



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 243 of 2012**

**PETER NJOROGE NGANGA.....PLAINTIFF**

**VERSUS**

**KENYA REINSURANCE CORPORATION LTD**

(Statutory Manager for United Insurance

Company Limited .....1<sup>ST</sup> DEFENDANT

**UNITED INSURANCE COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

Both the plaintiff and defendants claim to be the registered proprietors of all that piece or parcel of land known as Kajiado/Kaputiei-North/4243 hereinafter “*the suit premises*” measuring 20.23 hectares. The plaintiff claims to have bought the suit premises from one, **Martin Karumbe Koiyet** and acquired title on 14<sup>th</sup> March, 2012. On the other hand the defendants also hold title to the same suit premises issued to them way back on 27<sup>th</sup> August, 1999.

Apparently, the 2<sup>nd</sup> defendant was placed under statutory management on 15<sup>th</sup> July, 2005 and 1<sup>st</sup> defendant appointed a statutory manager. All documents relating to the 2<sup>nd</sup> defendant’s assets were handed over to the 1<sup>st</sup> defendant. One such asset was the suit premises. On 28<sup>th</sup> March, 2012 the statutory mandate of the 1<sup>st</sup> defendant was extended for a further period of 6 months with a view to having the assets of the 2<sup>nd</sup> defendants liquidated so as to settle outstanding claims. That process was commenced by way of advertisement of the assets in the Daily Newspapers.

The advertisement appeared in the Daily Nation of 25<sup>th</sup> June, 2012 in which the defendants invited Kenyan Public to tender for the purchase *inter alia* of the suit premises on the ground that the 2<sup>nd</sup> defendant was the registered proprietor thereof. The advertisement came to notice of the plaintiff. In the behest that he was the registered proprietor thereof, he felt offended and accordingly addressed an appropriate demand letter to the defendants asking them to withdraw the offensive advertisement as he was the absolute proprietor of the suit premises thereof. The defendants did not accede to his request and that is how he found himself in court on 9<sup>th</sup> July, 2012.

In this suit, the plaintiff seeks as against the defendants jointly and severally an injunction to restrain them from interfering, wasting, disposing, alienating, entering onto or remaining on or continuing in occupation of the suit premises, aggravated damages and costs of the suit.

Contemporaneously with the filing of the suit, the plaintiff took out a notice of motion seeking a

temporary injunction pending the hearing and determination of the suit. The application was anchored on Order 40 rule 1 of the Civil Procedure rules and sections 1A, 1B and 3A of the Civil Procedure rules. The grounds advanced by the plaintiff in support of the application are that:-

- He is the registered proprietor of the suit premises.
- He had bought the same from **Martin Karumba Koiyet** at a consideration of Kshs. 21,500,000/=.
- He sourced the finances for the purchase from the Cooperative Bank of Kenya Ltd. Having paid the full purchase price, the relevant transfer instruments were executed and successfully registered in his favour.
- In consideration of the loan facility aforesaid the Cooperative Bank executed a charge over it. After the registration of the transfer and charge the bank took custody of the original title deed and charge instruments as security for the repayment of the loan.
- On 25<sup>th</sup> June, 2012, the defendants wrongfully and unlawfully caused to be published in the Daily Newspapers an advertisement for sale of the suit premises, yet they were not the registered proprietors thereof.
- Despite demand by the plaintiff that they withdraw the suit premises from the list of their properties put up for sale on 10<sup>th</sup> July, 2012, the defendants had adamantly refused.
- The defendants have done the acts aforementioned maliciously and out of spite towards the plaintiff intending to humiliate and injure his proper feelings of dignity and pride and cause him to be treated with contempt by his family.
- The affidavit in support of the application sworn by the plaintiff merely reiterates and elaborates on the foregoing grounds.

On being served, the defendants reacted by filing a replying affidavit sworn by one, **Mumut Ole Sialo**, the Statutory Manager of the 2<sup>nd</sup> defendant. Where pertinent he deponed that on 15<sup>th</sup> July, 2006, the Commissioner of Insurance in exercise of his powers under Section 67C of the Insurance Act placed the 2<sup>nd</sup> defendant under statutory management and contemporaneously appointed the 1<sup>st</sup> defendant as the statutory manager. The statutory manager was required to trace, preserve and secure all the assets of the 2<sup>nd</sup> defendant, sale of such immovable properties and investment of the proceeds thereof in Government Securities to improve the 2<sup>nd</sup> defendant's liquidity. At the time of appointment, the 2<sup>nd</sup> defendant handed over original documents relating to the properties it owned, one of which was the suit premises. To date the 1<sup>st</sup> defendant is still in possession of the original title deed in respect of the suit premises. Over time and in the discharge of its duties of preservation of the assets, the 1<sup>st</sup> defendant lodged a caution in respect of the suit premises. Following valuation of the suit premises it was decided that it be disposed off and the proceeds thereof be made available to settle liabilities with a view of exploring the possibilities of the 2<sup>nd</sup> defendant being revived thereafter. The suit premises amongst other properties were therefore advertised in the Daily Newspapers. On 2<sup>nd</sup> July, 2012, a demand letter from the plaintiff was received registering an objection against the sale of the suit premises. The plaintiff's advocate had attached in the demand letter a purported title deed which had been re-issued to the plaintiff. The 2<sup>nd</sup> defendant having acquired the suit premises in 1999, there was no legal possibility of a title deed being re-issued when the owner has an original title in its possession. He went on to confirm that the suit premises had never before been offered for sale nor sold to any person in the name of the plaintiff or his vendor whatsoever or at all. The only time the property had been offered for sale by the owner was by the 1<sup>st</sup> defendant. On the basis of the foregoing, the plaintiff's documents were false, fictitious and fraudulent. In the premises the plaintiff cannot purport to hold proprietary rights over the suit premises on an invalid transaction. The only recourse available to the plaintiff according to the defendants was to pursue a refund and or compensation from the purported vendor and or any other culpable party but not the defendants. That the bidders over

the suit premises had already lodged their tenders and the sale processes commenced and it would occasion loss to the defendants and expose the statutory manager to possibilities of other damage law suits and costs if the sale was to be frustrated by way of injunction. Lastly, it deponed that no irreparable loss can be suffered by the plaintiff if orders sought are not granted as the suit premises can be valued in monetary terms for purposes of compensation if any, and he has never taken possession whatsoever or at all.

When the application came before me on 18<sup>th</sup> July, 2012, **Mr. Omulama** and **Mr. Milimu**, learned counsel for the plaintiff and defendants respectively agreed to canvass the same by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is common ground that both the plaintiff and the defendants have titles deeds in respect of the same parcel of land, the suit premises. Whereas the plaintiff's was issued on 14<sup>th</sup> March, 2012, that of the defendants was issued on 27<sup>th</sup> August, 1999. As between the two, which one is genuine cannot be determined at this interlocutory stage. It will have to await formal hearing and the calling of evidence. The respondents take the position that because theirs is earlier in time, it must be genuine, since the suit premises had never been offered for sale to the plaintiff by the defendants or to any other person, nor had they transferred and registered the suit premises in the name of the plaintiff or any other person. In the premises the title deed in the name of the plaintiff with regard to the suit premises was a forgery and or was obtained fraudulently since they still retain the original title deed.

The plaintiff counters this by saying that he bought the suit premises from **Martin Karumba Koiyet**. **Martin Karumba Koiyet** was the then registered proprietor of the suit premises. He carried out a search which confirmed that position. He then entered a written agreement for the purchase of the suit premises for the consideration of Kshs. 21,500,000/=. The transfer was executed subsequently. The Land Control Board Consent to the transfer was sought and obtained from Isinya Land Control Board by the vendor. Thereafter registration of the transfer in favour of the plaintiff was effected on 14<sup>th</sup> March, 2012 at Kajiado District Land Registry and a new title deed issued accordingly. Given that the plaintiff had sought and obtained a financial facility from the Co-operative Bank of Kenya Limited, two charges in favour of the said bank were registered against the title. The post registration search carried out on the same confirmed the position. On delivery to the bank of the title deed in the plaintiff's name and the charges registered in its favour, the bank duly facilitated the payment of Kshs. 19,150,000/= being the balance of the purchase prices to the vendor.

These are the contrasting position with regard to the ownership of the suit premises between the plaintiff and the defendants. At this juncture I am not required to make any definite findings on any of the above positions. That will be for another day when evidence will be called. What I am required to do is to determine whether or not, on the age old principles in **Giella vs Cassman Brown and Company Limited [1973] E.A. 358**, the plaintiff is entitled to the injunction sought. Thus the issues that call for determination are:-

- Whether the plaintiff has established a *prima facie* case with a probability of success
- Whether the plaintiff has established that he would suffer irreparable loss that cannot be compensated by an award of damages in the event that injunction is denied and lastly,
- Whether the balance of convenience tilts in his favour.

Dealing with the 1<sup>st</sup> issue, on the material placed before me, I am satisfied that the plaintiff has established a *prima facie case* with probability of success. He as a title to the suit premises just like the defendants. The defendants cannot say that theirs is superior to that of the plaintiff merely because it was issued earlier. The converse is equally true. These positions will have to be resolved in the plenary hearing of the suit.

The defendants have alleged fraud against the plaintiff's ownership of the suit premises. This may well be

true. It is now trite law that fraud is a serious charge which must be strictly proved and therefore can only be properly addressed during the hearing of the main suit, not at this interlocutory stage. See **Jeremiah Musyimi Nzuki vs Michael Mule Muluku [2006] KLR**. For now however I am satisfied that the plaintiff has established a *prima facie* case against the defendants with a probability of success.

According to the plaintiff, the suit premises went for Kshs. 21,500,000/=. By any standard, this is a huge sum of money that the plaintiff had to cough for the suit premises. He secured a loan from the Co-operative Bank of Kenya Ltd to purchase the same. He has invested a lot of time, energy and resource in the transaction. Of note here, is that banks would be very hesitant to advance a loan to a person who offered them security that was in the real sense not a security. I would imagine that if the injunction was not to be granted, the bank will recall the loan and call upon the plaintiff either to pay or replace the security. I wonder whether such damage would be quantifiable monetarily as the defendants would want us to believe. Further if the injunction sought is denied, the defendant will proceed to sell the suit premises as they have already evidenced that intention, at a great loss to the plaintiff. There are already 2 titles in respect of the suit premises. A determination will have to be made as to which one is genuine. The register will then have to be rectified. Such an order can only issue after full hearing. In the premises if the injunction sought is not granted, the effect will be that the main suit will have been rendered impotent. The totality of all the foregoing is that the plaintiff will suffer irreparable loss if the injunction is denied.

How about balance of convenience? It appears that the plaintiff is in possession of the suit premises as opposed to the defendants. As already stated if the injunctive relief sought is denied, the main suit will have no legs to stand on. Lastly, the suit premises is just one out of 112 properties that the defendants have put up for sale. I think that the defendants can wait for a little longer for the determination of the real owner of the suit premises. As correctly submitted by counsel for the plaintiff, while it is desirable to quickly source funds to pay the long suffering victims of accidents, it would be most convenient to do so in an environment which will guarantee them opportunity to enjoy their money without doubts hanging over their heads like the sword of Domiciles. In other words, the least injustice would be occasioned were this court to stay the sale of the suit premises, let the full hearing determine the rightful owner and thereafter proceed in accordance with the findings therein. Accordingly, the balance of convenience favours the plaintiff.

On the whole, I am satisfied that the application has merit. I allow it in terms of prayer 3. Costs shall be in the cause. The injunction is issued on condition that the plaintiff shall within the next seven (7) days from the date of this ruling execute an undertaking as to damages in the sum of Kshs. 6,000,000/=.

**DATED at MACHAKOS this 22<sup>ND</sup> day of NOVEMBER, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**

**DATED, SIGNED and DELIVERED at MACHAKOS this 14<sup>TH</sup> day of DECEMBER, 2012.**

**GEORGE DULU  
JUDGE**