

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)
Civil Suit 34 of 2006

GEOFFREY KURIA GITHAMBU.....PLAINTIFF
VERSUS
HOUSING FINANCE COMPANY KENYA LIMITED.....1ST DEFENDANT
REUBEN WARUI MWANGI.....2ND DEFENDANT
MERCY WANJIRU WARUI3RD DEFENDANT

RULING

1. A chamber summons application was filed with the plaint on 2nd February 2006, seeking for inter alia, an order of injunction to restrain the defendants from selling or dealing with the property known as TITLE NO. NDUMBERI/NDUMBERI/1594, (hereinafter referred to, as the suit premises) until the determination of the suit. This application was conversed before Ransely J and was dismissed for reasons that it did not disclose a prima facie case with a probability of success and on the grounds that the remedy for the plaintiff lies in the damages.
2. The plaintiff's suit was amended on 20th November 2006 to include the 2nd defendant and also to include allegations of fraud. On 25th January 2010, the plaintiff filed another chamber summons under the provisions of order XXX1X of the CPR seeking for an order of injunction against the 2nd defendant who should be restrained from selling or dealing with the suit premises pending the hearing of the suit which is set down for hearing on 20th May 2010. This application is premised on the grounds that the 2nd defendant is likely to sell the suit premises in order to frustrate the plaintiff. It was submitted that this application is not *res judicata* because it is against the 2nd defendant who was subsequently enjoined in the suit after he purchased the property in an auction.
3. This application was opposed by counsel for the respondent on the grounds that the prayers sought for injunction are not founded in the plaint. Moreover the applicant has not satisfied the court that they have a *prima facie* case with a probability of success. A similar application was determined by Ransely J. who dismissed it on 21st February 2006 thus the plaintiff was faulted for trying to have a 2nd bite on the cherry. Moreover, the property was sold to the 2nd defendant pursuant to the statutory power of sale under a charge and the 2nd defendant has every right to deal with the property as the registered proprietor. If the plaintiff has suffered any damages he has an opportunity to prove the same at the trial and his remedy lies in damages.
4. The principle elements to determine in this application are whether the applicant has established a prima facie case with a probability of success. Secondly irreparable harm which cannot be compensated for in damages would arise, and if in doubt, the court should determine the matter on a balance of probability. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 The Court of Appeal has explained what constitutes a prima facie case.

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude 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.”

5. The plaintiff had filed a similar application against the 1st defendant which was dismissed on 2nd February 2006. The plaintiff's claims is basically founded on the suit premises which was charged to the 1st defendant and pursuant to the statutory power of sale under the charge the suit property was sold to the 2nd defendant. The 2nd defendant was not a party to the contract between the plaintiff and the 1st defendant. Being guided by the prayers in the plaint, the plaintiff is claiming for damages for fraud, breach of contract and trespass. Thus damages if the allegations are proved would be a suitable remedy for the plaintiff.
6. Accordingly this application does not meet the threshold of granting an order of injunction. In the result the application is dismissed for lacking merit with costs to the defendant.

RULING READ AND SIGNED ON 16TH APRIL 2010 AT NAIROBI.

M.K. KOOME
JUDGE