



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 43 OF 2012

ARTHUR MBAISI MUSAGALA PLAINTIFF/APPLICANT

VERSUS

PETER MAHENDA MWAKISAGHU

**1. PAMELA KAVAI MAJANGA
2. KENYA COMMERCIAL BANK LTD. DEFENDANTS/RESPONDENTS**

R U L I N G

The **Notice of Motion** dated 15/2/2012 is predicated on **section 3** and **3A** of the **Civil Procedure Rules**. The main prayer in the application is for an order of injunction restraining the 3rd defendant/respondent, its agents, servants and or anybody acting for and on its behalf from selling, disposing off, alienating and in any manner whatsoever with the plaintiff's/Applicant's parcel of land better known as **L.R.Butso/Indangalasia/2878** pending hearing and determination of this main suit.

The application is supported by the affidavit of the applicant, **Arthur Mbaisi Musagala** sworn on 15/2/2012 and a further affidavit sworn by the same deponent on 23/7/2012.

The applicant's case as set out in the said affidavit is that the applicant is the registered owner of the whole parcel of land **LR Butso/Indangalasia/2878** (hereinafter suitland). According to the applicant, his Title Deed for the suitland went missing and he made a report at **Kakamega Police Station** on 12/11/2010. A search carried out at the **Kakamega Land Registry** revealed that the 1st and 2nd respondents had fraudulently used the said title deed to obtain consent and charged the title to the 3rd respondent. The 1st and 2nd respondents failed to service the loan facility and the 3rd respondent moved to exercise his power of sale and had the property advertised for sale by public auction. The applicant's contention is that he was not privy to any contract between the respondents. To fortify this point, the applicant exhibited a report by a forensic document expert which reflected that the signature on the Deed of Guarantee and Indemnity purported to be the applicant's were a forgery.

In opposition to the application, the 2nd respondent swore a replying affidavit on 13/6/2012 and a supplementary affidavit sworn on 2/11/2012. Through its Credit Support Manager, **Simon T.N. Gathiari** the 3rd respondent averred that on 9/3/2009, it offered to the 1st and 2nd defendants a credit facility for the sum of Kshs.2,325,000/= in the form of a guarantee in favour of **Total Kenya Ltd** to enable them to use personal cheques to purchase petrol and petroleum products from **Total Kenya**. A charge over the suitland secured a credit facility of Kshs.780,000/=. There were other two parcels of land that secured the credit facility for the rest of the credit facility.

Consent was obtained from the Commissioner of Lands to charge the subject property and the

applicant executed both the Deed of Guarantee and Indemnity. Due to failure by the 1st and 2nd respondents to settle their account with Total Kenya Ltd for petroleum products supplied to them, their account was on 22/4/2010 debited and was overdrawn with Kshs.2,152,410.49. Arrangements made between the 3rd respondent and the 1st and 2nd respondents to settle the account failed. The 3rd respondent moved to recover the outstanding amount. The applicant was served with the Statutory Notice and auctioneers instructed to sell the subject property by way of public auction.

According to the 3rd respondent, the allegations by the applicant are an afterthought as no criminal and/or civil proceedings have been instituted against the 1st and 2nd respondents. The 3rd respondent exhibited a letter of guarantee purportedly written by the applicant. The 1st and 2nd defendant/respondent did not enter appearance or file defence. Interlocutory judgment was entered against the 1st and 2nd defendant on 5/11/2012.

From the foregoing, it is clear that the subject land is registered in the applicant's name. There is no dispute that the land was used to secure a credit facility in favour of the 1st and 2nd defendants. There is also no dispute that the 1st and 2nd respondents failed to service the credit facility, hence the 3rd respondent moved to exercise its statutory power of sale.

The bone for contention is whether the applicant was privy to the contract between the 3rd respondent and the 1st and 2nd respondents. The applicant has exhibited a forensic document examiner's report (**annexture "AMM2"**) that states that the signature purported to be that of the applicant in the Deed of Guarantee and Indemnity is a forgery. On the other hand, the 2nd respondent has exhibited a handwritten letter (**annexture "SGA"**) purportedly written by the applicant confirming he was issuing a guarantee to the 2nd respondent and depositing the Title Deed. The 3rd respondent has not demonstrated whether it has subjected the said handwritten letter to examination by a forensic document examiner. It is therefore, not possible to tell at this stage whether the applicant was privy to the contract between the respondents or not. This will probably be proved during the hearing of the main suit.

This court's conclusion is that the applicant has demonstrated a *prima facie* case with a probability of success. As the registered owner of the subject land, the balance of convenience is in favour of the applicant.

Consequently, I allow the application with costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 29th day of May 2013.

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SAID J. CHITEMBWE

JUDGE