



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 70 OF 2014

NGUGI GICHUNE NJOGORE.....APPLICANT

VERSUS

1. CO-OPERATIVE BANK LTD.....1ST RESPONDENT

2. LOISE GATHONI NGUGI.....2ND RESPONDENT

RULING

1. The Plaintiff is the registered owner of **Land Parcel No. Subukia/Subukia West Block 1/22**. The said parcel was charged to the 1st Defendant Co-operative Bank Limited to secure a loan of Kshs.1,400,000/= by the 2nd defendant who is a daughter of the plaintiff, and the borrower. The Plaintiff is alleged to have executed a Personal Guarantee and Indemnity together with the Letter of Offer from the bank. The charge was registered against the title on the 25th February 2010.

2. The Borrower defaulted in servicing the loan and the bank opted to exercise its statutory power under the charge to realise the monies by sale of the charged property.

The plaintiff states that he was not aware that his land parcel was used as security by his daughter the 2nd Respondent to secure the loan as he did not give consent or authority. He further states that the title to the land was stolen, that he never requested for financial accommodation, never signed the Letter of Offer, the charge nor the guarantee and indemnity, and therefore the whole process was fraudulent.

3. By his application dated 16th October 2014 the plaintiff seeks an order that pending the hearing and determination of the suit filed hereof, the respondents, and particularly the 1st respondent, the Bank be restrained from advertising for sale, selling either by public auction or private treaty, foreclosing on the title **Subukia/Subukia West Block 1/22** or in any other way interfering with the applicant's quiet possession of the land. The 2nd defendant though served with suit papers failed to appear or file her defence.

The application is opposed by a replying affidavit sworn by one Joseph Irungu, the recoveries officer of the 1st Respondent and annexures attached thereto.

4. In his supporting affidavit to the application sworn on the 16th October 2014, the Applicant denies knowledge of the loan and disowns the whole process leading to the grant of the loan.

In brief, he states that sometimes in February 2011 the 2nd Respondent took his title to the land in question and caused a charge to be registered against it to secure a sum of Kshs.1,400,000/=.

He deposes that he never signed any letter of offer the charge, the guarantee or the indemnity and that he did not appear before any advocates where such documents are alleged to have been executed and witnessed by the said Advocates, being agents of the bank.

He states that the whole process was fraudulent. In his statement of claim, particulars of fraud are stated. It is his averment that the fraudulent dealings came to his knowledge in October 2014 when he carried out a search of his title when it dawned on him that his land parcel had been charged as aforementioned, and upon enquiry from the 1st defendant, it was revealed that the 2nd defendant's daughter was the borrower and that he signed all the necessary documents before the bank lawyers.

5. The 1st Respondent-Co-operative Bank of Kenya in its replying affidavit is that the 2nd Defendant on the 1st October 2009 approached the bank and applied for a loan of Kshs. 1,400,000/= and with consent of the applicant and another offered his land parcel as security and after valuation the bank approved the loan. It is its assertion that the 2nd defendant (Borrower) and the applicant signed the Letter of Offer before the Banks Advocates Ndeke Gatumu and J.C. Cherutich together with the guarantee and indemnity. It is stated that after disbursement of the loan proceeds to the 2nd defendant defaulted in payment forcing the bank to initiate realization process under the charge but which was halted upon institution of this suit.

6. Both the applicant and 1st Respondent counsel filed written submissions, and all agree on the salient issues that the court ought to determine-in the present application for a temporary injunction:

- (1) Whether the plaintiff/applicant has a *prima facie* case with probability of success.
- (2) Whether the plaintiff may suffer irreparable loss if the order of injunction is denied.
- (3) Whether the plaintiff is entitled to the injunction order on a balance of probabilities.

7. **The applicant's submissions** is that the case is based on fraud which has not been controverted by the 2nd defendant who neither entered appearance or filed a defence. **Relying on Section 61 of the Evidence Act**, it was stated that where a matter has been admitted by operation of rules of pleadings there is no need to prove. It was further relied on **Order 2 Rule 11 of the Civil Procedure Rules** that where a matter is not expressly traversed it is deemed admitted.

8. Mr. Githui Advocate for the applicant further went onto state that the 1st Respondent's Advocates, Mr. Ndeke Gatumu and J.C. Cherutich who allegedly witnessed the applicant sign and execute the Letter of Offer, Charge and Guarantee did not file a reply to rebutt the applicants averment that he never appeared before them or signed any documents before them. The applicant challenged both Advocates to swear affidavits to demonstrate their appointment and authority to witness execution of the documents that having not been done, he concludes that they must be truthful, and therefore the whole process was fraudulent.

9. Having so submitted, it was his conclusion that a *prima facie* case was established that ought to be determined by way of evidence. On irreparable loss, the applicant submitted that

the 1st Respondent has threatened to foreclose and sell off the charged property, that being an elderly couple, their matrimonial home if sold would render them homeless taking cognizance of the fact that they are victims of fraudulent acts.

10. On balance of probability, the applicant submission is that the scales tilt in favour of the applicant. That the charged property will remain intact during the pendency of the suit while selling the same would cause grave harm to the applicant. On the delay, it was submitted that interest charged by the bank would compensate the period of delay. The applicant relied on several authorities to buttress his submissions. The celebrated **Giella -vs- Cassman Brown (1973) EA 358 Stephen Obure Onkaga -vs- Njukca consolidated Ltd C.A 309 of 2006, South Nyanza Sugar co -vs- Samuel Oruko Anyona C.A 149 of 2006.**

11. **The 1st Respondent submissions** is that the applicant has failed to demonstrate a *prima facie* case and following the **Kismani Holdings Ltd -vs- Fidelity Bank Ltd (2013) KLR**, he stated that a *prima facie* case is more than an arguable case, that it is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of the applicants case upon trial. It was stated that if the title to the property was stolen, the applicant would have made a report to the police of the criminal act. This having not been done, it is stated, there is no proof of such an allegation and therefore no *prima facie* case was demonstrated. Further, it is submitted that vague and general allegations of fraud cannot stand the test. On the contrary, It was submitted that, *prima facie* examination of the signatories appended on the statement, appears very similar to those on the documents and no contrary evidence was adduced and therefore the applicant is bound by the terms and conditions in the contract.

12. It is further submitted that the applicant did not demonstrate any irreparable loss should this application be denied. It is averred that sale of land can be quantified and the Respondent being a bank would have no difficulties repaying the value should the case fail, and that the applicant having offered his property as security, it became a commercial commodity that could be sold to recover the amounts owed. Reliance was had to **Section 99(4) of the Land Act 2012 -**

“that a person prejudiced by an unauthorised improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

The Respondent added that the balance of convenience tilted in favour of the Respondent and therefore no injunctive order should be granted.

13. The court has considered the application, affidavit evidence annexures and submissions by counsel.

There is no dispute that the 1st respondent registered a charge on the suit property. What is disputed is the legality of execution of the documents leading to the perfection of the security. The applicant has denied having signed the Letter of Offer, the Charge, Guarantee and Indemnity. He further denied even appearing before the two advocates before whom he is alleged to have executed the same. He stated that his title was fraudulently taken away from him and fraudulently used to secure the loan. These are matters that ought to be strictly proved through evidence. It is noted that the two advocates before whom it is alleged the applicant executed the documents and who witnessed the same have not replied to the allegations to clear their names from the alleged fraudulent dealings.

14. The Borrower, 2nd defendant failed to defend the suit. I agree with Mr. Githui Advocate that the 2nd defendant having not contravened the applicants statements in his plaint is deemed to have been admitted by operation of rules of pleadings and that **Order 2 Rule 11**

Of the Civil Procedure Rules provides that where a matter is not expressly traversed it is deemed to be admitted.

By implication, the charge and all other documents prepared by the 1st Respondent having been a result of alleged fraudulent acts then they cannot be deemed to have been procedurally competent.

15. In **Ngurumbu Ltd -vs- Jan Bonde Nielsen & 2 Others CA No 77 of 2012**,

It was stated:

“---that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely.”

All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation.

“---- the applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes view that on the face of it, the applicants case is more likely than not to ultimately succeed.”

This court fully associates itself with the above sediments. The facts as stated by both the applicant and the 1st respondent in defence of their rival positions raise serious issues that on the face, ought to be tried to establish the truth or otherwise of the said allegations.

16. The 1st Respondent referred to the case **Viro Energy (K) Ltd -vs- Maloba Petrol station Ltd and Others.(2013) KLR**. The Judges of Appeal while quoting from **R.G. Petal -vs- Lalji Makanji (1957) EA 314** stated that:

“allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of provabilities is required.”

How else would such allegations of fraud be proved unless by evidence during a full trial? The court ought not to conduct a mini trial at an interlocutory stage so as to establish whether or not a *prima facie* has been established. It is only in a full trial where each party presents its position with evidence and argument.

17. The courts finds that the plaintiff/applicant has raised issues that ought to be interrogated and in my view, a *prima facie* case has been established to warrant granting the order of injunction pending the hearing of the suit.

I am minded that establishment of a *prima facie* case alone is not enough for the grant of an injunction order. The applicant must also establish that he might otherwise suffer irreparable injury which cannot be adequately compensated in damages. As I stated above, the property said to be a matrimonial home if sold would easily be compensated in damages by the Bank.

18. However, the court having made a finding that there are serious issues and allegations of fraud surrounding the whole transaction, it would be unfair to subject the applicant to anguish and suffering before the truth is established. Otherwise it is the court's finding that were it not for the fraud allegations, the court would not have hesitated to find that no irreparable damage would have been suffered by the applicant if the property was sold in realization of

the bank's security.

19. Having pronounced myself on the *prima facie* case and irreparable loss, the balance of probability tilts in favour of granting the injunction order.

While arriving at the above conclusion, I have considered that stoppage of the sale of the suit property may cause the debt to increase by the time the case is heard and determined. I have also considered what suffering the sale of the property may occasion to the applicant. It is a balancing act of two harms. The discretion of the court is called for, but such discretion must be exercised judiciously. The court has made the view that on the face of it, the applicant's case is more likely to succeed.

I shall therefore grant to the Applicant the orders sought in his application dated 16th October 2014, that the Respondent Bank is restrained from advertising for sale either by public auction or private treaty or foreclosing on title **Subukia West Block 1/22** or in any other way interfering with the applicants quiet possession of the suit land pending hearing and determination of the suit.

Costs of the application shall be costs in the cause.

Dated, signed and delivered in open court this 16th day of December 2015

JANET MULWA

JUDGE