



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Civil Case 464 of 2009

KARIANGO INVESTMENTS LTD. 1ST PLAINTIFF/RESPONDENT

HANNAH WAIRIMU NJUGUNA 2ND PLAINTIFF/RESPONDENT

THANDE NJUGUNA 3RD PLAINTIFF/RESPONDENT

V

ALI NOOR ABDI 1ST DEFENDANT/APPLICANT

STANDARD CHARTERED BANK OF KENYA LTD. 2ND DEFENDANT

DANIEL NDUNG’U TRAINING AS

NDUNG’U & CO. ADVOCATES 3RD DEFENDANT

R U L I N G

1. The application before court is a Chamber Summons dated **30th June 2009** filed by the Plaintiffs wherein they seek 5 prayers as enumerated in paragraphs 2, 3, 4, 5 and 6, all of them being injunctive orders. The said application is supported by an affidavit sworn by the 2nd Defendant, **HANNAH WAIRIMU NJUGUNA** dated **30th June 2009** with annexures, and two supplementary affidavits dated **27th July 2009** and **14th August 2009**.

2. The application is opposed by the Defendants vide a Replying Affidavit sworn by the 1st Defendant on **6th July 2009** with many annexures.

3. The 2nd Defendant also opposed the application vide a Replying Affidavit by **PETER JENNER** dated **23rd July 2009** while the 3rd Defendant has not responded to the application in any way.

4. The brief history of the application is that the property comprised in sub-division number 498 (original number 47/5). Section VII Land Reference Number 36 Eastleigh Nairobi) and the value of the same is quite substantial as thereon is developed a commercial building which the Applicants posit generated out Kshs.90,000/= per month as at 2004. It is the Applicant's position that the suit property was registered in favour of the 1st Applicant by virtue of an Indenture dated 28th April 1994 and duly registered on 3rd May 1994 (See annexure HWN3 to the Affidavit of Hannah Wairimu Njuguna).

5. In his Replying Affidavit the 1st Respondent contends that he purchased the suit property sometime on or around 10th June 2004, and mortgaged the same to the 2nd Respondent vide a Mortgage dated 13th September 2004 to secure an advance of Kshs.20,000,000/= said to be part of the alleged purchase price being Kshs.29,000,000/=. It is however, the Applicant's position that it did not authorize or enter into any Sale Agreement in respect of the suit property and neither it nor its officers took part in any way whatsoever, in the purported sale to the 1st Respondent. In a nutshell the Applicant submitted that the purported transaction leading up to the transfer of the suit property to the 1st Respondent was fraudulent.

6. The 1st Defendant has however, denied the allegation of the Plaintiff and submitted that the suit property was sold and conveyed to the 1st Defendant in August 2004 whereupon the 1st Defendant was registered as the sole owner of the suit premises in the Government Lands Registry and Nairobi in Volume Number 44, Folio 187/16, File Number 13731. This is denied by the Applicants who have unequivocally stated that they are in possession of the original Indenture to the suit property and are prepared to present the same to the court for court's examination at the hearing of the suit. This begs the question, *how then did the transfer of the suit properties and registration of the same in the name of the 1st Defendant take place without the original title?*

7. On their part the 2nd Respondent Bank admits that there is indeed in existence a mortgage given in favour of the 2nd Defendant by the 1st Defendant over the suit property. Indeed the 2nd Defendant submitted that there is evidence of fraud in the transaction. The 2nd Defendant however submits that the mortgage transaction is however legal and proper, and that it disbursed to the 1st Defendant the Kshs.20,000,000/= which was secured by the mortgage. The 2nd Defendant opposes the application stating that it has not intimated to any of the parties that it intends to sell the suit property. Neither has the 2nd Defendant issued either the Plaintiff or the 1st Defendant with a Statutory Notice of its intention to sell the suit property. Indeed the 2nd Defendant states that the suit property is not threatened in any way and that the application is presumptive and should be dismissed. The 2nd Defendant submitted that this

court cannot issue orders of injunction in vain and especially where there is no threat of the property in dispute being wasted, damaged or alienated, and that there is no evidence that an injunction in this suit is merited.

8. I have carefully considered the submissions of the parties. The grounds upon which this court exercises its discretion for an application for equitable injunction were set out in the now over celebrated case of **Giella Vs – Cassman Brown [1973] EA 358**. The court stated that:-

- a. *The Applicant must show a prima facie case with a probability of success.*
- b. *The Applicant must show that it would suffer irreparable injury, that is to say, loss that cannot be compensated in damages.*
- c. *When the court is in doubt, the application is to be decided on a balance of convenience.*

9. Applying the above principles to the case at hand, it is clear to me that the suit property's ownership is seriously disputed. The Applicant claims that it never sold the same to the 1st Defendant. The Applicant claims to have original title to the property, and it is inexplicable how the 1st Defendant managed to transfer the said property to himself.

The 2nd Defendant also agrees with the Applicant that there is possibility of fraud in the transaction involving the transfer of the suit property to the 1st Defendant. In my view, the Applicant has satisfied this court that it has a prima facie case with a probability of success. A full trial in which the issue of ownership is canvassed is necessary in order to determine who is the legal owner of the suit property. If the Applicant claims to have the original title to the suit property, and insists that the property was never sold then, in my view a *prima facie* case capable of succeeding has been established by the Applicant which merits an order which preserves the suit property until a determinate decision is reached.

10. The submissions by the 2nd Defendant that the suit property is not threatened and that there should be no injunction as they have not issued a Statutory Notice of such intention is, in my view, not judicious. It has been established that there is a likelihood of fraud involving the suit property. If that has been in the past, a fraudulent conduct may still happen in the future to further frustrate the Applicant's intention to secure the suit property. In any event, what happens if the 1st Defendant fails to repay the loan? The 2nd Defendant is not obligated to give any notice to the Plaintiff but only to the 1st Defendant.

How would the Plaintiff know when the 1st Defendant is in default? In other words the mortgage

transaction is between the 1st and 2nd Defendants and they can choose to communicate between themselves without looping in the Plaintiff. In those circumstances the only order which preserves the suit premises and assures the Applicant of the security of the same is that order that can be supervised by court and the Plaintiff.

11. In the upshot I allow the Notice of Motion application dated 30th June 2009 in terms of the outstanding prayers 4 (a) and (b), 5 (a), (b), (c), and (d) and 6.

12. Parties shall bear own costs of the application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Thuo holding brief for Marete for the Plaintiffs

Mathai for the Defendants

Teresia – Court Clerk