



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT AND LAND CASE NO.156 OF 2013

ELSA ATIENO OBIERO.....PLAINTIFF/APPLICANT

VERSUS

AFRICAN BANKING CORPORATION LTD.....1ST DEFENDANT/RESPONDENT

KENNEDY ONYANGO OBIERO.....2ND DEFENDANT/RESPONDENT

RULING

1. The suit herein was filed here on 18/6/2013 vide a plaint of even date. Contemporaneously with the suit was also filed an application – a Notice of Motion – seeking, inter alia, temporary restraining orders. That application is the subject of this ruling.

2. The applicant – **ELSA ATIENO OBIERO** – alleges that the second respondent – **KENNEDY ONYANGO OBIERO** – procured registration of land parcel **No.KISUMU/OJOLA/4330** into his names through guile, deception and/or fraud. The land previously belonged to the applicant and she all along thought the title deed was in her safe custody until she saw an advertisement in one of the daily newspapers stating, inter alia, that the land would be sold through Public auction.

3. That jolted her to action and she went to the Lands office where she discovered that the 2nd respondent was the new registered owner and had charged the land to 1st respondent – **AFRICAN BANKING CORPORATION (K) LIMITED**.

This prompted her to come to court. The application herein is meant to secure her some temporary relief before the suit is heard and determined.

4. The application is brought under Sections 1A, 1B and 3A of Civil Procedure Act (cap 21) and Order 40 Rules 1, 2 and 3 of Civil Procedure Rules, 2010, and all other enabling law. Four prayers are sought in the application but at this stage, the focus is on prayers (c) and (d) , prayers (a) and b having been granted earlier at the exparte stage.

5. Prayers (c) and (d) are as follows:

Prayer c: Pending the hearing and determination of the suit, an order of injunction be issued restraining the defendants jointly and severally, by themselves, their agents, servants, employees, successors in title, assigns, personal representatives or any person claiming their authority from selling or disposing of all that parcel of land known as **KISUMU/OJOLA/4330** by way of Public auction, Private treaty or in any other way interfering with the plaintiffs proprietary rights on

the said parcel of land.

Prayer (d): The costs of the application be provided for.

6. The grounds advanced in support assert that the applicant was the registered 2 owner of Land parcel **L.R. Kisumu/Ojola/4330** (Suit Land) and had the title in her custody. But 2nd Respondent stole it without her knowledge and transferred the suit and into his own name.

7. The 2nd Respondent then proceeded to enter into financial arrangements with 1st Respondent and money was lent to him, with suit land as security. The applicant alleges that the transfer of the Suit Land to the 2nd Respondent was unlawful. The 1st respondent was faulted for not conducting due diligence to establish the authenticity of 2nd Respondents ownership of the Suit Land. It was alleged too that 1st Respondent didn't conduct a survey or valuation. According to the applicant, there was also no formal application to the Land Control Board and any letter of consent used in the transaction between respondents are was forgery.

8. Further, it was alleged that the applicant's matrimonial home is on the Suit Land. Her likely loss is therefore said to be substantial and may not be compensable in monetary terms.

9. The applicants supporting affidavit is an elaborate restatement of what the grounds advanced contain.

10. The 1st Respondent responded vide a 39 – paragraph replying affidavit. It was deponed, inter alia, that the 1st respondent was not involved in any fraudulent activity concerning the suit land.

It only got to meet the 2nd respondent when one Mathew Omodo Etyang went with him to the bank seeking a loan facility. For that loan facility the suit land was to be used as security.

11. An agreement was entered into and the first respondent then gave a letter of offer for Kshs11,000,000 with the suit property as a legal charge for Kshs15,000,000. The second respondent accepted the offer. The 1st defendant carried out due diligence by conducting both a search and a valuation. The 2nd respondent was then advanced the money.

12. Then the 2nd respondent defaulted in payment. The need to sell the property therefore arose. The 1st respondent said it was not involved in any fraud with the borrower and the suit herein is seen as a way of preventing it from recovering its money. According to 1st Respondent, the suit is a conspiracy hatched between the plaintiff and the second respondent to forestall the 1st Respondent's right to exercise its power of sale.

13. It was deponed that the suit property was visited twice for purposes of valuation. The applicant, who even asserts that her matrimonial property is on it, did not query or protest the intrusion of the valuer. And contrary to allegations by the Applicant that no valuation was done, such valuation was indeed carried out.

14. The Applicant was challenged to reveal her source of income for the period running from 6/9/211 to 19/6/2013 during which period she got Kshs2,500,000 and Kshs.4,500,000 which enabled her to complete construction of a house for which she bought opulent furniture inclusive of sofa sets, carpets, beds, sideboards, cutlery, crockery etc.

15. Parties filed written submissions. The Applicant counsel sought to rely on the case of **Giella VS Cassman Brown & CO LTD {1973} E.A. 358**. It was argued that the fact that the applicant did not give her consent for transfer of her property shows that the transfer was fraudulent. The applicant therefore was said to have established a prima facie case. It was also said that if the application was not allowed, the applicant would suffer irreparable loss.

16. Counsel further relied on the case of **Otieno Vs Ougo & Another: (1987) 2 KLR 400** where the court of Appeal stated that the purpose of injunctive order was to preserve the subject matter pending

hearing and determination of the action.

17. The 1st Respondent on the other hand submitted that the copy of the greencard availed showed clearly how the suit land was transferred to various owners. The 2nd Respondent was said to have presented title to the suit property and the 1st respondent excised due diligence to establish the authenticity of its ownership.

The 1st Respondent's counsel submitted that the whole suit is a plan hatched between the Applicant and second Respondent to frustrate the 1st Respondent.

18. The Applicant and second respondent were said to be mother and son and they do not want the 1st Respondent to exercise its statutory power of sale. Counsel submitted that even if sale were to occur, the Applicant would easily be compensated in damages. He relied **Nyanza Fish Processors LTD VS Barclays Bank of Kenya: C A No.114/09 (unreported)** where the court observed that the loss is essentially financial and can be compensated in damages.

19. I have considered the application, the response and rival submissions. I note that contrary to allegations that the 1st respondent may not have acted diligently, the response availed shows it probably did. For instance, it was alleged that no valuation was done. But the response shows valuation was done and one aspect of such valuation included visiting the suit land.

20. I also bear in mind that there is no privity of contract between the applicant and 1st Respondent. The contract giving rise to the intended sale was purely between the 1st and 2nd respondent. It has emerged that the Applicant is the mother of the 2nd respondent. Infact the 1st Respondent alleges collusion between the 2nd Respondent and Applicant (son and mother respectively) to frustrate sale.

21. I would hesitate to take this as an idle allegation particularly given the contents of the replying affidavit. A situation like this would require the court to be cautious. I have had occasions to handle matters with general similarity to this one. One such matter is **WALTER ACHIENG NONDI VS STANDARD CHARTERED BANK (K) LTD & Another: ELC NO.13/2013**. The standard Chartered Bank had advanced some loan to one **Damaris Nondi**, who was sister to the plaintiff. When Damaris defaulted in payments and sale of the Land given as security become imminent. The plaintiff, her brother, filed the suit claiming that the Land was family property.

22. Yet another case is that of **JOHN OMOLLO OMONDI & 14 OTHERS VS AGRICULTURAL FINANCE CORPORATION & Another. EL No.269/2013**.

There, **Elias Obondo Omondi** (2nd defendant) had borrowed some money from **AGRICULTURAL FINANCE CORPORATION**. There was default in payment and sale became imminent. The plaintiffs filed the suit claiming that property was held in trust for them by 2nd defendant.

23. Both these cases wanted the lender temporarily restrained. I declined to grant the orders for reasons, inter alia, that the lender was an innocent party and that the lender had no privity of contract between itself and those seeking the orders.

24. In the two suits, the defaulters stood to benefit from any restraining orders granted.

Those asking for the orders were close family members. In most cases, the defaulting parties, though sued, will never file a defence or make a response to any application for restraining orders. And this is the scenario that obtains in this very case.

25. In such scenarios, the courts need to be circumspect. It is easy for close family members to contrive a stratagem to circumvent justice. Such family members are willing to lay bets with the judicial system with a view to bottlenecking justice. The aim is to make sure that the lender loses both the money and the property given as security. In the meantime, the defaulting party goes Scot-free.

26. It is true that the court should aim at preserving the subject matter of the action as stated in the case of **Otieno vs Ougo** (supra) but it is also true as held in **MBUTHIA V JIMBA CREDIT FINANCE CORPORATION & another {1988} KLR**, that the court should weigh up the relevant strengths of each sides proposition. Considering what the 1st Respondent has said in this case, I would hesitate to making a finding that the Applicant's side has made a case for temporary restraining orders.

27. Indeed, whether one is considering establishment of a prima facie case, or irreparable loss not compensable in damages or even the balance of convenience, the innocence of the 1st respondent as against the Applicant strikes one immediately at this stage. And I realise that the orders sought are essentially against this party and not the defaulting party.

28. It is in view of all this that I find the application herein is not merited and dismiss it with costs.

HON. A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

20/8/2015