



REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 228 of 2011

PETER NYANGA ADALA.....PLAINTIFF

VERSUS

IMMANUEL OMONDI NYANGA.....1ST DEFENDANT

CO-OP BANK OF KENYA LTD.....2ND DEFENDANT

R U L I N G

The notice of motion dated 7-12-2011 by the applicant prays for the following orders:-

1. Spent.

2. Spent.

3. That the 2nd defendant/respondent be restrained from selling, transferring, disposing off or in any other manner dealing with land parcel No. N/ Ugenya/Doho/970 pending the hearing and determination of this suit.

The application is supported by the affidavit of Peter Nyanga Adala sworn on 7-12-2011.

The substance of the said application is that the applicant is the administrator of the estate of the late Adala Muganda who died on the 29th March 2007. He was the registered proprietor of land parcel No. N/ Ugenya/Doho/970.

Unkown to the plaintiff, the 1st defendant on 16-12-2009 without obtaining the letters of administration transferred the suit property to himself and charged it to the 2nd defendant for a loan facility of Kshs. 1.4 million. He failed to pay the same and thus prompting the 2nd defendant/respondent to exercise its statutory power of sale. The 1st defendant/respondent by his own affidavit sworn on 20-3-2012 admitted the above facts. His only contention is that he is still willing to pay but by way of installments.

The 2nd defendant/respondent has sworn two replying affidavits. The same are dated 15-2-2012 and 3-4-2012. The deponent Tom Kondo depones that the bank indeed took all the necessary due diligence before disbursing the loan to the 1st defendant. He has annexed several documents which include copies of the title, search, valuation and the charge.

On the admission by the 1st defendant through his replying affidavit the 2nd respondent urged this court to ignore the same. He further swore that should the plaintiff's application be allowed then the bank stands

to suffer loss.

On the analysis of the facts herein, it is not disputed that the 1st defendant fraudulently and illegally had himself registered as the proprietor of the suit property. This fraud however needs to be further investigated and it cannot be done via affidavits. There is need to have oral evidence adduced.

Further, the plaintiff clearly is a victim of the 1st defendant's fraud. From what is on record the action by the 1st defendant was done behind his back. The bank on the other hand has a legitimate claim to recover the loan from the 1st defendant. However, should the security be realized before granting the plaintiff the opportunity to have their issues ventilated fully?

The court is of the view that the plaintiff have a *prima facie* case. In the light of the authority of **Gielle - VS- Cassman Brown [1973] E.A. 32** I shall grant the plaintiff a temporary injunction as prayed pending the hearing and determination of the main suit.

Meanwhile out of his own admission and without prejudice to the outcome of the substantive suit the 2nd respondent may have the liberty of pursuing its claim against the 1st defendant as an individual.

The costs of this application shall be born by the 1st defendant.

Dated, signed and delivered at Kisumu this 24th day of October 2012.

H.K. CHEMITEI

JUDGE

In the presence of:

Asunah for J. J. Masinga for the plaintiff

owiti for 2nd defendant

1st defendant present

HKC/va