REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 279 OF 2010

SUSAN K. BAUR……...…….PLAINTIFF

VERSUS

SHASHIKANT SHAMJI SHAH…….....……1ST DEFENDANT

DAVIDAR SINGH GHATA - AURA…….....…….2ND DEFENDANT

MARINDAR SINGH GHATA-AURA……..….....…….3RD DEFENDANT

RULING

By a Chamber Summons dated 29th October 2010 and filed on 8th November 2010, *(the application)*, the Applicant sought the following orders -

(1) that this Application be certified as urgent, service of the Application be dispensed with and be heard exparte in the first instance.

(2) that pending the hearing and determination of this Application a temporary injunction do issue restraining the Defendants whether by themselves, servants, employees or agents from selling, leasing, developing, subdividing, transferring, entering, trespassing or in any other way dealing with property title No. NAKURU MUNICIPALITY BLOCK 17/5 or interfering with the plaintiff's quiet, peaceful occupation and possession of the aforesaid suit property.

(3) An injunction do issue restraining the Defendants whether by themselves, their servants, employees or agents from selling, entering, trespassing, sub dividing, transferring or interfering in any way with the plaintiff's quiet enjoyment of the said parcel of land pending the full and final hearing and determination of this suit.

(4) Costs of the Application be costs in the cause in any event.

The application was based upon the Supporting Affidavit of the Applicant and the grounds on the face thereof. The first five prayers were granted ex parte by orders made on 9th November 2010 and are therefore spent. This Ruling therefore concerns prayer 3 of the application.

As ably argued by the Applicant's counsel in his skeletal submissions dated 13th January and filed on 14th January 2010, the *locus classicus* case on the grant of injunctions in East Africa is **GIELLA VS. CASSMAN BROWN & CO. LTD [1973] E.A. 358**

The principles laid down in that case are that -

(a) the applicant must show a prima facie case with a probability of success,

(b) the applicant might suffer irreparable loss or injury which cannot be compensated in damages,

(c) if the court is in doubt, it will decide the application on the balance of convenience.

In **MRAO LTD vs FIRST AMERICAN BANK KENYA LTD & 2 OTHERS [2003] K.L.R. 125**, the court defined a prima facie *"as a case in civil application as including but not limited to a genuine arguable case. It is a case which on the material presented to the court or a tribunal properly directing itself will concede that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

The Applicant's counsel argued inter alia that the applicant had established a prima facie case with a probability of success **firstly,** the alleged charge was invalid, as only an owner *(or registered owner)* can issue or grant a charge. The Applicant was only a purchaser at the time of the creation of the charge. **Secondly,** counsel for the applicant urged that the 1st Respondent did not issue the requisite statutory notice as is required under Section 74(1) of the Registered Land Act *(Cap. 300, Laws of Kenya)* to enable the Applicant to redeem the property.

Thirdly counsel argued, the 1st Respondent never informed the applicant that the property had been sold allegedly for Sh 5.5 million, while he had received Sh 4.0 million from the Applicant and that the 1st Respondent cannot have it both ways.

On his part, counsel for the 1st Respondent raised a Preliminary Objection dated 6th December and filed on 7th December 2010, that the application was misconceived, incompetent, bad in law and abuse of the process of the court, and **secondly** that the Plaintiffs suit was unsustainably defective and in contravention of Order VII of the Civil Procedure Rules. Counsel for the 1st Applicant also filed skeletal arguments.

Counsel's **first** argument on the Preliminary Objection is that the application herein was in contravention of Order VII *(now Order 4)* because it was brought by way of Chamber Summons, when it should have been instituted by way of Motion. This, counsel argued, was a serious defect and goes to the root of the application. Counsel relied on the Ugandan case **SALUME MUKASA VS. YOZEFU BUKYA [1966] E.A. 433** and the Court of Appeal decision in **MORRIS & CO. LTD VS. KENYA COMMERCIAL BANK LTD & OTHERS [2000]2 E.A. 605.**

Secondly 1st Defendant's counsel argued that the Applicant was in contravention of Order VII rule 1(f) as the applicant had failed to disclose the existence of Nakuru HCCC No. 204 of 2010 concerning the same property and raising similar claims.

Thirdly counsel for the 1st Defendant sought to have the Supplementary Affidavit of the Applicant filed on 10th December 2010 be struck out **firstly** because it was filed outside time and without leave of court and **secondly** it was not properly attested as is required by Section 88 of the Evidence Act *(Cap. 80, Laws of Kenya).* Counsel relied on the case of **PASTIFICIO LUCIO GAROFALO S.P.A. vs. SECURITY & FIRE EQUIPMENT CO. & ZASECO (K) LTD** *(Nairobi Milimani Commercial Courts HCCC No. 966 of 2000).*

The firm of Mutonyi & Mbiyu Co. Advocates filed skeletal submissions on behalf of the 2nd and 3rd Defendants/Respondents, dated and filed on 14th March 2011. They adopted the submissions by the 1st Defendant's counsel. They relied on all the three principles upon which an interlocutory injunction

may be granted, and submitted that the Applicant had not met any of the **Giella** or **Cassman Brown** principles, and prayed that the application be dismissed with costs.

I have considered the arguments from both the Applicant's and Respondents' counsel, and set out my response thereto in the paragraphs following.

On the purely procedural question whether or not the application should be struck for non compliance with the provisions of Order L, *(now 5), (Order 51)* of the Civil Procedure Rules, that all the applications should be brought by way Motion, and shall be heard in open court unless the court directs the hearing be conducted in chambers or unless the rules expressly provide otherwise.

The answer to this question partly lies in Order L, rule 13 *(now Order 51, rule 5)* that no application shall be refused merely because of failure to state the order, rule or other statutory provision under or by virtue of which the application is made. And Order VI rule 12 *(now Order 2 rule 12)* states that no technical objection may be raised to any pleading on the ground of any want of form.

The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as sated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective. In any event under this application there is correct reference to Order XXXIX rules 1(a), 2 & 3(a) and rule 9 (which says the application for temporary injunction may be brought by way of Chamber Summons. The contention otherwise is, I think, misconceived and mischievous.

Many counsel and their clients are in many occasions guilty of non-disclosure where such disclosure will, they think, adversely affect their interests. But non-disclosure of a fact or facts material to the case, is a good ground for reversing the orders obtained through such non-disclosure. In this case, the Applicant or applicant's counsel did not disclose the existence of Nakuru HCCC No. 204 of 2010.

However, although such disclosure was useful in the sense that the Applicant had already been sued by the 2nd and 3rd Defendants for mesne profits, and had obtained judgment in default of appearance and defence, the non-disclosure cannot be said to be so material as to affect the outcome of the application, although it may in the end affect the outcome of the plaintiff's suit against all the three Defendants.

Adverting to the substantive application, I am satisfied that the applicant has not established any of the three cooking stones in the **Giella vs. Cassman Brown** trilogy for the grant of an interlocutory injunction.

By selling the suit property and instituting a claw-back clause by way a charge, registered simultaneously with the transfer, the 1st Defendant secured the payment of the balance of the purchase price, which he obtained by exercising his statutory power of sale.

It is clear to me from the 1st Defendant's Replying Affidavit that he complied with the statutory provisions of Section 74 of the Registered Land Act, and so did the Auctioneer by giving the applicant 45 days Redemption Notice. Ninety (90) days notice was given on 24th September 2009, which expired on 29th December 2009. The 45 days notice by the Auctioneer having been given on 22nd January 2010 expired on 8th March 2010. The sale took place on 24th March 2010. There is therefore no contravention of any of those provisions.

On those grounds, the Applicant cannot be said to have established a prima facie with any probability of such success.

Neither can it be said that the applicant cannot be compensated in damages. There is no evidence that either of the Defendants are paupers or the 1st Defendant in particular is a pauper.

The balance of convenience at this stage lies with the 2nd to 3rd Respondents who bought the property at an auction, and their act cannot be said to be fraudulent or tainted with fraud.

For those reasons, I would vacate the temporary orders granted by me on 9th November 2010, and dismiss with costs the Applicant's application dated 29th October 2010 and filed on 8th November 2010.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE