



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 220 OF 2013**

**NAOMI NJOKI THIONG'O (SUING AS A**

**FRIEND AND GUARDIAN OF**

**STEPHEN THIONG'O MUHIA) ::::::::::: ::::::::::: PLAINTIFF**

**-VERSUS-**

**KENYA COMMERCIAL BANK LIMITED ::::::::::: 1<sup>ST</sup> DEFENDANT**

**DANIEL BOYO NJUGUNA ::::::::::: 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The application before the Court is the Plaintiff's Notice of Motion dated **28<sup>th</sup> May 2013** and filed in Court on **30<sup>th</sup> May 2013**. It is taken out under **Order 40 rules 1, 2 and 3** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**.
2. The application is seeking for interim orders to restrain the 1<sup>ST</sup> Defendant from in any way dealing or interfering with the Plaintiff's occupation of land parcel number NDUMBERI/NDUMBERI/2971 until further orders are given by the Court. It is also seeking for orders that the medical superintendent Mathari mental hospital be ordered to release the medical report as pertains to Stephen Thiong'o.
3. The application is premised on the grounds stated in the application and is supported by the affidavit of the Plaintiff sworn on **28<sup>th</sup> May 2013**.
4. It is averred by the Plaintiff that she is the wife of one Stephen Thiong'o who fell ill sometime in the year 2004 and was taken to Mathari hospital. According to the Plaintiff, the husband has never been well since then. The plaintiff further avers that they received a letter from the 1<sup>ST</sup> Defendant informing them that they would be evicted. (The letter dated 29<sup>th</sup> April 2013 is annexed to the plaintiff's application and marked NNT 1). The plaintiff states that it is at this time when they discovered that the title deed to the said land was missing and reported the matter to Kiambu Police Station. The Plaintiff has attached a copy of the police card as well as the Green card.
5. It is the Plaintiff's assertion that they came to know of the 2<sup>nd</sup> Defendant after receiving the aforesaid letter from the Bank. She states that they had leased out the suit property to one JAMES KURIA and that at the time the loan was allegedly secured by the said property, Mr.Kuria had a timber yard on the plot. It is also the Plaintiff's assertion that efforts to get a medical report from the Mathari mental hospital hit a snag as the medical superintendent insisted that he wanted a Court Order.

6. The 1<sup>st</sup> Defendant has opposed the application through the affidavit of DONALD OSEKO sworn on **2<sup>nd</sup> December 2013** and filed on **18<sup>th</sup> December 2013**. The 1<sup>st</sup> Defendant has further raised a preliminary objection dated **26<sup>th</sup> November 2013** and filed on **18<sup>th</sup> December 2013**. The 2<sup>nd</sup> Defendant did not file any response.
7. The Preliminary objection seeks to have the current application dismissed with costs and the entire suit struck out or otherwise dismissed for being fatally defective. According to the 1<sup>st</sup> Defendant the Plaintiff lacks the *locus standi* to sue.
8. In the replying affidavit, the deponent reiterates the point as raised in their preliminary objection by averring that the Plaintiff lacks legal capacity to institute the current suit. It is further averred by the deponent that the letter from the bank was addressed to James T. Kuria and did not seek to evict the Plaintiff as alleged.
9. It is the deponent's assertion that the 2<sup>nd</sup> Defendant obtained a loan facility of Kshs. 1,500,000/= from the 1<sup>st</sup> Defendant for which he charged the suit property. At the time of executing the charge, the suit property was duly registered in the name of the 2<sup>nd</sup> Defendant. Therefore, it is the 1<sup>st</sup> Defendant's case that at that point in time the plaintiff did not have any proprietary interest in the suit property. (Attached to the affidavit are copies of the official search and the title deed in respect to the suit property.)
10. It is the deponent's position that the 2<sup>nd</sup> Defendant defaulted in the repayment of the loan facility advanced to him. As a result the 1<sup>st</sup> Defendant issued the 2<sup>nd</sup> Defendant with a Statutory Notice in exercise of their rights under the charge, which Notice he failed to honour. Subsequently, the 1<sup>st</sup> Defendant issued a Statutory Notice to sell on 29<sup>th</sup> April 2013 notifying the 2<sup>nd</sup> Defendant and the occupants of the suit property of its intention to sell the same by public auction.
11. It is the 1<sup>st</sup> Defendant's case that they continue to suffer loss due to the pendency of the sale and that it would be in the interest of justice to allow them to proceed with the sale having complied with all procedures in law. It is also their case that the Plaintiff has not proved any right of ownership over the said suit property and that in any event the cause of action is against the 2<sup>nd</sup> Defendant who allegedly obtained the title fraudulently.
12. The application was prosecuted by way of written submissions.

### **ANALYSIS**

13. I have considered the application, the affidavits on record as well as the written submissions and the authorities cited therein. I will begin with the Preliminary Objection as raised by the 1<sup>st</sup> Defendant. It is the 1<sup>st</sup> defendant's position that the Plaintiff lacks legal capacity to institute the current suit. The Plaintiff has instituted the proceedings as the friend and guardian of Stephen Thiong'o. It is the 1<sup>st</sup> Defendant's case that the Plaintiff has not proved that the said Mr. Stephen Thiong'o is mentally ill and therefore incapable of filing the suit on his own behalf.
14. With regard to the ill health of the Plaintiff's husband I acknowledge that there are no medical records in the court file to prove that the said Mr. Thiong'o is mentally ill. It is the Plaintiff's position that efforts to get a medical report from the Mathari mental hospital hit a snag as the medical superintendent insisted that he wanted a Court Order. On record is a letter from the Plaintiff's Advocates requesting the Medical Officer in Charge, Mathari hospital, to avail the medical documents. There is no proof to show that the said superintendent required a Court Order to produce the same. That notwithstanding, I will give the Plaintiff the benefit of doubt and if indeed what is required is a Court Order to procure the medical records, I see no reason to deny the Plaintiff the same.
15. I also note that there is a copy of an out-patient card bearing the name of Stephen Muhia. This is *prima facie* an indication that he was a patient in the said hospital. However this is in the year 2004 and there is no account of his mental health in the subsequent years to date.
16. There is need to have the medical reports on record to determine this issue of *locus standi*. Therefore, I reserve my finding on the P.O until the medical reports are produced before this

- Court. The same should be produced within 30 days from the date of this ruling failure to which the Preliminary Objection will be upheld and the suit will automatically be dismissed.
17. I now turn to the substance of this application which is to determine whether the Plaintiff is entitled to the interim orders sought.
18. This is an injunction application and the principles applicable were well settled in the case of **Giella –vs- Cassman Brown (1973) EA 358**. Those principles are first, that the applicant must establish a *prima facie* case with a probability of success; secondly that the applicant must demonstrate that damages will not be an adequate remedy; and thirdly, if in doubt, the court will determine the matter on a balance of convenience.
19. It is not in doubt that the 1<sup>st</sup> Defendant is entitled to exercise its statutory power of sale. It is also not in dispute that at the time the 1<sup>st</sup> Defendant was advancing the loan facility to the 2<sup>nd</sup> Defendant, the suit property was registered in the name of the 2<sup>nd</sup> Defendant as can be seen in the green card. According to the green card, it seems that the title deed in respect of the suit property was issued to the 2<sup>nd</sup> Defendant on 12<sup>th</sup> May 2011 while the Charge in respect of the loan facility was registered therein on 20<sup>th</sup> July 2011.
20. However, the Plaintiff's case as I understand it is that the 2<sup>nd</sup> Defendant obtained the title to the suit property fraudulently. The Plaintiff avers that Stephen Thiong'o was the proprietor of the land and that he was incapable of selling the same due to his mental illness. I have perused the green card and it indicates that Stephen Thiong'o was indeed a proprietor of the said property prior to the 2<sup>nd</sup> Defendant.
21. There is no evidence of a sale agreement between Stephen Thiong'o and the 2<sup>nd</sup> Defendant or a transfer of the suit property to the 2<sup>nd</sup> Defendant on the Court record. Therefore it is uncertain under what circumstances the said property devolved from Stephen Thiong'o to the 2<sup>nd</sup> Defendant. It is unfortunate that the 2<sup>nd</sup> Defendant did not file a response yet he would have clarified the circumstances under which the sale and transfer of the suit property took place. I believe the Transfer document should also have been entered in the property section of the green card to show the history of how the title changed hands. The same was not done.
22. The 2<sup>nd</sup> Defendant has not filed a response, which leaves this Court in doubt as to whether or not he acquired the suit property legally. Nothing would have been easier than for the 2<sup>nd</sup> Defendant to clear the issues herein by filing a response. As for the 1<sup>st</sup> Defendant, they have established that the suit property indeed belongs to the 2<sup>nd</sup> Defendant. However, prior to the official search of 1<sup>st</sup> March 2013, it is not certain whether the 1<sup>st</sup> Defendant did a search and to what extent. The green card is missing important details as to how the property was transferred from one Stephen Thiong'o to the 2<sup>nd</sup> Defendant. I do not fault the 1<sup>st</sup> Defendant for advancing the loan facility on the basis that the 2<sup>nd</sup> Defendant had a Title deed. Nevertheless, it is my view that due diligence requires that the 1<sup>st</sup> Defendant should have done more inquiry on the history of the suit property.
23. In view of the above findings, I am inclined to find that the Plaintiff has established a *prima facie* case with a probability of success.
24. I will not delve into whether or not damages are an adequate remedy. It has already been held before by these Courts on several occasions that damage is not always an adequate remedy. See; **Joseph Siro Mosioma Vs Housing Finance Company of Kenya and others Nairobi, High Court case No 265 of 2007 [2008] eKLR**.
25. In light of the above findings, the balance of convenience tilts in favour of the Plaintiff. In the upshot, I make the following orders;-
- a. **The Plaintiff's Notice of Motion dated 28<sup>th</sup> May 2013 and filed in Court on 30<sup>th</sup> May 2013 is**

- hereby allowed.*
- b. *The interim orders therein are conditional pending the production of the medical records to determine Stephen Thiongo's mental health and subsequently the Plaintiff's locus standi to institute the current suit.*
  - c. *The Medical officer in Charge, Mathari Hospital to release the medical records of one Mr. Stephen Thiong'o within 30 days from the date of this ruling.*
  - d. *There is no order as to costs.*

**DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2014**

**E. K. O. OGOLA**

**JUDGE**

**Present:**

Akech holding brief for Kaburu for Plaintiff

Mare for Defendant

Teresia – court clerk