether the application can be granted on its own merit, my answer is that I am persuaded by the merits of the application to allow it. I have noted that indeed part of the suit property has been sold to third parties during the tenancy of this suit. At the time the application for injunction was dismissed on 19th August 2005, the Plaintiff had not been amended to include the prayer for the return of the suit premises to the Plaintiff. Upon the amendment, which was pursuant to the leave of this court, the 1st Defendant became aware of the Plaintiff's claim to title of the suit property, and while there was no injunction stopping him from dealing as he wish with his property, to purport to sell the same in the middle of the hearing proceeding is not an act in good faith. Any further mutilation of the suit property as the matter is being heard would not be desirable, and any court seized of the matter would not allow that, as courts hate to labour in vain or to issue orders which are incapable of being performed by the reason of the suit subject matter having been dissatisfied.
20. I also reject the submission that damages would be adequate remedy should the suit property be sold and the Plaintiff wins the suit. A party to a suit shall not be allowed to interfere with, sold or waste another's property simply because he has the money and can pay damages. The payment of damages would be the last remedial resort, and would be resorted to simply because for reasons or facts which cannot be recreated, damages would be adequate remedy. Where a court is placed in a position to secure the suit premises, and where there appears good grounds that the suit premises may have been disposed off in a manner which may entitle the innocent party a right to resume ownership and title, the court must resist the temptation to succumb to the submission that damages would be adequate remedy. It is true that once a property has been given as security for a loan it becomes a commodity which can be sold and therefore damages in most cases would be adequate. However, when the process of the said sale is impugned for whatever reason and there is *prima facie* evidence of the illegality such impugnement, which would itself render the sale illegal, a submissions that damages would be adequate remedy is a fallacy which this court frowns upon.
21. The other prayer in the application is that the firm of Highlands Valuers be granted access to the suit property to evaluate the current state of the suit premises for the purposes of establishing the current market value. In my view this prayer is not necessary. As it is, the premises belong to the

1st Defendant, and the value thereof is not material as at now. The value of a suit property can be accessed at any time, but the most material time is the time of the Judgement. If the court dismisses the Plaintiff's suit, there would be no need to establish the value of the suit property. However, if the court enters judgment for the Plaintiff and there is need to establish the value of the suit property, the relevant time is the time of the Judgement. So it does not matter the value of the property at the time it has been alleged to have been sold by the 1st Defendant to some third parties. The relevant value of the property is at time of the Judgement.

22. Arising from the foregoing paragraphs of this Ruling, I allow the application in the following terms:-

- a. *A temporary injunction be and hereby issued to restrain the 1st Defendant howsoever described from alienating, selling or otherwise disposing off all the suit property being Land Reference No. 12489/23 situate in Karen, Nairobi pending the hearing and determination of the suit herein.*
- b. *Cost of the application shall be in the cause.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Mungla holding brief for Machira for the Plaintiff

Mr. Kosgei holding brief for Githinji for the Defendants

Teresia – Court Clerk