



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MILIMANI

ELC SUIT NO. 433 OF 2013

PETER N. KIMANI.....APPLICANT/PLAINTIFF

=VERSUS=

NYUMBALINK LTD.....1ST DEFENDANT/RESPONDENT

JAMES N. MUCHIRI.....2ND DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR THIKA...3RD DEFENDANT/RESPONDENT

RULING:

By a **Notice of Motion** dated 29th April,2013, the Plaintiff/Applicant herein has sought for the following orders.

2. *That an order of temporary injunction do issue restraining the 2nd Defendant from entering,constructing,building,alienating,disposing and/or in any other manner dealing with the Parcel of Land known as **Parcel No.L.R Ruiru/Ruiru East Block 2/9074** untill the final determination of the suit or untill further orders of the honourable court.*

4. *That an order of Mandatory Injunction be issued compelling the 3rd Respondent/Defendant to furnish the Plaintiff/Applicant with copies of all documents/instruments that were used to register a transfer in favour of the 2nd Defendant/Respondent within 15 days or as the period this court may prescribe.*

The application was premised on the following grounds and on the annexed affidavit of **Peter Nganga Maina**.

- a. *That the Plaintiff/Applicant is the lawful proprietor of **Land Parcel No. Ruiru/Ruiru East Block 2/9074** which the 2nd Defendant has illegally transferred to himself with the aid of the 1st Defendant.*
- b. *That the Plaintiff/Applicant has owned the said plot for the last 20 (twenty) years and it is where he resides with his family.*
- c. *That the Plaintiff/Applicant has a prima-facie case with high chances of success .*

- d. *The instruments used to transfer the suit land to the 2nd Respondent are in the custody of the 3rd Respondent and the same must be fgeries as the applicant has never executed any transfer instruments in favour of the 1st and 2nd Respondents or any other party.*

The applicant in his affidavit averred that he borrowed **Kshs. 298,773/=** from the 1st Defendant on 10/7/2010 which he was to repay on 10/08/2012 and the Applicant deposited his Title Deed for Parcel **No. LR Ruiru/Ruiru East Blcok 2/9074** as security to be discharged only after the loan was repaid as per the loan agreement marked **PNM1**. Applicant further averred that he was advanced the loan on cash basis and he paid it in cash before the 10th August 2012 , but the 2nd Defendant who is the Director of 1st Defendant told him that his title was mispalced and he promised to call him immediately the same was found. That then upon carrying a search at the lands office, the applicant discovered that the land was fraudulently transferred to the 2nd Defendant without the applicant's knowledge or consent. He attached a copy of the search certificate as annexure **PNM2** .

Applicant denied ever selling, or executing any transfer document to the 2nd Defendant. He therefore alleged that all transfer documents(if any) presented to the 3rd Defendant were fraudulently obtained and the 3rd Defendant ought to have refused to register the transfer. That though the 1st Respondent wrote a demand letter to the applicant on 21st january, 2013, claiming that they would dispose off his land should he fail to pay the loan, the said transfer had already been effected illegally to 2nd Respondent who is a Director of 1st Respondent as evidenced by annexure **PNM3**. The Deponent further alleged that the 3rd Respondent has failed to furnish him with any information relating to the illegal transfer.

The applicant is therefore fearfull that the 2nd Defendant may evict him forcefully from his land or further more dispose it to 3rd parties or have the same charged and therefore he stands to suffer irreparable damages , unless the 2nd Defendant is restrained by an order of this Court.

The 1st and 2nd Respondents opposed the applicant's Notice of Motion . **James Ngatia Muchiri** , the 2nd Respondent swore a Replying Affidavit on behalf of the 1st Defendant and his behalf as a 2nd Defendant. He averred that he is a Director of the 1st Defendant and had been duly authorised by the 1st Defendant to swear the affidavit.

The 2nd Respondent averred that he gave the Plaintiff a friendly Loan on or about 10th May ,2012. That the plaintiff deposited his **Title No.Ruiru/Ruiru/East Block 2/9074** as security and also endorsed a transfer document on the premise that if the Plaintiff defaulted, then a transfer would be effected. That the applicant was advanced friendly loan as per annexure **JNM2** on the strength of the Title number **Ruiru/Ruiru East Block 2/9074**. That when pledging the said Title as security and subsequently obtaining the friendly laon facilities, the Plaintiff knew or ought to have known that the said suit property would be sold in case he defaulted and the Plaintiff is therefore precluded from resiling on the mutual unequivical binding terms of their mutual agreement.

He further averred that the transfer was freely and voluntarily executed without caution and the Plaintiff was aware of the implications of the engagement he had undertaken. He further alleged that the Plaintiff deliberately failed to honour the terms of the agreement and he even went underground. That Plaintiff was sent demand letters as evidenced by **JNM3** and he was aware that the suit property was to be transferred. That if the transfer is cancelled, the Plaintiff will have succeeded in his illegal endeavour to unjustifiably enrich himself at the expense of the 1st and 2nd Defendants herein. He also averred that the Plaintiff has not met the threshold requirements for grant of an injunction and prayed for the dismissal of the Plaintiff's application.

The applicant filed a supplimentary affidavit and averred that if the transfer was legally done, then he would have been summoned by the **Land Control Board** to give his consent or disaproval. That Defendants colluded with the District Registrar Thika, to fraudulently dispose off the applicant's land.

The 2nd Respondent filed a further affidavit and averred that at the time of registration of the impugned transfer, the applicant had clearly defaulted and had also failed to return his calls leaving the 1st and 2nd Respondents with no option but to realize the pledged security.

The parties herein canvassed this Notice of Motion by way of written Submissions which I have considered. The applicant submitted that he has demonstrated that he has a prima facie case with high probability of success and that he has proved that the land was transferred illegally by the 1st Defendant to 2nd Defendant who is the Director of the 1st Defendant. The 1st and 2nd Defendants also filed their written submissions and stated that the Plaintiff has failed to demonstrate that the transfer was fraudulently obtained and if anything, the same was done after the Plaintiff failed to repay the outstanding loan amount. That the Plaintiff became bound by the terms of clause 5 of the agreement which stated:-

“On the event of default in payment, the lender may with or without Notice by himself, agents or servants as he may think fit, sell the item at such a place, manner, time as he may deem fit and retain.”

The 1st and 2nd Respondents also relied on two authorities:

1. **Kenya Breweries Ltd Vs Okeyo (2002) EA 101 CAU** where the Court of Appeal held that:-

“A mandatory injunction ought not be granted in an interlocutory application in the absence of special circumstances”.

2. **Locabail International Finance Vs Agro Export & Others (1988) ALL ER 901** where the Court held that :-

“ A Mandatory Injunction should only be granted in simple matters”.

The 1st and 2nd Respondents also relied on **Halsbury laws of England, 4th Edition, Volume 24 Paragraph 28** which stresses on the need to sparingly grant mandatory injunctive relief at an interlocutory stage,

“A mandatory injunction can be granted in an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted, However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is as simple and summary one which can be easily remedied.....a mandatory injunction will be granted on an interlocutory application.”

Further, the 1st and 2nd Respondents submitted that the Plaintiff has failed to establish that he has a ***prima facie case with high probability of success***, he will incur loss which is irreparable and that the balance of convenience tilts in his favour as was set out in the case of **Giella Vs Cassman Brown 1973(EA) 358.**

I have considered the instant Notice of Motion and the pleadings generally. The question now for determination is whether the applicant has met the threshold principles set down for grant of injunctive relief.

The applicant alleged that he was the initial registered owner of **Ruiru/Ruiru/East block 2/9074**. That fact was also admitted by the 2nd Respondent herein. There is also no doubt that the Applicant was advanced some friendly loan by the 1st Respondent. The applicant deposited his **Title Ruiru/Ruiru East Block 2/9074** as security for the loan advanced to him. The 2nd Respondent admitted to that fact too.

What is in dispute is how much was advanced to the applicant by the 1st Respondent. The applicant alleged that he was only advanced Kshs 298,773 as per the agreement marked as **PNM1**. The said loan was to be repaid by 10th August 2012. The 1st and 2nd Respondents disputed that figure and alleged that the applicant was advanced a loan of over **3 million** and the said amounts accrued to **Kshs.3651,860/=** as per demand letter marked **JNM3**. The 2nd Respondent attached various agreements to show the different amount advanced to the plaintiff on various dates. However, the Plaintiff disputed the said agreements and averred that they were fraudulently obtained. The said dispute therefore can only be resolved by the court after evidence is called and interrogated through a full trial by a trial court. However, there is no doubt that the Plaintiff was the Original Registered owner of **Ruiru/Ruiru East**

Block 2/9074. The applicant alleged that the 1st and 2nd Respondents fraudulently transferred the land to 2nd Defendant even after applicant had cleared payment of the loan advanced.

The 1st and 2nd Respondents alleged that the transfer was after the applicant had failed to repay the loan. That was in fulfilment of clause 5 of the agreement which clearly stated that;

“ On the event of default in payment, the lender may, with or without notice by himself, agents or servants as he may think it, sell the item at such a place, manner time as he may deem fit and retain”.

The 2nd Respondent in his affidavit averred that, 1st Respondent sent the applicant **Demand Notice** but the applicant went underground and refused to repay the loan advanced. The said **Demand Notice** is dated 21st January 2013. The Title Deed in the name of **James Ngatia Muchiri** for **Ruiru/Ruiru East Block 2/9074** is dated 29th August, 2012. That means the 1st Defendant transferred the Land to 2nd Defendant long before it issued the Demand Notice dated 21st January, 2013. The 1st and 2nd Respondents are not therefore honest that they transferred the Land to the 2nd Respondent after Demand Notice to the applicant failed to yield any fruit.

It is now evident that the 2nd Respondent is the registered owner of the disputed Parcel of Land. **Section 26 of the Land Registration Act 2012** states that such certificate is conclusive evidence of proprietorship ; it provides as follows:-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

Though the above section provides that such certificate and title shall not be subject to challenge, the said section gives instances when the same can be challenged such instances are:

- a. *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

The applicant has alleged that the 1st and 2nd Respondents transferred the said land to 2nd Respondent illegally and fraudulently. If such is the case, then the Title Deed in the name of 2nd Respondent (as per annexure PNM4) can be challenged. The said Title Deed was acquired on 29/8/2012 though the Demand Notice to the applicant was dated 21st January; 2013. There is therefore doubt as to how and when the transfer was done. The applicant has therefore established that he has a prima-facie case with high probability of success (See EA Industries Vs. Trufoods (1972) EA 920.)

The applicant has also alleged that he stands to suffer irreparable loss which cannot be compensated by way of damages if injunction not granted. The applicant averred that he resides with his family on the suit property. That there is a danger that the 2nd Respondent might evict him and his family now that he is the registered proprietor of the suit land. **Section 24 of the Land Registration Act 2012** confers rights and privilege to such registered owner. It provides as follows:-

24. Subject to this Act—

(a) “ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and”

The applicant's fear is therefore not misguided or misplaced as the 2nd Respondent can deal with the suit land as he so wish. The applicant stands to suffer irreparable loss which is not capable of being compensated by an award of damages. Though the 1st and 2nd Respondents averred that the transfer was done in accordance with the agreement entered by the parties herein, such transfer was done without the consent of the applicant or competent Court. As was held in the case of Gusii Mwalimu Investment Co.Ltd & Others Vs. Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 of 1995.

“A court of law cannot allow such a state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession, the landlord has to obtain an order of competent Court or statutory Tribunal to obtain possession”.

Equally, the 2nd Respondent ought to have obtained such transfer with consent of the applicant or order of competent court. The 2nd Respondent did not obtain any of the above.

Having found that the applicant has established that he has a prima facie case with high probability of success and that he stands to suffer irreparable loss which cannot be compensated by an award of damages. I find that there is no need of dealing with the third principle of the balances of convenience.

The applicant has also sought for a Mandatory Injunction to compel the 3rd Respondent to furnish him with copies of all documents that were used to register a transfer in favour of the 2nd Defendant/Respondent. The 3rd Defendant did not enter appearance nor file a Replying Affidavit. The 3rd Defendant therefore did not oppose that prayer. Halsbury law of England 4th Edition Volume 24 paragraph 28 deals with the principles to be applied while granting Mandatory Injunctive relief at an interlocutory stage.

“A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff, mandatory Injunction will be granted on an interlocutory application”.

Mandatory Injunctions can therefore be issued in special circumstances (see **Locabail International Finance Ltd Vs Agro-Export (1988) 1 ALL ER 901.**

The applicant alleges that the transfer was done without his consent or even before the last date of the repayment of the friendly loan. The 1st and 2nd Respondents denied that allegation. The Title Deed in the name of 2nd Respondent is dated 29/8/2012. It is important to see and scrutinize the documents that were presented to 3rd Respondent so that he could effect such transfer. I find that there exists special circumstances that warrant grant of such mandatory injunction (see **Canadian Pacific Railway Vs Raud (1949) 2KB 239 at 249.**

Having now considered the pleadings generally and the Written Submissions, the Court finds that the applicant's Notice of Motion dated 29th April, 2013 is merited. I allow the same in terms of prayers No.2 and 4. The 3rd Respondent to avail copies of all documents and/or instruments that were used to register a transfer in favour of 2nd Defendant/Respondent within a period of **30 days** from the date of this Ruling.

Applicant is also entitled to costs of this application.

It is so ordered.

Dated, Signed and delivered this 25th day of March, 2014

L. GACHERU

JUDGE

In the Presence of:-

.....for the Applicant/Plaintiff

.....for the 1st Defendant/Respondent

.....for the 2nd Defendant/Respondent

Lukas: Court Clerk

L.GACHERU

JUDGE