



REPUBLIC OF KENYA



KENYA LAW
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Mogaka v Diamond Trust Bank of Kenya Ltd & 2 others (Environment & Land Case 29 of 2019) [2022] KEELC 3328 (KLR) (15 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 29 OF 2019**

JM ONYANGO, J

JUNE 15, 2022

BETWEEN

ESTHER KEMUMA MOGAKA PLAINTIFF

AND

DIAMOND TRUST BANK OF KENYA LTD 1ST DEFENDANT

**STEPHEN KARANJA KANGETHI T/A DALAI TRADERS
AUCTIONEERS 2ND DEFENDANT**

ALYSSA LIMITED 3RD DEFENDANT

RULING

Introduction

1. The 3rd Defendant filed an application dated 28th October, 2021 seeking the following orders:
 - a) Spent
 - b) That pending the hearing and determination of this application inter partes, the Honourable Court be pleased to issue an order of temporary injunction barring the Plaintiff by herself, her agents, servants, property manager or any person howsoever acting under the Plaintiff's instructions from managing, receiving or collecting rent, instructing tenants, leasing, entering into leases licenses and/or tenancy agreements and/or in any manner continuing with possession of the 3rd Defendant's premises popularly known as Uhuru Plaza erected on Land Reference Number Kisii Municipality/ Block 111/334 situated at Kisii township.
 - c) That pending the hearing and determination of this application inter partes, the Honourable Court be pleased to issue an order of temporary injunction barring the Plaintiff by herself, her agents, servants, property manager or any person howsoever acting under the Plaintiff's instructions from withdrawing, transferring or dealing with rental income remitted by tenants



to Account Number 1222xxxxxx operated in the name of Zablun Nyamari Mogaka at KCB Bank of Kenya, Kisii Branch and/or any other Bank Account held and/or operated in the name of the Plaintiff or Zablun Nyamari Mogaka and a freezing and/or a preservation order be issued in respect of Account Number 1222xxxxxx or any other Bank Account held and /or operated in the name of the Plaintiff or the said Zablun Nyamari Mogaka.

- d) That pending the hearing and determination of this suit, the Honourable Court be pleased to issue an order of temporary injunction barring the Plaintiff by herself, her agents, servants, property manager or any person howsoever acting under the Plaintiff's instructions from managing, receiving or collecting rent, instructing tenants, leasing, entering into leases licenses and/or tenancy agreements and/or in any manner continuing with possession of the 3rd Defendant's premises popularly known as Uhuru Plaza erected on Land Reference Number Kisii Municipality/ Block 111/334 situated at Kisii township.
 - e) That pending the hearing and determination of this suit, the Honourable Court be pleased to issue an order of temporary injunction barring the Plaintiff by herself, her agents, servants, property manager or any person howsoever acting under the Plaintiff's instructions from withdrawing, transferring or dealing with rental income remitted by tenants to Account Number 1222xxxxxx operated in the name of Zablun Nyamari Mogaka at KCB Bank of Kenya, Kisii Branch and/or any other Bank Account held and /or operated in the name of the Plaintiff or Zablun Nyamari Mogaka and a freezing and/or preservation order be issued in respect of Account Number 1222xxxxxx or any other Bank Account held and /or operated in the name of the Plaintiff or the said Zablun Nyamari Mogaka.
 - f) That the Honourable Court be pleased to order accounts to be taken directing the Plaintiff to render accounts within 30 days from the date of the order in respect of the rent paid by each tenant, received or collected by the Plaintiffs from the tenants occupying the 3rd Defendant's property known as Land Reference Number Kisii Municipality/Block/111/334 and popularly known as Uhuru Plaza for the period between 20th December, 2017 and the date of the order of the Court and upon such compliance, the Honourable Court be pleased to make such further orders in the interest of justice.
 - g) That pending the hearing and determination of this suit, the Honourable Court be pleased to issue an order of mandatory injunction compelling the Plaintiff to deliver and/or yield up possession of the 3rd Defendant's premises popularly known as Uhuru Plaza erected on Land Reference Number Kisii Municipality/Block/111/334 situated at Kisii township.
 - h) That the costs of this application be borne by the Plaintiff.
2. The application is supported by the grounds on the face of it as well an Affidavit sworn on 28th October, 2021 by Bole Rahma, the 3rd Defendant's Property Manager. In the said affidavit he has deposed that sometime in November, 2017 the 3rd Defendant bought the suit property at a public auction conducted by the 2nd Defendant on behalf of the 1st Defendant. The suit property which was charged to the 1st Defendant to secure a loan advanced to the Plaintiff was sold in exercise of the 1st Defendant's statutory power of sale following the Plaintiff's failure to repay the loan advanced to her by the 1st Defendant.
 3. He further deposes that following the said sale, the suit property was registered in the name of the 3rd Defendant on 7th August, 2019 after which it was charged to the 1st Defendant to secure a loan advanced to the 3rd Defendant. However, in a bid to frustrate the 3rd Defendant and prevent it from assuming



possession, the Plaintiff filed this suit together with an application for a temporary injunction. The said application was dismissed by a ruling delivered on 25th September, 2020.

4. Mr. Rahma depones that their efforts to take possession of the suit property have been frustrated by the Plaintiff and she has continued to collect a monthly rent of approximately Kshs. 3,811,597/= from the tenants since 20th December, 2017. By the time the application was filed, she had collected about Kshs. 121, 971, 104/= which she had failed to remit to the 3rd Defendant or account for the same.
5. He depones that the Plaintiff's actions are unlawful and amount to trespass. Further that as a result of the said unlawful acts, the 3rd Defendant has been unable to service the loan advanced to it and there is a risk of the suit property being sold by the 1st Defendant.
6. It is his contention that the Plaintiff's equity of redemption was extinguished after the fall of the hammer and her only remedy is in damages. He therefore urges the Court to protect the 3rd Defendant's constitutional right to own property.
7. In response to the application, the Plaintiff filed a Replying Affidavit sworn on the 10th February, 2022. The gist of his response is that the Plaintiff intends to challenge the sale and transfer of the suit property to the 3rd Defendant on the grounds that the sale was fraudulent.
8. The 3rd Defendant filed a rejoinder to the Replying Affidavit through the Supplementary Affidavit of Bole Rahman sworn on the 14th March 2022 in which he reiterates the contents of his Supporting Affidavit and contends that the Plaintiff is by design inviting the Court to sit on appeal on its own decision which is untenable.
9. He further depones that the Plaintiff's belated attempt to file a Notice of Appeal out of time was rejected when the Court of Appeal dismissed her application for leave to appeal out of time. He contends that it would be illegal and unjust to condemn the Applicant to go to trial as the sale by public auction conducted in the exercise of the bank's statutory power of sale is immunized from any suit under section 99 of the Land Act.
10. The Court directed that the application be canvassed by way of written submissions and both the plaintiff and 3rd Defendant filed their respective submissions and authorities which I have considered.

Applicant's Submissions

11. In his submissions, learned counsel for the 3rd Party/Applicant gave a background of the matter and contended that the Applicant had established a *prima facie* case with a probability of success as stipulated in the case of Mrao v First American Bank Ltd & 2 Others (2003) KLR 125 and the celebrated case of Giella v Cassman Brown & Co Ltd (1973) E.A 358. It is also counsel's contention that the Applicant has met the threshold for a mandatory injunction set out in the case of Kenya Breweries & Another v Washington O Okeyo (2002) eKLR. It has been submitted that the Applicant was not a party to the alleged fraud and that the Plaintiff's right of redemption was extinguished at the fall of the hammer during the public auction as per the case of Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd & 4 Others (2005) eKLR.
12. Relying on the provisions on section 99 of the Land Act and sections 24, 25 and 26 of the Land Registration Act, counsel contends that the Applicant has been offered statutory protection as a *bona fide* purchaser for value without notice.
13. It was contended that the Plaintiff's actions amount to economic sabotage. In relying on the case of Aikman v Muchoki (1984) KLR 353 counsel submitted that even if damages are an adequate remedy, an injunction should issue so as not to aid the Plaintiff in flouting the law.



14. Finally, it was argued that by declining to grant the orders sought the Court would be allowing the Plaintiff to have a second bite of the cherry. He was therefore of the view that the balance of convenience tilts in favour of the Applicant.

Respondent's Submissions

15. On his part, learned counsel for the Plaintiff submitted that the Applicant's application is unprocedural as the prayers sought by the Applicant are not anchored on any pleadings and granting them would be tantamount to determining the suit, without subjecting the issues to a hearing which would not be in tandem with the rules of natural justice.
16. Arguing that the orders of injunction sought under Order 40 (1) and (2) of the Civil Procedure Rules are temporary in nature pending the disposal of the main suit, the Applicant must make full and frank disclosure of all relevant facts. He challenged the Applicant's assertion that it is a *bona fide* purchaser for value without notice and maintained that the issues raised by the Plaintiff touching on fraud are weighty and can only be determined after a full trial as determining them at a preliminary stage would be premature, prejudicial and it would deprive the Plaintiff of her right to be heard. He relied on the case of Mbutia v Jimba Credit Finance Corporation & Another (1988) KLR. He also relied on the case of Kenya Commercial Bank Ltd v Osebe (1982) KLR 296, where the Court of Appeal held that the question of whether or not the sale was at an undervalue and whether it was mismanaged were disputed facts which should not be resolved on affidavit evidence.
17. With respect to the prayer for a mandatory injunction, counsel argued that the Applicant had not established any special circumstances to warrant the grant of a mandatory injunction.

Issues for Determination

- i. Whether an injunction can be issued in a vacuum.
 - ii. Whether the Applicant has met the conditions for a mandatory injunction.
 - iii. Whether the orders sought can be granted at an interlocutory stage.
18. It is trite law that an injunction cannot be granted in a vacuum. In the case of Ernest Mwangi Waigi v National Bank of Kenya Ltd the Court held as follows:

“A perusal of the plaint reveals that the plaintiff is primarily challenging the lawfulness of the defendant's exercise of its statutory power of sale. However, he never included any prayer in the plaint to that effect. In my view and as correctly pointed out by Maina Wachira, the plaintiff should at least have included a prayer for a declaratory order seeking that this court declares the defendant's intended exercise of its statutory power of sale to be unlawful. In the absence of such prayer, the plaintiff's prayer for a permanent injunction has no legs to stand on. Prayers for injunction cannot exist in a vacuum”.
 19. Similarly, in the case of Kileleshwa Service Station v Kenya Shell Limited (2008) eKLR the Court of Appeal observed that since the application for injunction was extraneous to the orders of the superior court, it was misconceived.
 20. In the instant case, the Applicant has not filed his Defence and as correctly submitted by counsel for the Plaintiff, a party would ordinarily seek that which they seek in the main suit to be granted in the interim



by way of an interlocutory application, the purpose being to preserve the subject matter pending the hearing and determination of the main suit lest the suit be rendered nugatory.

21. In the absence of a Defence, the Applicant is asking the court to determine substantive issues on affidavit evidence which is unprocedural and untenable. As was held in *Mbuthia v Jimba Credit Credit finance Ltd (supra)* the Court ought not to determine the case at an interlocutory stage but only to determine the relative strength of the parties' cases. By granting the orders sought, there will be nothing left for the court to determine and the Plaintiff's right to a fair hearing will be compromised. On these two grounds, I would decline to grant the orders sought.
22. Nevertheless, I will examine whether the Applicant has met the conditions for the grant of a mandatory injunction. In the case of *Kenya Breweries Ltd v Washington Okeyo* (2002) eKLR the Court of Appeal held that:

“A mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant tried to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”

23. It is the Plaintiff's submission that the Applicant has failed to establish any special circumstances that would compel the court to issue a mandatory injunction. As pointed out earlier in this ruling, the Applicant has not filed any Defence to the main suit and it would be premature to grant a mandatory injunction. The court cannot summarily determine whether the Applicant is a *bona fide* purchaser for value without notice nor can it summarily determine whether there was fraud on the part of the Plaintiff. These are serious issues that must be subjected to a full hearing. I therefore find that this is not an appropriate case in which a mandatory injunction ought to be granted.
24. Although I sympathize with the 3rd Defendant's predicament, I am unable to grant the orders sought in the application which have far-reaching implications on the parties' rights to a fair hearing as the 3rd Defendant has neither put forth its defence nor has the same been tested at a hearing. With greatest respect to counsel for the 3rd Defendant, there is nothing illegal about a case against a *bona fide* purchaser proceeding to full trial, as it is only then that the said purchaser would be able to prove that he is entitled to protection in terms of section 99 of the *Land Act*. Any precipitate findings at this stage would be premature, more so where the chargor has raised the issue of fraud. At any rate, if the 3rd Defendant proves its case against the Plaintiff, it will be entitled to any damages it shall have suffered as a result of the Plaintiff's conduct.
25. In the premises, I am disinclined to grant the application and the same is dismissed. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF JUNE 2022.

J.M ONYANGO

JUDGE

