



Lutomia v Telagen Investments Limited & 3 others (Environment and Land Case Civil Suit E228 of 2022) [2022] KEELC 12800 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E228 OF 2022
SO OKONG'O, J
SEPTEMBER 27, 2022**

BETWEEN

JACKSON WANDERA LUTOMIA PLAINTIFF

AND

TELAGEN INVESTMENTS LIMITED 1ST DEFENDANT

KINGS PRIDE PROPERTIES LIMITED 2ND DEFENDANT

ECOBANK KENYA LIMITED 3RD DEFENDANT

DIRECT 'O' AUCTIONEERS 4TH DEFENDANT

RULING

1. What is before me is the plaintiff's application brought by way of notice of motion dated July 7, 2022 seeking the following orders;
 1. That a temporary injunction do issue restraining the 3rd and 4th defendants whether by themselves, their agents, servants and/or employees from advertising, selling or offering for sale whether by public auction or private treaty, transferring, charging, leasing, pledging or in any other way alienating, disposing of or dealing with the property known as Unit A2, 2nd Floor, Capital View Apartments erected on LR Number 93/1488 pending the hearing and determination of this suit.
 2. That the costs of this application be provided for.
2. The application is brought on the grounds set out on the face thereof and on the supporting affidavit of the plaintiff sworn on July 7, 2022. The Plaintiff/Applicant is the owner of all that property known as Unit A2, 2nd Floor, Capital View Apartments erected on LR Number 93/1488 (hereinafter referred to only as "the suit property". The plaintiff has averred that by a letter of offer dated August 28, 2015, the 2nd defendant offered to the plaintiff for sale on behalf of the 1st defendant the suit property for a



sum of Kshs 9,500,000/-. The plaintiff has averred that on various dates between September 1, 2015 and February 2, 2018, the plaintiff made various payments to the 2nd defendant towards the purchase price of the suit property. The Plaintiff has averred that on February 2, 2018, the plaintiff and the 2nd defendant executed a sale agreement (hereinafter referred to only as “the agreement”) under which the suit property was sold to the Plaintiff free from any encumbrances or adverse claims. The plaintiff has averred that, on 2nd February 2018, the Plaintiff was also issued with a hand over form confirming that the full purchase price had been paid and the suit property handed over to the plaintiff. The plaintiff has averred that he took possession of the suit property and has remained in possession since then. The Plaintiff has averred that he paid to the 1st and 2nd defendants through their advocates a further sum of Kshs 508,500/- towards processing of the title for the property which he was informed would take time to be issued. The Plaintiff has averred that on or about March 12, 2020, to the Plaintiff’s utter shock, he saw an advertisement by Valley Auctioneers advertising the suit property for sale by public auction on April 22, 2020.

3. The plaintiff has averred that he came to realize that on or about April 19, 2016, without his knowledge, the 1st defendant took a credit facility of Kshs 90,800,000/- from the 3rd defendant on the security of the suit property. The plaintiff has averred that as at the date of the charge by the 1st defendant in favour of the 3rd defendant, he had paid Kshs 5,000,000/- and acquired an overriding interest over the suit property. the plaintiff has averred that he also learnt that the 1st defendant had filed suit against the 3rd Defendant namely, HCCC No 102 of 2020, Telagen Investments Limited V Ecobank Kenya Limited (hereinafter referred to as “the High Court suit) in which the 1st defendant entered into a consent with the 3rd defendant to discharge the suit property upon confirmation of payment of the full purchase price into an escrow account held by the 3rd defendant. The plaintiff has averred that the 1st defendant was also required to service the loan facility failure to which the 3rd defendant was at liberty to institute recovery proceedings. The plaintiff has averred that he was not a party to the said suit. The plaintiff has averred that he had paid a significant portion of the purchase price for the suit property before the same was charged to the 3rd defendant and that he had completed payment of the purchase price long before any default by the 1st defendant or creation of the escrow account held by the 3rd defendant. The plaintiff has averred that the 3rd defendant has now through the 4th defendant purported to advertise the suit property for sale by way of public auction on July 8, 2022. The plaintiff has averred that the 3rd and 4th defendants to the great distress of the plaintiff, intend, unless restrained by this court to auction the suit property unlawfully and irregularly on 8 July 2022 to a third party and dispossess the plaintiff thereof. The Plaintiff has averred that unless the court issues the orders sought, the plaintiff will suffer irreparable loss and harm. The plaintiff has averred that it is in the interest of justice that the orders sought be granted as prayed.
4. The application is opposed by the 3rd defendant through a notice of preliminary objection dated 13th July 2022 and a replying affidavit sworn by Edith Wanjiku on July 13, 2022. In its preliminary objection, the 3rd defendant has contended that this court has no jurisdiction to entertain the plaintiff’s application since the same *res judicata*. The 3rd defendant has contended that the issues raised in the application had been raised and adjudicated upon between the same parties in CMCC No E1328 of 2022, Jackson Wandera v Ecobank Kenya Limited and 2 others in which a ruling was delivered dismissing the Plaintiff’s application for injunction. The plaintiff has averred further that the present suit is *sub-judice* as the issues raised before this court are pending determination before Hon Lesootia in CMCC No E1328 of 2022, Jackson Wandera v Ecobank Kenya Limited and 2 others(hereinafter referred to as “the lower court suit”). The Plaintiff has averred further that this suit is an abuse of the process of this court.



5. In its replying affidavit, the 3rd defendant has contended that the suit property was voluntarily offered to the 3rd defendant as a security for a loan that was advanced to the 1st defendant. The 3rd defendant has averred that the plaintiff had brought a similar suit and application before the lower court which dismissed the application as having no merit. The 3rd defendant has reiterated that the suit is *sub-judice* while the application before the court is *res judicata*. The 3rd defendant has contended that it was not a party to the agreement for sale that the plaintiff entered into with the 1st and 2nd defendants. The 3rd defendant has averred that the 1st defendant charged among others the suit property to secure a project loan facility of Kshs 90,800,000/- that was granted to it by the 3rd defendant. The 3rd defendant has averred that the 1st defendant failed to repay the loan in accordance with the terms and conditions upon which the said loan was granted even after several restructuring as a result of which the 3rd defendant took steps to realize its security.
6. The 3rd defendant has averred that it was at this point that the 1st defendant filed the High court suit to stop the sale of the suit property which suit was settled by a consent order made on June 29, 2020. The 3rd defendant has averred that the 1st defendant did not abide by the terms of the said consent leaving it with no alternative but to sell among others the suit property to recover an outstanding loan that stood at Kshs 123,536,447.51 as at July 7, 2022. The 3rd defendant has averred that it was not privy to the agreement for sale which is the basis of the plaintiff's claim herein. The 3rd defendant has averred that the plaint discloses no cause of action against it. The 3rd defendant has averred that the suit property was sold to the plaintiff on February 2, 2018 while its Charge was in existence. The 3rd defendant has averred that it was only obliged to discharge the charge over the suit property if the purchase price in respect thereof was deposited in an escrow account held by the 3rd defendant. The 3rd defendant has averred that no evidence has been placed before the court showing that the purchase price paid for the suit property was deposited in the said account. The 3rd defendant has averred further that if the Plaintiff had done due diligence, he could have noted that the suit property was charged to the 3rd defendant. The 3rd defendant has averred that the plaintiff has no *locus standi* to challenge its exercise of statutory power of sale. The 3rd defendant has averred that the Plaintiff's claim if any lies against the 1st defendant or any other person to whom he made payment. The 3rd defendant has averred that the orders sought by the plaintiff if granted would subject it to extreme prejudice. The plaintiff swore a further affidavit on July 25, 2022 in which he reiterated the contents of his affidavit in support of his application and denied the allegations made in the 3rd defendant's replying affidavit and notice of preliminary objection.
7. On July 28, 2022, the court directed that the plaintiff's application be heard by way of written submissions. None of the parties filed submissions as directed by the court. I have considered the application before me together with the affidavits filed in support thereof. I have also considered the replying affidavit and notice of preliminary objection filed by the 3rd defendant in opposition to the application. The plaintiff has sought a temporary injunction pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co Ltd* [1973] EA 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.



8. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal stated as follows:

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation... The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

9. It is on the foregoing principles that the plaintiff's application falls for consideration. From the material before me, I am not satisfied that the plaintiff has established a *prima facie* case with a probability of success against the 3rd and 4th defendants against which the temporary injunction is directed. The plaintiff has not established that in putting up the suit property for sale, the 3rd and 4th defendants have committed any wrong or illegality. The suit property is an apartment which is situated on LR No Nairobi/Block 93/1488("the parent title"). The parent title is owned by the 1st defendant. On August 28, 2015, the 2nd defendant offered to sell to the plaintiff the suit property subject to contract. The plaintiff made some payments to the 1st and 2nd defendants pursuant to the said letter of offer before the parties entered into a formal agreement. On April 19, 2016 before the plaintiff and the 1st and 2nd defendants entered into a formal agreement for the sale of the suit property, the 1st defendant charged the parent title to the 3rd defendant to secure a loan of Kshs. 90,800,000/-. The charge was registered on May 26, 2016. The plaintiff and the 1st defendant ultimately entered into an agreement for the sale of the suit property on February 2, 2018. As of the date of this agreement, the property was already charged to the 3rd defendant. I am not persuaded by the plaintiff that the letter of offer dated August 28, 2015 issued to him by the 2nd defendant that was subject to contract gave him a superior right over the suit property. I am not convinced that the plaintiff's interest in the suit property based on the said letter of offer and the payments he made thereunder takes precedence over the 3rd defendant's charge. As at the time of the creation of the charge, the plaintiff's interest in the suit property was not registered against the title of the property. The converse is true as concerns the 3rd defendant's charge. As at the time, the 1st defendant was cheating the plaintiff on February 2, 2018 that it was selling the suit property to the plaintiff free of encumbrances, the parent title had an encumbrance. I am in agreement with the 3rd defendant that if the Plaintiff had conducted due diligence as at February 2, 2018 when it was entering into the agreement for sale with the 1st defendant in respect of the suit property, he could have noted that the property was charged. Due to the foregoing, I find no basis upon which the Plaintiff can stop the 3rd defendant from exercising its statutory power of sale while a sum in excess of Kshs 120,000,000/- is due and owing by the 1st defendant to the 3rd defendant. I am in agreement with the 3rd defendant that the Plaintiff's claim if any lies against the 1st and 2nd defendants who sold to him the suit property.
10. That finding is sufficient to dispose of the plaintiff's application. I however wish to add that the 3rd defendant's contention that this suit is an abuse of the process of the court is not far-fetched. The plaintiff has been aware since 2020 of the existence of the High Court Suit in which the legality of the 3rd defendant's exercise of its statutory power of sale over among others the suit property is in issue. The plaintiff has equally been aware of the orders made in that suit. The plaintiff did not see it fit to



join that suit to argue the case that he has now put forward before this court. I am of the view that the High Court Suit was the proper forum for the determination of the issues that have been raised herein. The plaintiff waited until the 1st defendant defaulted in its obligations, to file a suit in the lower court and only came to this court after the lower court dismissed his application for injunction. I am of the opinion that if the Plaintiff was acting in good faith, nothing would have stopped him from amending his plaint in the lower court and pleading the case that he has brought before this court. As evidence of bad faith, the plaintiff did not even disclose the existence of the lower court case. A party who is out to conceal material facts to the court is abusing the process of the court and is not deserving of the exercise of the court's discretion.

11. I have said enough to show that a *prima facie* case has not been established. It is not necessary for me to consider the other conditions for granting a temporary injunction. The plaintiff's notice of motion dated July 7, 2022 has no merit. The same is dismissed with costs to the 3rd defendant.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the 1st and 2nd Defendants

Ms. Mideva h/b for Mr. Mugisha for the 3rd and 4th Defendants

Ms. C. Nyokabi - Court Assistant

