



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 442 OF 2010

PATRICK MWAEBWA DZIMBA PLAINTIFF

V E R S U S

ANDREW KATANA MWAEBWA

MUGANDA WASULWA T/A

KEYSIAN AUCTIONEERS

EQUITY BANK LTD

THE REGISTRAR OF TITLES MOMBASA.....DEFENDANTS

RULING

PRELIMINARY

1. This Ruling was due to be delivered on 23rd April 2015. it was delayed because of my annual leave and because of the transfer of my secretary and court clerk out of the Mombasa Law Court at the end of May. The delay in its delivery is however regretted.

CHAMBER SUMMONS DATED 8TH DECEMBER 2010

2. The Plaintiff filed the Chamber Summons dated 8th December 2010 seeking an interlocutory injunction directed against the 2nd and 3rd defendants to restrain them from selling property known as **FRERE TOWN/BLOCK 1/MN/19** (Suit property).

3. The Plaintiff by his affidavit in support stated that he is the administrator of the estate of the late Hellen Mwaeba (deceased). That the deceased in her lifetime was the registered owner of the suit property. That beneficiaries of the estate of the deceased, who are the children of the deceased, agreed to allow the son of the Plaintiff Andrew Katana Mwaeba, the 1st Defendant to use the suit property for purpose of obtaining a loan facility from Standard Bank Limited. 1st Defendant used the funds of that loan as it had been agreed, to build commercial and residential premises on the suit property. Allegedly the 1st Defendant serviced that loan.

4. That, however, the 1st Defendant forged the Plaintiff's signature to effect a transfer of the suit property into his name. That after obtaining that transfer in his name the 1st defendant charged the suit property to Equity Bank Limited the 3rd Defendant. That he defaulted in the repayment of that loan and the 3rd

defendant put into place the process of realising its security, that is sale of the suit property by auction. It is that auction the Plaintiff sought to stop by the chamber summons application.

5. The following are some of the depositions of the Plaintiff in his affidavit in support of the chamber summons:

“THAT I am apprehensive that there is every likelihood that the property subject matter will be sold to the detriment of the beneficiaries who need day to day support from the proceeds of the investment.

THAT I aver that because of the act of forgery of my signature leading to registration of the property in the name of the 1st Defendant, the register of titles ought to be compelled by this Honourable court to cancel registration in favour of the said 1st Defendant as the said registration was obtained through dubious and illegal means.

THAT the property in question i.e FREETOWN/MSA 1/BLOCK 19 belongs to the beneficiaries of the estate of the late Hellen Susan Mwaeba which beneficiaries include his children and the illegal acts of the 1st Defendant regarding this property are adverse to their interests.”

ANALYSIS

6. I have considered the application, the supporting affidavit of the Plaintiff and all the annexures thereof. I have also perused the submissions of the Plaintiff and the 2nd and 3rd Defendants submissions.

7. Having done so I wish to start by saying that the Plaintiff failed to shift the burden of proof to enable this court determine his application in his favour.

8. Sections 107 and 109 of the Evidence Act cap 80 elucidates on where the burden of proof lies in a case. Those sections provide as follows:

“107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability Dependant on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact is said that the burden of proof lies on that person.”

109. Proof of Particular facts

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

9. I have considered the facts set out by the Plaintiff in support of the application and at best those facts remain mere allegation. They were not proved by the Plaintiff at all. I will go through facts to prove the basis of my findings above.

10. The Plaintiff attached a grant of letters of administration appointing him administrator over the estate of the late Hellen Mwaeba issued in Mombasa Succession cause no. 304 of 2003. The grant was issued in February 2004. Plaintiff did not attach the confirmed grant. It is confirmed grant that would have indicated that the Estate of Hellen Mwaeba to include the suit property. The grant relied upon by the Plaintiff did not identify any asset belonging to the estate of Hellen Mwaeba.

11. The agreement dated 13th December 2005 between the Plaintiff, the alleged children of Hellen

Mwaeba (deceased) and the 1st Defendant, (named in that agreement as the financier) gave 1st Defendant permission to charge the suit property and to obtain a loan of Kshs 4.2 million. There is nothing in that agreement which indicates that the Loan was to be obtained from Standard Bank Ltd, as deposed by the Plaintiff. It follows the Defendant charging the suit property in favour of the 3rd Defendant then his actions were in tandem with that agreement. What is even more interesting is that one of the clauses in that agreement recognised that the suit property would be registered in the joint names of the Plaintiff, the alleged children of Hellen (deceased) and the 1st Defendant. So what the 1st Defendant did was not entirely out of character with that term of the agreement. But perhaps more damaging to Plaintiff's argument is the following term of that agreement.

“That for the avoidance of doubt it is hereby agreed that “the financier” will be at liberty to register a charge on the said parcel of land after the same has been registered as provided herein in clauses 4 & 5 so as to secure his rights and interests on the finances he is using for the benefit of the beneficial owners of the said parcel of land.”

12. The above Clause shows 1st Defendant was permitted to charge the suit property which he did to the 3rd Defendant.

13. The Plaintiff alleged the 1st Defendant forged his signature to obtain transfer of the suit property into his name. There was 'zero' evidence on this allegation and I will not deal with it further than that.

14. In view of the above finding I am of the view that on a prima facie basis the Plaintiff has failed to prove on a balance of probability that injunction as sought ought to be issued. The Plaintiff in other words failed on the first principle of granting an injunction set out in the case GIELLA VS. CASSAMAN BROWN AND COMP. LTD [1973] E.A 358. Plaintiff did not show a prima facie case with probability of success.

15. In that regard I rely on the holding of KENYA HOTEL LIMITED Vs KENYA COMMERCIAL BANK LTD AND ANOTHER (2004) IKLR.

16. In the case KAREN BYPASS ESTATE LIMITED Vs PRINT AVENUE AND COMPANY LTD [2014] eKLR the court had this to say on the principle of granting an injunction:

“The conditions outlined in Giella’s case (supra) are sequential “so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

17. The 2nd and 3rd Defendants were right in citing the case Mombasa HCCC No. 55 of 2009 ALI KHAN ALI MUSES t/a KINONDO SILVER SAND BEACH RESORT Vs. FEDILITY COMMERCIAL BANK LTD where the courts summarized its findings as follows:

“What the applicants have succeeded in doing is making a strong appeal to sentiment. However, causes coming to court must be decided on the basis of the law and the evidence, nothing else. In commercial causes, it must be remembered always that contracts are made to be performed and, in default of performance, to be enforced by the courts in accordance with the law. To give an injunction to restrain a party from exercising the statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason in whichever circumstances, would, to my mind, be to shirk judicial responsibility to enforce contractual rights. It would be to render securities useless.”

18. I wholly adopt that summary to this case.

CONCLUSION

19. In view of the above finding I find the plaintiff’s application is lacking in merit and I do hereby, dismiss the chamber summons dated 8th December 2010.

20. I have also noted that there has been inordinate delay in setting down this suit for hearing. For that reason and having in mind the overriding objective of the Civil procedure Act, Cap. 21, I make an order that if the plaintiff does not obtain a date for pre trial directions at the court's registry within 30 days from today's date this suit shall stand as dismissed for want of prosecution with costs being awarded to the 2nd and 3rd Defendants. The 2nd and 3rd Defendants are awarded costs of the chamber summons dated 8th December 2010. It is so ordered.

DATED and DELIVERED at MOMBASA this 25th day of June, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary kasaongo

C/A Kavuku

For the Plaintiff

For the 1st Defendant

For the 2nd and 3rd Defendant

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE