



CONSOLIDATED BANK OF KENYA LTD PLAINTIFF

-VS-

AHMED FAUD AMIR AWADH

SELECTED ENTERPRISES LIMITED

THE COMMISSIONER OF LANDS

THE HONOURABLE ATTORNEY GENERAL

KENNEDY SITUMA

DANIEL KARIUKI MACHARIADEFENDANTS

RULING

1. The plaintiff's Notice of Motion dated 14th March, 2012 is brought under Order 40 rule 1 and 2 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and Section 159 of the Constitution. For purposes of this ruling it seeks two prayers, namely No. 4 & 5:

“4. That an order of injunction do issue to restrain the 1st, 2nd, 5th and 6th defendants by themselves, their agents, employees and/or on their behalf from selling, alienating, disposing, transferring, charging, pledging, leasing or in any manner whatsoever disposing or agreeing to dispose of any interest in the parcel of land known as Portion Number M.51 Malindi more particularly describe don't he Deed Plan Number 3514 annexed to the Indenture dated 10th day of May, Two Thousand and five and registered in the Land Titles Registry at Mombasa in Presentation Number 67 volume number L.T. 38 Folio Number 319/16 File number 3759 and thereon bordered red and held for an estate in fee simple SUBJECT to the covenants and conditions contained in the aforesaid Indenture and/or any subdivision resulting therefrom pending the hearing and determination of the suit herein.

5. An order do issue directed at the 3rd defendant by himself/his agents, employees and/or any other person acting on the authority of the 3rd defendant and/or on his behalf not to register and/or effect any transfers and/or any other dealings or in any manner whatsoever of any interest in the parcel of land known as Portion Number M.51 Malindi more particularly described on the Deed Plan Number 3514 annexed to the Indenture dated the 10th day of May two Thousand and five and registered in the Land Titles Registry at Mombasa in presentation Number 67 volume number L.T.38 Folio Number 319/16 File Number 3759 and thereon bordered red and is held for an estate in fee simple SUBJECT to the covenants and conditions contained in the aforesaid Indenture and/or any subdivisions resulting therefrom pending the hearing and determination of the suit herein.

2. The application is supported by the affidavit of Julius Gikonyo. The said affidavit contains 20 paragraphs and annexures, the purport of which can be summarised by restating the grounds on the face of the application. These are reproduced hereunder:

“1) That the 1st, 2nd, 5th and 6th defendants whilst acting in cahoots and in collusion and in connivance with the 3rd defendant and/or his officers fraudulently and illegally purported to cause a reconveyance/discharge of charge in respect of the suit property and thereafter clandestinely proceeded to subdivide the aforesaid suit property and thereafter clandestinely proceeded to subdivide the aforesaid suit property into at least forty (40) subdivisions and further unlawfully and illegally caused the said subdivisions to be registered in the names of third parties.

2) That at the time of the purported reconveyance/discharge of charge and the sub-division and transfer to 3rd parties by the defendants, the said suit property had already been lawfully mortgaged in favour of the plaintiff whose consent/approval was absolutely critical before such reconveyance/discharge of charge could be proceeded with.

3) That the 1st, 2nd, 5th and 6th defendants, the purported vendors knew very well that the suit property herein was under a mortgage and any conveyance of the same of whatever nature without the consent and approval of the plaintiff was null and void and of no effect.

4) That the 3rd defendant and/or his officers negligently and/or frequently and/or unlawfully purported to reconvey, subdivide and register transfers in respect of portions of the suit property in contravention of the law.

5) That the 3rd defendant abused his statutory duty as ordained by Law when by the acts of his officers at the Lands Registry he purported to register a reconveyance/discharge of charge, effect and/or register subdivision and thereafter register transfers to 3rd parties against a title which was already encumbered and without the authority and/or consent of the plaintiff as mortgage.

6) That the 1st, 2nd, 5th and 6th defendants are now in the process of sourcing for more buyers for portions of the subject property and unless restrained by this Honourable Court as sought herein, they will proceed with their intended action and transfer portions of the suit property herein to third parties to the detriment of the plaintiff.

7) That the plaintiff herein stands to suffer irreparably unless the order sought herein are granted as the 1st, 2nd, 5th and 6th defendants have failed to repay the loan advanced by the plaintiff bank and at the same time, the 1st, 2nd, 5th and 6th defendants are now disposing of the subject property herein which is under mortgage to the plaintiff bank as security for repayment of the said loan.”

3. Briefly, the plaintiff's case was that in July, 2005, the plaintiff bank advanced to the 1st and 2nd defendant a sum of shs. 6,000,000/- repayable in 36 months. The said loan facility was secured by a mortgage over the land parcel no. M51 located in Malindi (the suit property) owned by the 1st defendant, and guarantees executed by the 1st, 5th and 6th defendants as directors of the 2nd defendant. After servicing the loan for about one year, the defendants defaulted and by August 2010 the arrears had accumulated in excess of kshs. 15 million.

4. When the plaintiff attempted to realise the immovable security, it allegedly discovered that the 1st and 2nd defendants ***“acting in cahoots and in collusion and in connivance with the 3rd defendant and/or his officers (had) fraudulently and illegally purported to cause a reconveyance/discharge of charge in respect of the suit property and thereafter clandestinely proceeded to subdivide the ...suit property (into) 40 subdivisions and further unlawfully and illegally caused the said sub-divisions to be registered in the names of third parties.”***

At the time of moving the court the plaintiff was apprehensive that the defendants were in the process of sourcing for perspective buyers for the remaining subdivisions.

5. Although the defendants were served with the application, they did not file any grounds or affidavit to

oppose the same. On record however, is a memorandum of appearance filed on 9th May, 2012 by the firm of Kamoti Omollo & Company on behalf of the 1st, 2nd, 5th and 6th defendants.

6. The principles governing the grant of interim orders of injunction were laid down in the celebrated case of **GIELLA VS CASSMAN BROWN & CO. [1973]EA 38**. These principles are that an applicant must demonstrate that he has a prima facie case with a probability of success, and he will suffer irreparable damage unless the application is granted. When the court is in doubt it will decide the application on the balance of convenience.

7. Applying these principles to the uncontroverted material presented by the plaintiff in support of its application, I am satisfied that the applicant has surmounted the first two hurdles in the **Giella Case**, and secondly, that to preserve the subject matter pending litigation, it will be in the interest of justice to grant prayers 4 and 5 of the Notice of Motion. Costs are awarded to the plaintiff. It is so ordered.

Delivered and signed at Malindi this 4th day of **July, 2012** in the presence of: Mr. Mwadilo holding brief for Mr. Kibara, the plaintiff's counsel. Court clerk - Evans/Leah.

C. W. MEOLI
JUDGE