



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 281 of 2012

STEPHEN GITAHI GITHU1ST PLAINTIFF

KANGETHE WAINAINA EDWARD2ND PLAINTIFF

- VERSUS -

FRANCIS KOMU GITAU.....DEFENDANT

AND

CONSOLIDATED BANK OF KENYA LTD.INTERESTED PARTY

RULING

1. The application before the court is a **Notice of Motion** dated **29th April 2012**. It seeks as the main prayer an order of injunction directed against the Defendant and the Interested Party restraining and prohibiting them from in any way dealing in, transferring, alienating, selling and or disposing land parcel numbers **Ngong/Ngong/23478** and **Kiambaa/Kanunga/T215** and or advertising them for sale or transfer or otherwise pending the hearing and determination of this application.

2. The application is premised on grounds set out therein among them that that on the strength of the Interested Party's letter to the Defendant dated **16/7/2010** the Plaintiffs entered into 2 sale agreement dated **14th February 2012** with the Defendant over land parcels **Ngong/Ngong/23478** and **Kiambaa/Kanunga/T215**. Despite the sale agreement the Interested Party has by a **45 days** redemption notice dated **1st March 2012** moved to sell the subject properties to other persons which move is detrimental to the Plaintiffs.

3. The application is supported by two separate affidavits sworn by the 1st and 2nd Plaintiffs dated **29th April 2012**. The content of the 2 affidavits are the same and a duplication which in my view was unnecessary. To these affidavits are attached the said Interested Party's letter dated **15th July 2010** and a copy of unregistered sale agreement between the Defendant and the Plaintiffs dated **14th February 2012**.

4. The application is opposed by the Interested Party vide a replying affidavit sworn by **JULIUS GIKONYO** dated **28th May 2012** with annexures. The Defendant filed his replying affidavit in court on **25th July 2012**. That affidavit actually supports the Plaintiff's application.

5. The brief history of the application is that on or about the month of **January 2012** by two (2) letters written by the Interested Party and its advocates respectively dated **16th July 2010** and **5th July 2011**, the Defendant offered to sell to the Plaintiffs two (2) of his properties charged with the Interested Party namely **Ngong/Ngong/23478** for Kenya Shillings Two Million Six Hundred Thousand only (Kshs.2,600,000/=) and **Kiambaa/Kanunga/T215** for Kenya shillings four million two hundred thousand only (**Kshs.4,200,000/=**) the sale price for the two parcels totaling Kenya Shillings Six Million, Eight Hundred Thousand only (**Kshs.6,800,000/=**).

It is alleged that the Plaintiffs promptly accepted the Defendant's offer upon which acceptance they entered into 2 sale agreements dated **14th February 2012** for the two parcels and the Plaintiffs paid to the Defendant Kenya Shillings Four Hundred and twenty Thousand only (**Kshs.420,000/=**) and two hundred and sixty thousand (**Kshs.260,000**) only being the respective **10%** sale price deposit for the two (2) parcels in issue herein. It is alleged that one (1) of the terms and conditions in the sale agreements was that the Defendant was to inform the Interested Party of the sale agreement by furnishing it with a copy of the sale agreement between the Plaintiffs and the Defendant.

6. It appears that the Defendant did not inform the Interested Party of the above agreement. The Interested Party then proceeded to advertise the suit property for sale, and this is what has angered the Applicant hence this suit.

7. The Plaintiff submitted that despite them entering into the sale agreements with the Defendant, and paying the 10% deposit, the Interested Party has proceeded to issue notification for sale of the suit property. The Plaintiffs therefore seek injunctive orders to restrain the Interested Party from selling the suit property as well as an order of specific performance compelling the Defendant to perform the said contracts. The Applicants submitted that they are innocent purchasers for value and deserve the orders and that they stand to suffer irreparable loss and damages should this application be dismissed.

8. On their part the Defendant did not submit but relied on the replying affidavit filed in court on **25th July 2012**. Essentially the Defendant does not oppose the application. The Defendant agrees with the factual stipulations of the Applicant as stated by the Applicant. He agrees that he entered into the said two sale agreements dated **14th February 2012** to sell the suit property to the Plaintiffs. The Defendant also agrees that he failed to notify the Interested Party of the said transaction since the need was overtaken when the Interested Party through M/s Leekey's Auctioneers advertised the suit property for sale. He denies any collusion between him and the Applicant and also agrees that the orders sought by the Plaintiffs against the Interested Party be allowed.

9. On their part, the Interested Party submitted that the Defendant is indebted to the Interested Party in the sum of over **Kshs.12,637,619.49** arising from the legal charge over the suit property in **2007**. The Interested Party narrated the history of the loan which was characterized by several failures by the Defendant to repay the loan, various negotiations, court cases and injunctions, further negotiations, which however have not resolved the matter. The Interested Party submitted that on **16/07/2010** it gave the Defendant a written authority to sell title number **Ngong/Ngong/23478** to offset part of the debt, but this was not complied with, and that it was not for an indefinite period, but in any event the Defendant never furnished the Interested Party with a sale agreement within a reasonable time as requested or at all hence the accommodation lapsed resulting in the instructions to the auctioneers.

10. The Interested Party submitted that the application before the court is a collusion between the Plaintiffs and the Defendant and should be dismissed.

11. I have carefully considered the application in light of the opposing submissions. To dispose of this matter I raise the following issues for determination:-

- (i) Whether the Plaintiffs are innocent purchasers for value?
- (ii) Whether the purchase price was paid to the Interested Party or to the Defendant?
- (iii) Whether there appears to be a collusion between the Applicants and the Defendant.

- (iv) Whether a cause of action has been disclosed against the Interested Party?
- (v) Whether the principles in *Giella – Vs – Cassman Brown* have been satisfied?
- (vi) Whether the court can exercise its discretion in the Plaintiff's favour?

12. To begin with I do not believe at all that the Plaintiffs herein are innocent purchasers for value as they were aware or are deemed to have notice of the Interested Party's interest in the suit properties as Chargee and that there was a pending court case over the same. In my view, the Applicants were under a duty to confirm from the Interested Party any transactions involving the suit property before committing themselves in any way. In this regard, it is important to whom the 10% deposit of the purchase price may be paid or payable. Having known, or having reason to know the overriding rights of the Interested party as a Chargee, the Applicants could have paid the 10% deposit not to the Defendant, but to the Chargee, or indeed as directed by the Chargee. This did not happen. The admission by the 1st Defendant that he failed to notify the Interested Party of the transactions involving the suit properties with the Plaintiff and the clear support given to this application by the Defendant confirm to me that the Plaintiffs and the Defendant are engaged in a collaborative scheme against the Interested Party, and that the Applicants have not come to this court with clean hands. A court of equity considers all the circumstances of a case. I am satisfied that the Applicants are not the alleged innocent purchasers for value without notice; that they deliberately failed to pay the alleged 10% to the Interested Party although they had a reason to believe that as Chargee the rights of the Interested Party were overriding; and I believe there is a collusion between the Applicants and the Defendant to frustrate the Interested Party from realizing the security through the proposed sale.

13. Having stated my view this far, I am not prepared to determine other issues I have raised in this matter, partly because the determination thereby will not change the decision I will arrive at, but more importantly because the finding thereof will, in my view, not be favourable to the Applicants.

14. In the upshot the Notice of Motion application dated **29th April 2012** is dismissed with costs to the Interested Party.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF DECEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

N/A for the Plaintiff

Kibathi for the Defendant

Wambugu H/B for Lilian for Interested Party

Teresia – Court Clerk