



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 82 of 2009

**MONICAH WANGARI RUTHI)
JIMNAH MUCHIRI RUTHI)..... PLAINTIFFS**

Versus

KENYA COMMERCIAL BANK

DAVID GEORGE GATIBA RUTHI..... DEFENDANTS

R U L I N G

By an application dated 22nd May, 2009 in the nature of a chamber summons expressed to be brought under order XXXIX rule 1, 2, 3 and 9 of the Civil Procedure Rules and all other enabling provisions of the law, **Monica Wangari Ruthi** and **Jimnah Muchiri Ruthi** hereinafter referred to as the respondents sought in the main the following order against Kenya Commercial Bank and **David George Gatiba Ruthi** hereinafter referred to as the respondent's "**.... a temporary injunction to restrain the first respondent its agents or servants from selling parcel of land Loc.10/Wanjegi/121 by public auction or otherwise. On 27th May, 2009 or on any other date until the hearing of this suit or further orders...**" The applicants also prayed that costs of the application be provided for.

In support of the application, the 1st respondent deponed that land parcel Loc.10 Wanjegi/121 hereinafter referred to as the suit premises was family land where the entire family of the late **Christopher Ruthi Kimani** live. All along they thought that it was still registered in the name of **Christopher Ruthi Kimani** – deceased. However sometimes in May, 2009 they learned that the 2nd respondent who is one of the deceased's sons caused the suit premises to be registered in his name and proceeded to charge it to the 1st respondent as security for a loan he had taken. Apparently, 2nd respondent defaulted in the repayment of the loan and the suit premises were put up for sale by public auction by watts enterprises acting on the instructions of the 1st respondent. The 2nd respondent had no mandate to change the ownership of the suit premises. In the event that the suit premises are sold, the family stand to suffer irreparable loss, hence a plea for injunction.

In response to the application, the 1st respondent through one, **Simon N. Gathiari**, a relationship manager with the 1st respondent

swore a replying affidavit. He deponed in pertinent paragraphs that the affidavit in support of application was incompetent and the entire application was consequently fatally defective for want of compliance with the provisions of order 1 rule 12 of the civil procedure rules. The 2nd respondent entered into several agreements with the 1st respondent by virtue of charges made on several occasions that were duly registered over the suit premises to secure repayment of monies advance to him at his own request and instance. The 2nd respondent failed to service satisfactorily the financial facilities granted to him as aforesaid and a statutory notice under section 74 of the Registered Land Act was duly issued by the 1st respondent on 17th August, 2000 requiring him to pay Kshs.1,712,581/75/= then outstanding. That after the aforesaid statutory notice the 2nd respondent commenced several suits in the High Court as well as Senior Principal Magistrates court at Murang'a seeking inter alia injunctive relief's restraining the 1st defendant from realizing the security in the exercise of a chargees statutory power of sale. Those suits were Murang'a SPMCC No.183 of 2002, Milimani HCCC No.635 of 2003, Milimani HCCC No.295 of 2006, Nairobi C.A 266 of 2006. In respect of Milimani HCCC No.635 of 2003 and 295 of 2006 respectively, the High Court delivered rulings confirming that the 1st respondent was entitled to realize the security. The 2nd respondent's application for injunction pending the hearing and determination of C.A. 266 of 2006 was also dismissed by the court of appeal. The suit premises belonged to the 2nd respondent and not the applicants. As the registered proprietor vested with absolute ownership he had absolute right to charge the suit premises in favour of the 1st respondent without seeking any approval or consent from the applicant. Accordingly, the applicants have no locus sandi to initiate this suit and therefore have no prima facie case with probability of success. The 1st respondent having complied with all the procedures are entitled to realize the security in a lawful and legitimate exercise of a chargees statutory power of sale that has accrued.

The 2nd respondent too swore a replying affidavit. His case is that yes, he borrowed from the 1st respondent money using the suit premises but denies that he participated in the transfer of the suit premises into his name and never gave any consent for the transfer nor did the 1st respondent call him for a land control board meeting to obtain consent. He supported the application on the grounds that the 1st respondent and himself had several cases pending before the high court and the court of appeal in Nairobi and thus the 1st respondent's move to sell the suit premises in the exercise of purported power of sale was wrong since the suit have not been determined. That he had issued notice to the 1st respondent for the release of the title under order 1 rule 21 (b) of the civil Procedure Rules. Accordingly the 1st respondent ought to be restrained from dealing with the suit premises in any manner.

When the application came up for inter partes hearing **Mr. Wachira, Mr. Munyale and Mr. Njeru** for the applicants, 1st respondent and 2nd respondent respectively agreed to canvass the application by way of affidavits on record as well as written submissions. Subsequent thereto parties filed their respective submissions which I have carefully read and considered alongside cited authorities.

The principles upon which a court of law grants and interlocutory injunction as in the instant case were settled about 37 years ago in the celebrated case of **Giella V Cassman Brown & co. Limited (1973) E.A.358**. The court of appeal in this case held that a court before which an application for injunction has been made has to enquire as to:-

(i) **Whether the applicant has laid out a prima facie case with a probability of success.**

(ii) **Whether the applicant might suffer irreparable injury if the injunction is not granted; and**

(iii) If there is doubt, if the balance of convenience favours the applicant.

These considerations are sequential so that the 2nd condition can only be addressed if the first one is satisfied and when the court is in doubt the 3rd conditions can then be addressed. This was the holding by the court of appeal in the case of **Kenya Commercial Finance Co. Limited VS Afraha Education Society (2001) 1 E.A. 86.** Further an injunction temporary or otherwise is in the nature of an equitable relief. It behoves a party seeking such relief to come to court with clean hands.

With the above considerations in mind, I now turn to consider the application can one say in all sincerity that the applicants have made out on the pleadings and submissions on record, a prima facie case with probability of success? I do not think so. A perusal of the prayers in the plaint reveal that the plaintiff is only seeking a permanent injunction to issue against the first respondent to restrain it from selling the suit premises by public auction or otherwise and then the costs of the suit. The plaintiffs have not included any prayer in the plaint challenging the lawfulness of the 1st exercise of its statutory power of sale and or cancellation or rectification of the register with regard to the suit premises in so far as it relates to the transfer and subsequent registration of the suit premises in the names of the 2nd respondent. The plaintiffs in my view should at least have included a prayer for a declaratory orders(s) of sought. It necessarily follows that in absence of such other prayers, the plaintiffs' claim for injunction has no legs to stand on. It is baseless and therefore frivolous, vexatious and an abuse of the court process. The prayer for injunction cannot exist in a vacuum. It has to be supported by other orders. Once the injunction whether temporary or permanent, what then happens thereafter to the suit? There will no suit to be heard and determined in the circumstances. On that score alone, I would hold that no prima facie case with probability of success has been made out by the applicants.

The applicants have brought the suit and therefore the applicant as members of the family of the late **Christopher Ruthi Kimani**. Indeed they describe themselves as wife and son respectively of the late **Christopher Ruthi Kimani**. Initially the deceased was the registered proprietor of the suit premises before according to them was mysteriously transferred in the name of the 2nd respondent. If that be the case, are they suing the respondents for and on behalf of the deceased estate. Ideally it should be the estate complaining about the fraudulent transfer and not themselves in their personal capacities. If they are claiming the suit premises on behalf of the estate of the deceased then they have no locus standi as they have not obtained a grant of letters of administration intestate with regard to the same estate and even if they are in possession of the same, they have not been able to exhibit it.

A careful reading of the plaint in my view does not disclose any cause of actions against the defendants known in law. Their claim is that all along they believed that the suit premises were in the name of the deceased. They were thus surprised when in May 2009 they learned that the 2nd respondent had secretly transferred the suit premises to himself and thereafter borrowed on the strength of the same from the 1st respondent. On 12th May, 2009 they learned that their parcel of land was up for sale by public auction. The applicants then aver that the 2nd respondent had no mandate from the family to charge the family property to the 1st respondent. They then conclude their plaint by stating that if the land is sold the entire family of **Christopher Ruthi Kimani** shall be rendered destitute. What cause of action is revealed by these pleadings? I cannot think of any. Whether the applicants innocently believed that the suit premises was still registered in the name of deceased only to learn later that it was in fact registered in the name of the 2nd respondent a son and brother to them is not by itself a cause of action known in law. The fact that he subsequently failed to meet the terms of the loan agreement and the suit premises have been offered

for sale by public auction pursuant to the chargees statutory power of sale is not a cause of action known in law as well. Further the fact that the 2nd respondent had no mandate from the family to charge the suit premises to the 1st respondent is also not a cause of action known in law. In any event at the time when he charged the suit premises, they were registered in his name. Finally the mere fact that if the suit premises are sold the entire family of **Christopher Ruthi Kimani** shall be rendered destitute is not a cause of action in law. The applicants in their plaint have not challenged the 1st respondent's exercise of its statutory power of sale nor have they challenged the alleged transfer whether fraudulent or not of the suit premises from the deceased **Christopher Ruthi Kimani** to the 2nd respondent. They were only content with stating in supporting affidavit to the application **"that we are in the process of challenging this transfer of the family land by one of us to himself..."** This is not enough where in particular an applicant is expected to satisfy the court that he has a prima facie case with probability of success. This cannot be on the basis of a future event.

It is common ground that the 2nd respondent has filed several suit against the 1st respondent over this transaction. In the case HCC No.635 of 2003, it is noteworthy that the 2nd respondent pleaded that **"...The plaintiff is the registered proprietor of the parcel of land known as Title NomLoc.10/Wanjengi/121 Murang'a District which he charged to the defendant by a further charge registered on 13th October, 1994 to secure the loan of Kshs.1,400,000/=...."** Yet in Milimani HCC 295 of 2006, he stated thus with regard to the suit premises. **"...The plaintiff did secure the said facility using LR No.Loc.10/Wanjengi/121 located in Murang'a...."** It is clearly from the foregoing, that the suit premises at the time belonged to the 2nd respondent. It is too late now for the 2nd respondent to claim that though he borrowed money using the title deed of the suit premises to secure an overdraft facility from the 1st respondent but deny having participated in the transfer of the suit premises to himself. The title is in his name. Ordinarily a bank would carry out due diligence before processing a loan. That is a matter of common notoriety and does not require evidence. Such due diligence will encompass official search at the lands office with regard to the suit premises. The 1st respondent could not have advanced the 2nd respondent unless the suit premises were registered in his name. By deponing to as above the 2nd respondent is clearly not being candid with the court. A court of equity ordinarily frowns upon such lack of candour.

In all the suits filed by the 2nd respondent unsuccessfully sought injunction. In the case of **HCC No.295 of 2006, Ochieng J** observed

"...and even though the sale of the suit property May result in the loss of the plaintiffs ancestral land and home, upto which his wider family has lived for over one century, the plaintiff must be reminded that when he consciously decided to offer the said property as security, he was in effect knowingly risking the loss thereof, in the event that he did not pay the facilities which he accepted from the bank. The sentimental value which the plaintiff's family attaches to the suit property cannot be permitted to devail the legal rights which accrued to the defendant pursuant to the legal charge....."

This holding in nutshell answers the applicant's plea with regard to the suit premises being family land. Yet again in the case of HCCC No.635 of 2003 **Mutungi J** observed

".....There is no doubt I mind that the application has no legal basis to oppose the bank's statutory sale of the charged property....." As correctly submitted by counsel for the 1st respondent, it is clear from the rulings aforesaid that the 1st respondent's statutory power of sale was recognized by the courts. In so far as the said decision were not challenged then the same is conclusively settles the matter and any attempt by any parties claiming similar relief is res judicata in terms of explanation 6 of section 7 of the civil procedure Act. The explanation is in these terms, **".....where persons litigate bonafide in respect of a public right or of a private right claimed**

in common for themselves and others, all persons interested in such right shall, for purposes of this section, be deemed to claim under the person so litigating.” This explanation clearly romps in the applicants. For as long as the 2nd respondent was litigating over the suit premises on the basis of family land, he was litigating as well as behalf of the applicants. On that basis, the application for injunction is clearly res-judicita. It matters not that in this suit the applicants are the plaintiffs whereas the respondents are defendants.

The 2nd respondent’s replying affidavit makes an interest. Reading through it one gets a district feeling that the 2nd respondent is acting in collusion with the applicants to frustrated the 1st respondent from exercising its statutory power of sale. How else can one explain the fact that though the 2nd respondent is sued as a defendant, he is nonetheless supporting the claims by the applicants against him and the 1st respondent.

For all the foregoing reasons I am not satisfied that the applicant has laid out a prima faciei case with a probability of success.

Will the applicants suffer irreparable loss if the injunction is not granted? I do not think so. Having failed to establish a prima facie, the issue of substantial loss is secondly. The applicants in their written submissions talk of having an overriding interest in suit premises pursuant to section 30 (g) of the Registered Land Act. However is not part of the pleadings. In any event the land is registered in the name of the 2nd respondent. From the certificate of official search exhibited him the affidavit of the 1st respondent, it is apparent that the suit premises were transferred to the 2nd respondent long before 1982. The applicants and 2nd respondent have deliberately failed to disclose when is it on. It is possible therefore that the transfer was effected during his life time may be as a fight intervivos. If that be the case and there is no reason to lead belief otherwise, then the applicants cannot be heard to challenge the transfer nor can they claim overriding interest. Further it cannot then be the case that they would suffer irreparable injury. In any event there are two decisions by the High Court of Kenya at Nairobi giving the 1st respondent to go ahead and exercise its statutory power of sale. If I was to grant the instant application, there will be three contradictory decisions of this court on the subject matter; two decisions allowing the 1st respondent to exercise its statutory power of sale and one countermanding it. That would indeed be an absurd scenario. The issue of irreparable loss and balance of convenience in the light of the foregoing does not therefore arise for determination.

In the upshot I would dismiss the application with costs to the 1st respondent.

Dated at Nyeri this 22nd March, 2010.

M.S.A. MAKHANDIA

JUDGE

Delivered on 22nd day of March, 2010,

By:

J.K. SERGON
JUDGE