



**No.3002**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL CASE NO.367 OF 2009**

**NONGOTOYOK OLE OLOJON NEILANG..... PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BAKN LTD. .... 1<sup>ST</sup> DEFENDANT**

**EURASIA INTERNATIONAL TRADING CO. LTD.....2<sup>ND</sup> DEFENDANT**

**BART JAN ROZEBOOM.....3<sup>RD</sup> DEFENDANT**

**RUTH MPAAYEI .....4<sup>TH</sup> DEFENDANT**

**JOSEPH TAUTA OLE KOYEI.....5<sup>TH</sup> DEFENDANT**

**JOSEPH LESIAMON .....6<sup>TH</sup> DEFENDANT**

**RULING**

By a chamber summons application dated 30<sup>th</sup> November, 2009, the plaintiff seeks orders of injunction against the 1<sup>st</sup> defendant to restrain it from selling, transferring, alienating, registering, charging, mortgaging and in any other way from dealing with all that piece or parcel of land known as **Kajiado/Kipeto/2648**, hereinafter “**the suit premises**” pending the hearing and determination of the suit. The plaintiff further appeals to this court to issue an inhibition in respect of the suit premises pending the hearing and final determination of the suit.

The application is expressed to be mounted under sections 3A and 63 ( c) and (d) of the Civil Procedure Act, order XXXIX rules 1 (a), 3 and 9 of the Civil Procedure rules, section 128 (1) of the Registered Land Act and other enabling powers and provisions of the Law. The application was supported by an affidavit sworn by the plaintiff. In response thereto the 1<sup>st</sup> defendant filed a replying affidavit sworn by its head of debt recovery unit, **Elizabeth Hinga**. Besides the two affidavits, two other affidavits were filed by the 5<sup>th</sup> and 6<sup>th</sup> defendants. These latter affidavits are in favour of and support the plaintiff’s application.

From the pleadings so far filed, the crux of the plaintiff’s claim is that he was induced by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants into signing a guarantee in favour of the 1<sup>st</sup> defendant by fraudulent misrepresentation. That being the case he contends the said guarantee was therefore unenforceable,

illegal, unlawful and of no legal effect. Again it was fraudulent for the 1<sup>st</sup> defendant to register a charge over the property. In the premises the intended exercise of the statutory power of sale was based on void documents.

The case for the 1<sup>st</sup> defendant however is that by a letter of offer dated 25<sup>th</sup> September, 2006 and a facility agreement dated 30<sup>th</sup> October, 2006, it offered to advance to the 2<sup>nd</sup> defendant a loan facility in the sum of KShs.15,000,000/- on condition that the 2<sup>nd</sup> defendant would offer as security, a first legal charge over the suit premises registered in the name of the plaintiff and supported as well by the personal guarantee of the plaintiff. The Plaintiff was indeed a party to the transaction and in fact, accepted the terms thereof by endorsing his left hand thumb print thereto jointly with the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants on 26<sup>th</sup> September, 2006 before an advocate as a witness. The charge documents were properly executed and registered. Indeed on or about 2<sup>nd</sup> November, 2006, prior to the registration of the said charge, the plaintiff duly applied for and was granted consent by the Land Control Board, Kajiado on 8<sup>th</sup> November, 2006 to charge the suit premises to the 1<sup>st</sup> defendant. Therefore it was mischievous, dishonest, an afterthought and an act of perjury for the plaintiff to depone that he was induced by misrepresentation into charging the suit premises in favour of the 1<sup>st</sup> defendant. Under the facility agreement, the 2<sup>nd</sup> defendant was to repay the loan in a period of 36 months by making monthly instalments of KShs.527,113/50 commencing 30<sup>th</sup> November, 2006 and thereafter on the 30<sup>th</sup> of each succeeding months until payment in full. In breach of the terms of the facility the 2<sup>nd</sup> defendant defaulted in paying the agreed monthly instalments thereby prompting the 1<sup>st</sup> defendant to begin to realize its security including the appointment of the receivers to take over the management of the affairs of the 2<sup>nd</sup> defendant and to exercise its statutory power of sale under the charge with respect to the suit premises.

In a bid to avoid the foregoing, the 2<sup>nd</sup> defendant filed a suit being **Nairobi HCCC No.159 of 2008**. Simultaneously with the filing of the aforesaid suit, the 2<sup>nd</sup> defendant took out an application seeking, inter alia, an injunction to restrain the 1<sup>st</sup> defendant from selling, disposing off, offering for sale or alienating the suit premises. By a ruling dated 27<sup>th</sup> January, 2009 the said application was dismissed with costs after an inter partes hearing and consideration on merits. The said suit is still pending hearing though. Therefore the plaintiff's prayer for injunction is *res judicata*, the said having been determined in the above suit. In the premises, the plaintiff had not shown a prima facie case with a probability of success against the 1<sup>st</sup> defendant nor had he demonstrated any irreparable injury he stands to suffer and which may not adequately be compensated by an award of damages. Finally, in the light of the fact that the plaintiff holds an indemnity against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants over the suit premises, the balance of convenience tilts in favour of denying the injunction since the plaintiff has a remedy against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants whereas the 1<sup>st</sup> defendant will be left with no enforceable security.

The case for the 5<sup>th</sup> and 6<sup>th</sup> defendants is that they introduced the plaintiff to the 3<sup>rd</sup> and 4<sup>th</sup> defendants who had expressed their wish to assist poor families with land to educate their children having been approached by the said defendants to identify and assist such needy families in their home area in Kajiado. If the 3<sup>rd</sup> and 4<sup>th</sup> defendants were carrying out business for profit and were engaged in fraudulent activities, then it was not within their knowledge or blessings. They concede that the offer letter and facility agreement was executed by the plaintiff in their presence and in the presence of the 3<sup>rd</sup> and 4<sup>th</sup> defendants but not in the presence of an advocate. The 3<sup>rd</sup> and 4<sup>th</sup> defendants explained to the 5<sup>th</sup> and 6<sup>th</sup> defendants which explanation was also advanced to the plaintiff that the documents were in furtherance of charitable intentions. The plaintiff did indeed hand over the title deed to the 6<sup>th</sup> defendant for onward transmission to the 3<sup>rd</sup> and 4<sup>th</sup> defendants for safe keeping with charitable intentions and for no other purpose. The 6<sup>th</sup> defendant assured the plaintiff as much before he handed over the title to him. At no time did the 5<sup>th</sup> and 6<sup>th</sup> defendants intend to mislead the plaintiff to allow his suit premises to be charged by the 1<sup>st</sup> defendant and had they known the true intentions of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, they would have advised the plaintiff not to associate with them. They therefore supported the applicant's application for injunction.

Though the other defendants were served with the application, they did not see the need to respond to the same.

When the application came up for inter partes hearing before **Lenaola J.** on 15<sup>th</sup> December, 2009, he directed that the same be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. However, by then **Lenaola J.** had left the station on transfer. The task of crafting and delivering the ruling therefore fell on his successor, **Waweru J.** On 19<sup>th</sup> October, 2010, **Waweru J.** indicated that he would deliver the ruling on 11<sup>th</sup> March, 2011. However, this never came to pass. On 17<sup>th</sup> November, 2011 he returned the file to the station following his transfer without having crafted the ruling as a result of his busy schedule in his new division in the High Court of Kenya at Nairobi. He requested this court to decide on the way forward in respect of the application.

On 30<sup>th</sup> November, 2011 I caused the file to be mentioned before me whereat only counsel for the 1<sup>st</sup> defendant appeared. He suggested that since all the parties had filed and exchanged written submissions, in accordance with **Lenaola J.**'s order this court should act on the same, craft and deliver the ruling. I agreed with the suggestion.

It is now settled that the principles applicable for the grant of a temporary injunctions are those laid out in the celebrated case of **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A. 358**, that is, the applicant must satisfy three requirements, namely; he must demonstrate a prima facie case with probability of success; secondly, a temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and thirdly, if the court is in doubt, it will decide the application on the balance of convenience. Above all the remedy is equitable and discretionary.

Applying the foregoing to the circumstances of this case, it is common ground that the plaintiff is the registered proprietor of the suit premises. It is also common ground that there exists a charge and guarantee in favour of the 1<sup>st</sup> defendant in respect of the suit premises. There exists also a personal indemnity executed in favour of the plaintiff by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Looking at the pleadings so far filed, it would appear that, essentially the plaintiff's complaint is directed at the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. They are the ones who apparently induced him into signing a guarantee by fraudulent misrepresentation. It had nothing to do with the 1<sup>st</sup> defendant. If the plaintiff was to show a prima facie case with probability of success against the 1<sup>st</sup> defendant, he has to demonstrate, firstly that the 1<sup>st</sup> defendant engaged or was party to the fraud when registering a charge and secondly, that the charge document lacks some essential validity so as to render them invalid and enforceable. From what has been placed before me I am not certain that the plaintiff can meet that threshold. Of course the plaintiff, the 5<sup>th</sup> and the 6<sup>th</sup> defendants have intimated that the offer letter and facility agreement were executed by the plaintiff but in the absence of an advocate. This is in attempt to impugn the said documents. However, I doubt whether those documents are absolutely necessary for a charge to be validly registered. In any event, there is an affidavit on record sworn by **Gatheru Gatheru Advocate** confirming that the said documents were executed in his presence and indeed after he explained their tenor and purport.

As stated in the case of **Central Kenya Limited Vs. Trust Bank Limited & 4 others, C.A. No.215 of 1996 (UR)**, fraud and conspiracy are very serious allegations. Proof was much higher than in an ordinary civil case. Having looked at the charge documents and the affidavit of **Gatheru Gatheru** who certified that the plaintiff appeared before him on 30<sup>th</sup> October, 2006 and being known to him acknowledged the signature and or marks on the charge documents to be his and that he freely and voluntarily executed the charge and understood its contents, I doubt whether the plaintiff challenge based on fraud can be sustained. It is instructive that though the plaintiff denies having executed any documents before any advocate, he has not seen it worthy while to enjoin the said **Gatheru Gatheru** in this suit.

It is also evident that the transaction was subject to consent being obtained by the plaintiff from the relevant Land control Board. That consent was obtained. In order for the plaintiff to obtain such consent, he must have appeared before the Kajiado Land Control Board. Why then could the fraud not have been

detected and or discovered at that stage? From where I sit and for the moment, if there was fraud perpetrated against the plaintiff, the same must have been authored and executed by the 2<sup>nd</sup> to 6<sup>th</sup> defendants. I cannot see how the 1<sup>st</sup> defendant can come in for blame.

It is also telling that the plaintiff handed over his title deed to the 3<sup>rd</sup> defendant 3 years ago allegedly expecting to secure education sponsorship for his children yet took no steps at all to redeem the same after the deal aborted and or did not go through.

The plaintiff too has not denied that the 2<sup>nd</sup> defendant filed suit against the 1<sup>st</sup> defendant when the 1<sup>st</sup> defendant began the process of realizing its securities by selling the suit premises by way of public auction. The 2<sup>nd</sup> defendant rushed to court and filed suit being **Nairobi (Commercial and Tax Division, Milimani) HCCC. No.159 of 2008 – Eurasia International Trading company Limited Vs. Diamond Trust Bank (k) Limited and 2 others (UR)**. Simultaneously with the filing of the suit, the 2<sup>nd</sup> defendant took out an application seeking an injunction to restrain the 1<sup>st</sup> defendant from selling, disposing off, offering for sale or alienating the very same suit premises. By a ruling dated 27<sup>th</sup> January, 2009, the said application was dismissed after interpartes hearing. In view of the relationship between the plaintiff and the 2<sup>nd</sup> to 6<sup>th</sup> defendants and considering the circumstances of this case and in particular the conduct of the 5<sup>th</sup> and 6<sup>th</sup> defendants, I would agree with the 1<sup>st</sup> defendants submissions that the present application is a well orchestrated and smart collusion between the plaintiff and the 2<sup>nd</sup> to 6<sup>th</sup> defendants to avail themselves a second bite of the same cherry having failed to stop the sale of the suit premises in the earlier suit. The allegations of fraud against the plaintiff easily and readily admitted to by 5<sup>th</sup> and 6<sup>th</sup> defendant is I think a smokescreen to deny the bank the defence of *Res judicata*. As stated by **Ringera J.** (as he then was) in the case of **George Omondi Vs. National Bank of Kenya Ltd. & 2 others (UR)**

***“... I accept the submissions by the counsel for the defendants that the doctrine of res judicata would apply not only to situations where specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situation where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or cause of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments.”***

The same situation obtains here. The plaintiff can litigate perfectly well in the earlier suit which is still pending hearing.

I have said all these to show that the plaintiff has not made out a prima facie case with a probability of success to entitle him to an order of temporary injunction. Accordingly, the application is dismissed with costs to the 1<sup>st</sup> defendant.

**Dated and delivered at Machakos, this 16<sup>th</sup> day of January, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**