

REPUBLIC OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 273 of 2008 (OS)

PUNDA MILIA CO-OPERATIVE SOCIETY..... PLAINTIFF

VERSUS

SAVINGS & LOAN (K) LIMITED..... DEFENDANT

RULING

Before me is an application by the plaintiff made under the provisions of **Order XXXIX Rules 1 and 9** of the **Civil Procedure Rules** seeking orders of the court to restrain the defendant, by itself, its agents or servants from selling, alienating, transferring, interfering and or dealing with the parcel of land known as LR No.209/138/44, Nairobi (*hereinafter referred to as the suit property*) pending the hearing and determination of the originating summons filed by the plaintiff. The application is supported by the annexed affidavit of Joseph Wanyoike Ngaruiya, the chairman of the plaintiff society. The application is opposed. Victoria Chelangat, the legal services manager of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard oral submissions made by Mr. Ng'ang'a for the plaintiff and Miss Nungo for the defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the submissions made by counsel for the parties herein, including the decided cases cited, in support of their respective clients cases. The facts of this application are, more or less not disputed. The plaintiff was the former registered owner of the suit property. Sometime in 1994, the City Council of Nairobi sued the plaintiff seeking to recover land rates which were allegedly in arrears. The suit was filed in the subordinate court (*i.e. Nairobi RMCC No. 725 of 1994*). According to the plaintiff, the land rates arrears which were allegedly owed to the City Council by the plaintiff was KShs.112,000/=. The hearing of the case proceeded in the absence of the plaintiff. Judgment in default of appearance was entered in favour of the City Council of Nairobi. The City Council executed the decree issued in its favour by attaching the suit property and subsequently thereafter offered it for sale.

The suit property was purchased by one Mary Wahito Mbugua. The suit property was sold for a purchase consideration of KShs.3 million. According to the plaintiff, the property at the moment is valued at KShs.75 million. There is no evidence to suggest that the City Council paid to the plaintiff the balance of the purchase consideration after it had recovered the decretal sum decreed in its favour. From the copy of record of entries made in respect of the title of the suit property, it was clear that the said Mary Wahito Mbugua was not a stranger to the plaintiff. Indeed the plaintiff had in 1984 leased part of the suit property to the said Mary Wahito Mbugua who had partnered with one John Wachira Maina. After the sale of the suit property by the City Council in execution of the decree, by a vesting order dated 19th December 1995, the said Mary Wahito Mbugua was registered as the owner of the suit property. The said Mary Wahito Mbugua subsequently charged the suit property to the defendant to secure a total sum of KShs.3.5 million. According to the defendant, the said Mary Wahito Mbugua defaulted in repaying the loan advanced to her together with the accrued interest, hence its decision to sell the suit property in exercise of its statutory power of sale pursuant to the instrument of charge to recover the outstanding amount.

When the plaintiff became aware of the judgment entered against it in default of entering appearance, it made an application to set aside the default judgment. The application was allowed and the *ex parte* judgment set aside. Mary Wahito Mbugua was aggrieved by the said decision of the court. Her several attempts to appeal against the decision of the court setting aside the default judgment were unsuccessful due to procedural defects to her pleadings. She was finally able to mount a competent appeal being Civil Appeal No. 49 of 2003 before the Court of Appeal. According to the plaintiff, the said Mary Wahito Mbugua died in September 2005 before the appeal could be heard and determined. There is no evidence on record to suggest that the administrators of the estate of the said Mary Wahito Mbugua have taken any steps to prosecute the appeal. There is further no evidence to suggest that the said Mary Wahito Mbugua obtained orders from the court staying the giving effect of the orders of the court setting aside the default judgment. As it is, the order which granted the City Council of Nairobi authority to sell the suit property in execution of the decree issued in its favour is set aside and is of no legal effect.

The plaintiff has been unable to reverse the transfer of the suit property to the said Mary Wahito Mbugua due to the fact that the suit property had been charged to the defendant. According to the defendant, its statutory right to sell the suit property to realize the outstanding amount owed to it cannot be challenged by the plaintiff. The defendant argued that at the time the suit property was charged to it, the said Mary Wahito Mbugua was the duly registered owner of the suit property. The defendant is of the view that the title of the said Mary Wahito Mbugua could not be impeached pursuant

to **Section 23** of the **Registration of Titles Act**.

Having evaluated the facts of this application, it is clear to this court that the defendant cannot rely on **Section 23** of the **Registration of Titles Act** to defeat the plaintiff's claim. **Section 23(1)** of the **Registration of Titles Act** provides that:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

It is evident that a court of law is required to consider a certificate of title issued under the **Registration of Titles Act** as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements, restrictions and conditions contained therein. The said **Section 23 (1)** prohibits the challenge to such certificate of title on any other ground other than that of fraud or misrepresentation to which the registered owner is proved to be party. In the present application, it is clear that the basis of the plaintiff's claim to the suit property is an order issued by a court of competent jurisdiction setting aside the order which vested the suit property to the person who charged the suit property to the defendant.

Whereas this court acknowledges that certain rights accrued to the defendant as a result of the said charge, taking into consideration the value of the suit property and the fact that the title issued to the person who charged the suit property to the defendant has already been impeached, this court cannot in good conscience reach the determination sought by the defendant to the effect that all the events prior to the transfer of the suit property to the said Mary Wahito Mbugua should be ignored. The defendant is presumed to be aware of the fact that the suit property was transferred to the said Mary Wahito Mbugua pursuant to a court order. It is inconceivable that the defendant could have accepted the title of the suit property as security if it had not conducted a search and became aware of the history of transactions in respect of the title of the suit property. The plaintiff established, to the required standard of proof on a balance of probabilities, that it has equitable ownership, capable of being legally enforced, of the suit property.

This court is required to reach a finding that the plaintiff has established a prima facie case with high chances of success, and further that the plaintiff will suffer irreparable loss that will not likely be compensated by an award of damages before it can issue an order of interlocutory injunction. (See **Giella vs. Cassman Brown [1973] EA 358**). In the present application, it was apparent that the plaintiff established equitable ownership of the suit property pending the hearing and determination of the current suit in which it seeks legal ownership of the suit property. The defendant cannot exercise its statutory right to sell the suit property pursuant to the instrument of charge to recover the amount which is said to be outstanding before the issue whether the plaintiff is entitled to a declaration that it is the legal owner of the suit property is addressed by the court. If the defendant proceeds to sell the suit property in exercise of its statutory power of sale, the plaintiff will suffer irreparable damage that cannot be compensated by an award of damages.

I therefore hold that the plaintiff established a prima facie case as to entitle the court grant it the interlocutory injunction sought. The defendant, by itself, its agents or servants are hereby restrained from selling, alienating, transferring, interfering and/or dealing with all that property known as LR. No. 209/138/44, Nairobi in any manner whatsoever, pending the hearing and determination of the originating summons filed herein. The costs of the application shall abide the outcome of the hearing and determination of the said originating summons.

It is so ordered.

DATED at **NAIROBI** this 17th day of **APRIL, 2009**.

L. KIMARU

JUDGE