



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

E.L.C NO. 353 OF 2013

ANILA RAMESH THAKKAR1ST PLAINTIFF

RAMESH CHANDRA MAGNAL

THAKKAR.....2ND PLAINTIFF

VERSUS

HAWKIN MUTEGI KAMUNDI.....DEFENDANT

RULING

By a Plaint dated **8th May, 2013**, the Plaintiffs brought the suit herein seeking, among other orders, a mandatory order of injunction against the Defendant by himself, his agents or servants restraining him from entering, remaining or in any way interfering with the plaintiff's quiet possession and occupation or quiet enjoyment of the same until this suit is heard and determined.

Simultaneously with the plaint, the plaintiff filed a Notice of Motion of even date seeking among others, a temporary order of injunction against the Defendant/respondent by himself, his agents or servants restraining him from entering, remaining or in any way interfering with the plaintiff's/applicant's quiet enjoyment and use of **L.R.NO. NAKURU MUNICIPALITY BLOCK12/227 ('Suit Land')** until this suit is heard and determined.

Grounds in support of the application are stated on its face and there is a supporting affidavit sworn by the 2nd plaintiff. The thrust of the plaintiffs' application is that they are the (registered) owners of the suit land. They purchased this property from **M/s Consolidated Bank Limited ("the Bank")** who sold the property in exercise of its statutory right to sell as chargee. A sale agreement (**RMT1**) evidencing the sale has been exhibited. The land was subsequently registered in the name of the plaintiffs on **26th April 2013** (see **RMT2**) and a certificate of lease issued by the Lands office. The plaintiffs contended that they purchased the property without knowledge of existence of any other claim to the land, legal or beneficial in favor of the defendant. They are third party purchasers for value without notice and should therefore be protected by the court. After purchasing the land and registering it in their names, they sought to take possession but were resisted by the defendant who is said to be in occupation of the land. He has put in place a robust security mechanism to prevent anyone from accessing the property. The plaintiffs therefore have approached the court seeking for the orders alluded above whose effect will be to have the defendant removed from the suit land. As I understood the prayers and submissions by counsel for the plaintiff's they wish that this court grants them an interlocutory mandatory injunction.

In a rejoinder, the defendant opposes this application. He filed an elaborate replying affidavit. In summary, the respondent contends that he bought the land from one Mr. Elias Kaburu Muriithi (**'Muriithi'**) vide a Sale Agreement dated **10th August 2005** (see **HMK1**). A disagreement subsequently arose regarding the fulfillment of the terms of that agreement which culminated to a suit being instituted by "Muriithi", this is HCC No. 128 of 2011 (now ELC No. 210 of 2013). In that suit, temporary injunctive orders prohibiting dealings with the "suit land" were granted by the High Court; Ouko J (as he then was) on **24th October 2011**. Subsequent to the issuance of those orders, the same were later set aside by this court for reasons that were recorded.

The long and short of the defendants contention is that there was impropriety in the manner in which the "suit land" was sold to the plaintiffs' particularly given the existence of HCC no. 128 of 2011. The sale, according to the defendant was merely intended to defeat the outcome of HCC no 128 of 2011 and hence the rights of the defendant herein. The defendant's counsel's view is that, for all the reasons stated in his written and oral submissions the present application should fail. As far as I understood the parties, I am called upon to determine several issues which will lead to the success or failure of this application as follows:-

1. **Did the plaintiffs' validly purchase the "suit land "or put differently; Was there impropriety by the plaintiffs in the manner of acquiring the 'suit land"?**
2. **If there was impropriety, were the plaintiffs part of the same or at the very least were they aware, at time of purchasing the "suit land" that the defendant had any rights (perceived or real) over the same?**
3. **Does the defendant have any rights over the "suit land"**
4. **If indeed the defendant had any rights were the same extinguished by the sale of the "suit land" to the plaintiffs.**

In considering the first issue it is worth reiterating that the plaintiffs bought the suit land from a chargee, exercising its statutory right to sell on a valid charge. Mr. Muriithi had borrowed monies from the bank which he failed to repay as per the terms agreed between him and the bank. The bank was therefore entitled to exercise its statutory right of sale. In doing so, the bank entered a sale agreement with the plaintiffs who paid the agreed consideration and hence got the suit land transferred to them. At that time, they were not aware of any court or other dispute between any person claiming through the chargor and the chargee over the "suit land". There were no court orders barring the chargee from exercising its statutory power of sale. It cannot therefore be said that the plaintiffs were aware of the history of the "suit land" prior to the execution of the sale agreement. That disposes issues No. 1 & 2 above.

As regards the third issue, the defendant is predicating his claim over the "suit Land" on the sale agreement dated **10th August 2005**. According to him, he bought the land from Mr.Muriithi. At the time of execution of the agreement, the "suit land" was charged to Housing Finance Company of Kenya(HFCK) (see paragraph 4 of HMK1), it is important to note that HFCK despite being the chargee was not a party to the said agreement. It is also evident that the consent of HFCK had not been obtained allowing Mr. Muriithi to dispose of the "suit land". Can a chargor validly enter into an agreement to dispose off an undischarged property without the express consent of a chargee? Can he confer any proprietary rights? I do not think so. While it may well be that Mr. Muriithi had a right to ultimately redeem the suit land by fulfilling the terms of the charge, he was incapable of selling the suit land during the currency of the charge.

While the charge lasted, he could not validly transfer his rights to any third party without the consent of the chargee. Any perceived rights Mr. Muriithi thought he had while purportedly executing the sale agreement dated 10th August 2005, were illusory and non- existent at the time. He therefore conferred no rights to the defendant. Having answered this issue as above it follows that issue number 4 collapses as well. I say so because the foregoing demonstrates that the defendant did not have proprietary rights and therefore none could be extinguished. Having so found, I will not delve into the various allegations of misdeeds by the defendant against Mr. Muriithi and the bank. There have been generalized allegations of impropriety against "Mr. Muriithi" and the bank ostensibly to defeat the defendants "**rights**". If they exist, then it is not for this court to determine at this time.

Having made the findings as I have, the question that comes to the fore is this, should this court grant an interlocutory mandatory injunction? There is no doubt in my mind that the answer is in the affirmative. What then is the criteria for the grant of this kind of relief seeing as it appears, that such orders will have the effect of substantially concluding the suit? Fortunately for us, the East African Court of Appeal and our very own court of Appeal have dealt with this kind of situation before; see for instance, *The Despina Pontikos (1975) 1E.A.-38*; *Mucuha –vs.- Ripples Ltd (1990-1994) 1 EA 338*; *Kenya Breweries Limited –vs.- Okeyo)2002) 1EA 109 CAK*. These decisions and others have reiterated that an interlocutory injunction shall only be granted in very special cases and in very clear circumstances. Our High Court has followed this principle for grant of interlocutory mandatory injunction; see for instance, *Bojani –vs. - Mwaghoti (2002) 2 KLR 774*; *John Kirika Kimani & Another –vs. Hannah Njeri Nganga (2006) eKLR*.

do the circumstances of this case satisfy the criteria repeatedly reiterated by the above cases and others? In my view they do. The plaintiffs validly purchased the suit land and had it transferred into their names. The transactions that began with the sale by the bank to them until registration in their names have not been challenged. The defendant's complaint that he was not informed of the sale to the plaintiffs falls flat on its face when it is considered that the bank had no obligation to notify the defendant while exercising its statutory power of sale!

In any event, as stated above, the sale agreement dated **10th August 2005** did not confer any such rights. Therefore to allow the defendant to continue in occupation of the "suit land" a minute longer will be an affront to the rights of the plaintiffs as conferred to them by Law. I think I have said enough to show that this application must succeed.

Now, the plaintiffs are effectively seeking interlocutory mandatory injunction. They require the defendant to cease being present on the suit land. That means that the defendant must vacate the Suit land and thereafter not interfere with the plaintiffs' quiet occupation of the same. The court of Appeal in; *KIG Bar Grocery & Restaurant ltd vs Gatabaki & Another(1972)1EA 503*, held inter alia that, "***an order for mandatory injunction should be couched in positive terms rather than negative terms***". In that regard, the order of this court shall be that the Defendant is hereby ordered to vacate the Suitland within the next **Ten (10)** days from the date of this ruling and hand over the same to the plaintiffs. Should the defendant fail to do so, the plaintiffs are at liberty to evict him from the Suit land. In doing so the plaintiff should enlist the assistance of the court bailiff.

However, before I leave this matter, I must mention that I observed in paragraph 22 of the defendant's, defence; jurisdiction of this court has been denied. Even though the parties are required to address me on this point they did not do so. As it is, the law is that whenever a court's jurisdiction has been challenged, the earliest opportunity should be seized to address that issue. That this court has got jurisdiction to deal with this kind of matter; one only needs to read Article 162 (2) (b) of the Constitution to confirm that this court has the requisite jurisdiction. I will say no more on the issue. Since there was no prayer for costs, none are granted.

Dated, signed and delivered at Nakuru on this 17TH day of September 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Kimatta for the plaintiff/Applicant

Mr Kisila for the defendants

Stephen Mwangi : court Clerk

L N WAITHAKA

JUDGE