



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 653 OF 2007

RAMNIKLAL SHAH..... PLAINTIFF

VERSUS

FINA BANK LIMITED.....1ST DEFENDANT

KIRPAN INVESTMENTS LIMITED.....2ND DEFENDANT

PATEL & PATEL ADVOCATES.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

R U L I N G

The application:

The application before me is an amended chamber summons filed on 18th December, 2007 and orally amended on 25th February, 2008. In the application, Ramniklal Shah (hereinafter referred to as the applicant), seeks orders against Fina Bank Limited, Kirpan Investments Limited, Patel & Patel Advocates, and the Commissioner of Lands (hereinafter referred to as the 1st, 2nd, 3rd and 4th respondents respectively) as follows: -

- (1) This application be certified as urgent and be heard *ex parte* in the first instance.
- (2) An injunction to issue restraining the 2nd defendant, its agents or servants from selling or alienating or otherwise dealing in any way whatsoever with LR 209/64/31 situate on Muthithi Road, Nairobi, pending determination of this application.
- (3) An interlocutory injunction do issue to restrain the 2nd defendant or its agents from trespassing onto, evicting or interfering in any way whatsoever with the plaintiff's quiet possession of LR 209/64/31, or selling or alienating or otherwise dealing in any way whatsoever with LR 209/64/31 pending determination of the suit.
- (4) That, if need be, the defendants be served by substituted service by advertising in one edition of the Daily Nation.
- (5) A declaration that the sale and transfer of LR 209/64/31 by the 1st defendant to the 2nd defendant

under the Charge dated 11th July, 2005 was null and void.

(6) That the plaintiff do give an undertaking as to damages.

(7) That costs be in the cause.

The cause of action:

The application is anchored on a suit brought by the applicant against the respondents by way of a plaint filed on the 17th December, 2007. The subject matter of the suit is a property known as LR No.209/64/31 (hereinafter referred to as the suit property), of which the applicant claims to have been the registered owner. According to the plaint, the circumstances in which the cause of action arose are as follows:

The suit property was a leasehold which was due to expire on 1st April, 2003. The applicant charged the suit property in favour of the 1st respondent in August, 1996. The applicant further charged the property to the 1st respondent on 1st December, 1997 to secure a debt by Parsonic Ltd. In view of the expected expiry of the lease, the 3rd respondent, on the 1st respondent's instruction prepared a Discharge of Charge and a further Charge which documents were executed by the applicant in February, 2004. At the same time the applicant executed a fresh Charge which was prepared by the 3rd respondent.

The lease in respect of the suit property expired on 1st April, 2003 and a fresh certificate of title was issued on 12th July, 2005. In breach of the 1st respondent's duty of care to the applicant, the 1st respondent, with the connivance of 3rd and 4th respondents withdrew the Discharge of Charge documents from the Lands registry, and fraudulently altered the date of the Charge instrument to read 11th July, 2005 and presented it for registration purporting the Charge to have been duly executed by the applicant and the 1st respondent's directors on the 11th July, 2005.

The 1st respondent subsequently sold and transferred the suit property to the 2nd respondent on the basis of the forged Charge document. The 2nd respondent has now issued the applicant with a notice to move from the premises. The applicant maintains that there was no valid Charge, nor was any statutory notice served upon him. The applicant therefore seeks judgment as follows:

(1) An injunction to restrain the 1st, 2nd, 3rd and 4th defendants from dealing, transferring or alienating or otherwise dealing with LR 209/64/31.

(2) An injunction to restrain the 2nd defendant or its agents, or howsoever from interfering with the plaintiff's quiet possession of LR 209/64/31.

(3) An order that the transfer of 25th September, 2007 of LR 209/64/31 to the 3rd defendant is null and void.

(4) That LR 209/64/31 be reconveyed back to the plaintiff free of encumbrances and that the 3rd defendant do deliver up to the plaintiff documents of title pertaining to the property.

(5) Exemplary damages against the 1st, 2nd, 3rd and 4th defendants.

(6) Such other orders as this court may deem fit to grant.

(7) Damages.

(8) Costs and interests.

Facts relied upon by the applicant:

In support of the application, the applicant has sworn a supporting affidavit in which he reiterates the matters pleaded in the plaint and annexes all the relevant documents. These include: a copy of the title deed for the suit property, copy of the Charge dated 20th August, 1996 and the further Charge dated 1st December, 1997, copies of correspondences exchanged between the applicant's advocate and the 1st respondent's advocate, copies of the Discharge of Charge and further Charge dated 11th July, 2005, a Charge dated 11th July, 2005, and annual returns for 2004 and 2005 for the 1st respondent showing that its managing director Mr. V. M. Shanbagh resigned from 1st respondent's employment on 2nd April, 2004.

The applicant also exhibited a copy of the letter from the 2nd respondent's advocate, requesting the applicant to handover the suit property on the grounds that the suit property has been transferred to the 3rd respondent. The applicant swears that he neither executed the Charge purportedly dated 11th July, 2005 nor did he execute the Discharge of Charge and further Charge purportedly executed on 11th July, 2005. The applicant contends that the purported Charge of 11th July, 2005 is a forgery, and there cannot therefore be a valid sale and transfer to the 3rd respondent based on that Charge. The applicant explains that he is old and ailing and unless the orders of interlocutory injunction is granted, he will suffer irreparable harm as he is currently residing in the suit property. The applicant also maintains that the suit property was allegedly sold for Kshs.1,750,000/= which is a gross undervalue as the suit property was valued at well over 40 million.

Response by 1st respondent:

The 1st respondent replied to the application through an affidavit sworn by its employee Henry Khejeri. It was deponed *inter alia*, that the applicant was at the material time a director of Parsonic Ltd and apart from executing a Charge and a further Charge in favour of the 1st respondent, the applicant also executed a guarantee dated 13th November, 1997. The deponent swore that the applicant instructed his advocate to obtain the extension of the lease over the suit property pursuant to which the applicant's advocate instructed the 3rd respondents to prepare the Discharge of Charge and further Charge to facilitate the issuance of the new title as well as to prepare the Replacement Charge over the new title. The 1st respondent maintained that it fully entrusted the 3rd respondent with all matters relating to the execution and registration of the Discharge of Charge and the Replacement Charge. The 1st respondent maintained that it did not receive any certificate of title until after the Charge was registered. It was denied that the Replacement Charge was registered before the new title came into being. It was contended that the 1st respondent did not act fraudulently. To the contrary it was maintained that the applicant did not make full and proper disclosure to the court regarding correspondences and discussions relating to the issues. It was further maintained that the advocate for the 1st respondent served an appropriate statutory notice on the applicant before the 1st respondent sold the suit property to the 2nd respondent in exercise of its statutory powers of sale. It was maintained that the 1st respondent had a Charge over the original title of the suit property and was entitled to a Charge over the replacement title and therefore there was no fraud or forgery.

2nd respondent's grounds of opposition:

The 2nd respondent filed grounds of opposition under Order L Rule 16 of the Civil Procedure Rules objecting to the application on the following grounds: -

- (1) That the said suit as instituted by the plaintiff is further incurably defective as there exists no cause of action against the 2nd defendant.
- (2) That the said application is fatally defective for the plaintiff's failure to comply with the provisions of Order XXXIX Rule 3 sub rule 3 of the Civil Procedure Rules which imposes that after an *ex-parte* injunction is granted the applicant has three (3) days to serve on the other party the entire pleadings and documents relied upon. The plaintiff is yet to comply with the aforesaid provision.

- (3) That the issue of the sale sought to be restrained and injuncted has been overtaken by events as the subject property has already been sold and transferred to a *bonafide* purchaser for value being he 2nd defendant who has since obtained an indefeasible title over the same. The plaintiff is therefore entitled to sue for damages if at all he is entitled to any remedy.
- (4) That the plaintiff has failed to make out a prima facie case with a high probability of success that would warrant the Honourable Court invoke it's inherent jurisdiction in granting the equitable remedy of injunction.
- (5) That the Honourable Court lacks the jurisdiction to grant prayer 5 of the aforementioned application at the interlocutory stage.

Response by 3rd Respondent:

In reply to the application, a lengthy affidavit was sworn by Clare Nanjala Wanyama (Wanyama) an advocate employed by the 3rd respondent. Wanyama swore *inter alia*, that the application for injunction was based on a deliberate suppression and or non-disclosure of material facts as well as distortion of the relevant factual position by the applicant. While Wanyama admitted that prior to 1st April, 2003, the applicant was the registered proprietor of a leasehold interest in respect of the suit property and that the applicant had by a Charge dated 19th August, 1996 and a further Charge dated 13th November, 1997 secured the leasehold interest in favour of the 1st respondent, Wanyama swore that the correct position relating to the extension of the leasehold interest and the registration of the Discharge of Charge and further Charge as well as the replacement Charge was as follows:

The 4th respondent agreed to extend the applicants leasehold interest in the suit property for a period of 50 years with effect from 1st April, 1998 on condition that the applicant surrendered the existing title in exchange for a new title incorporating the extended term, and further that a new deed plan was duly prepared. It was on this understanding that the 1st respondent wrote to the 3rd respondent instructing the 3rd respondent to prepare and register a replacement Charge at the same time that the new title incorporating the extended term was to be registered.

The 3rd respondent therefore wrote to the applicant's then advocate Wambugu and Company informing them of the instructions given to them by the 1st respondent and seeking information on the progress in respect of the production of the new deed plan, surrender of the old title and grant of a new title. The 3rd respondent received the response from the applicant's counsel informing them that the 4th respondent could only prepare the draft grant and surrender, after the original old title and deed plan, Discharge of the current Charges and replacement Charge were availed to him. The applicant's advocate therefore requested the 3rd respondent to release the title documents upon a professional undertaking of the applicant's advocate to return the said documents to the 3rd respondent after they had been used to procure the extension of the lease over the suit property and the replacement Charge was registered against the fresh grant.

On seeking instructions from the 1st respondent, the 1st respondent insisted that the preparation and registration of the discharge of the two Charges and the replacement Charge should be handled by the 3rd respondent. The applicant and Parsonic Ltd then instructed their advocate to forward all the documents in respect of the proposed extensions to the 3rd respondent to finalize the matter. Later, the applicant through Tushak Shah of Parsonic Ltd forwarded the 3rd respondent a bankers cheque for Kshs.69,900/= for onward transmission to the applicant's advocate in respect of his fees. The applicant further instructed the 3rd respondent to collect documents in possession of their former advocate for purposes of completing the new renewal and subsequent Charge. The banker's cheque and the letter were delivered to the applicant's now former advocate, who handed over various documents to Wanyama. On 19th January, 2004, Wanyama was introduced by a representative of the applicant Mr. Tushak Shah to one Julius

Kisongoa who was introduced to her as the applicant's agent in touch with the office of the 4th respondent and Wanyama was advised to act on Kisongoa's instructions in securing the extension of the lease and the registration of the replacement Charge. Wanyama was informed by Kisongoa that the new grant was ready. Wanyama therefore prepared and engrossed the discharge of the then existing Charges as well as the Replacement Charge, however she left a number of blank spaces in the Replacement Charge for completion after engrossing the new grant. For that reason, Wanyama did not insert a date of execution in either of the two new documents except for the year 2004. Later the applicant together with Mr. Tushak Shah and Milan Shah, went to the offices of the 3rd respondent where Mr. V. M. Patel of the 3rd respondent explained to the applicant the reasons for the blank spaces which appeared on the replacement Charge. The applicant then executed the documents which were thereafter also executed by the 1st respondent.

On 2nd February, 2004, the 3rd respondent forwarded to the 4th respondent the original grant in respect of the suit property, the new deed plan, the duly executed discharge of the two Charges, and the duly executed replacement Charge with the blanks. The 3rd respondent wrote a covering letter requesting the 4th respondent to complete the blanks relating to the particulars of the replacement Charge. These were the IR Number and the various dates when the new grant was issued. The 3rd respondent asked the 4th respondent thereafter to register all the documents at the same time.

On the 18th March, 2004, Mr. Kisongoa brought a letter of allotment dated 3rd March, 2004 in the name of the applicant. The allotment was issued because the earlier lease had expired and a new title was being issued. Wanyama forwarded the letter of allotment to the applicant through Mr. Tushak Shah. Mr. Tushak Shah accepted the contents of the letter of allotment and instructed the 3rd respondent to proceed with the matter. The 3rd respondent prepared a letter addressed to the 4th respondent confirming that the applicant had accepted the contents of the letter of allotment. However, Mr. Kisongoa who was to deliver the letter did not show up until sometime in May, 2004 when he collected the letter. There was a lot of delay as a result of various factors including loss of contact with Mr. Kisongoa, one Mr. Osoro, an officer in Lands Office dealing with the matter being on leave, and necessity for valuation of the premises. Further delay was caused by a discovery that the area of the land shown on the new deed plan was less than the area shown in the deed plan annexed to the original title. These necessitated amendment of the grant to reflect the reduced land rent resulting from the reduced area. Wanyama swore that sometime in May 2005, Kisongoa drew her attention to the fact that the year 2004 indicated on the Discharge of the two Charges as well as in the replacement Charge would have to be amended to read 2005. The matter was discussed between Mr. V.M. Patel of the 3rd respondent firm and Mr. Tushak Shah in the presence of Wanyama and it was agreed that the said document be recalled with a view to amending the year shown therein.

On 19th May, 2005, the 3rd respondent wrote to the 4th respondent requesting for the Charge and Discharge of Charge documents to be returned to them to enable them amend the dates on the said documents and resubmit the amended documents for registration against the title. The documents were returned to the 3rd respondent as requested and Wanyama then replaced the pages containing reference to the year 2004 in the returned documents and inserted fresh pages containing reference to the year 2005. The documents were then returned to the Lands office to await the issuance of the new grants.

On 11th July, 2005, Mr. Kisongoa informed Wanyama that the new grant was ready and together they proceeded to the lands office where they collected the Discharge of the two Charges and the new replacement Charge so that that they could insert therein the date of 11th July and 18th July against the previously inserted year of 2005. Wanyama explained that it was necessary to insert those dates in order to secure exemption from stamp duty prior to registration. Indeed, the required exemption from stamp duty was obtained.

Wanyama further explained that there was further delay in lodging the documents because there was some outstanding land rent which had to be cleared before the new grant could be stamped. The outstanding rent was paid and thereafter the documents comprising of the Discharge of the two Charges,

the replacement Charge and the new grants were simultaneously registered on the 9th September, 2005. Wanyama maintained that there was no fraud or forgery on the part of the 3rd respondent as alleged by the applicant.

4th respondent:

Although duly served with the application, the 4th respondent did not file any reply nor attend court for the hearing of the application.

Submissions made by applicant's Counsel:

In support of the application, Counsel for the applicant Mr. Singh Gitau submitted that the 3rd respondent became the agents of the 1st respondent by virtue of the 1st respondent's insistence that the 3rd respondent must prepare the documentation. Mr. Singh maintained that the 1st and 3rd respondent acted together, as was evident from the replying affidavits sworn by Claire Wanyama and Henry Khejeri. Mr. Singh urged the court to strike out paragraph 24 of Wanyama's affidavit wherein she depones that the applicant signed the Discharge of further Charge and the Replacement Charge, as Wanyama did not depone that she was present during the exercise nor did she reveal her source of information. Mr. Singh contended that Ms. Wanyama never dealt with the applicant but only dealt with Kisongoa or Mr. Tushar Shah. Mr. Singh drew the court's attention to the disparity in the attestation at page 29 of the Replacement Charge purported to have been signed by the applicant, as exhibited by Wanyama, and the copy exhibited by the applicant. Mr. Singh submitted that Mr. V.M. Shanbhag the managing director of the 1st respondent who is purported to have signed the Discharge of Charge and further Charge as well as the Replacement Charge having resigned from the company on 2nd April, 2004, the execution of the documents by him in June, 2005 either did not take place or if it did take place was improper and did not comply with Section 47 of the Registration of Titles Act.

Mr. Singh further submitted that the consideration for entering into a new Charge (i.e. the Replacement Charge) was the Discharge of Charge and further Charge, and that since that instrument was improperly executed by the 1st respondent there was no consideration for the new Charge. It was submitted that paragraph 43 of Wanyama's affidavit wherein she explains that it was necessary to insert dates of 11th July and 18th July to the already amended year of 2005, so as to secure exemption from Income Tax, reveals Tax evasion which is a criminal offence. It was maintained that the respondents could easily have amended the documents as provided under Section 59(2) of the Registration of Titles Act by presenting them to the Registrar for rectification, however, the respondents irregularly substituted part of the documents and that was a criminal offence under Section 83 of the Registration of Titles Act.

It was submitted that the document executed by the applicant and the document under which the property was sold was not the same document. It was contended that immediately the document was interfered with, it became null and void and could not convey any property as the applicant was entitled to plead the doctrine of *nolles factum*. It was submitted that the applicant having filed a suit, the doctrine of *lis pendens* as provided under Section 52 of the Transfer of Property Act became applicable.

It was submitted that on the face of the Replacement Charge, it was not clear whether the right of sale was explained to the Chargor as there is no date indicated, and therefore the applicant's explanation that he never appeared before the advocate as he was undergoing treatment was plausible.

Further it was maintained that the Replacement Charge could not come into being before the new title was issued.

As regards the 2nd respondent, Mr. Singh submitted that no replying affidavit having been filed by it, the allegations of collusion and fraud must be deemed to be true. Mr. Singh further urged the court to invoke Section 53 of the Transfer of Property Act, and infer fraud as the alleged consideration of Kshs.1.75 million at which the suit property was allegedly sold to the 2nd respondent was grossly

inadequate given that the suit property was secured for a sum of KShs.23 million.

In the light of the anomalies pointed out, the court was urged to find that the applicant had established a prima facie case with a probability of success.

It was maintained that the applicant cannot be adequately compensated by an award of damages as the financial ability of the 2nd respondent was not known, It was also submitted that the applicant being unwell he would be traumatized if prayers are not granted and he is forced to move from the premises.

Submissions made by 1st respondent's Counsel:

Mr. Frazer who appeared for the 1st respondent submitted that it was not in dispute that the 1st respondent had a Discharge over the suit property prior to the expiry of the term. That the applicant agreed to have the existing Charge and further Charge registered against the title (which was due to lapse) discharged, and a Replacement Charge executed and registered against the new title. Mr. Frazer contended that under Section 71 of the transfer of Property Act, a mortgagee is entitled to the Charge on the new title. It was maintained that the Discharge of Charge and further Charge, and the Replacement Charge were fully executed by both parties, and that the circumstances in which the changes in the documents were made have been fully explained in the affidavit of Wanyama. Mr. Frazer submitted that under Section 23 of the Registration of Titles Act, a certificate of title issued by the Registrar is conclusive evidence of title. Mr. Frazer submitted that the 3rd respondent was looking after the interest of both the applicant and the 1st respondent and that there was no evidence that the 1st respondent actively participated in any way in the changes of which the applicant is aggrieved any more than the applicant. It was submitted that no allegation of fraud or collusion have been made against the 2nd respondent either in the plaint or the affidavits, and that the property having been transferred to the 2nd respondent, the 2nd respondent has acquired an indefeasible title, and the applicant would only be entitled to damages as against the 1st and 3rd respondents if he succeeds in proving his claim.

Relying on Section 32(1) of the Registration of Titles Act, Mr. Frazer submitted that documents take effect on registration and presentation of the documents before the title was issued was therefore not relevant. It was maintained that appropriate statutory notices were issued to the applicant, both under the Charge and under the guarantee before the sale of the suit property. It was submitted that the applicant having sat on his alleged rights for a period of about 17 months, the court should not exercise its discretion in his favour. It was further submitted that the 1st respondent was a financial institution which had lent large sums of money to the applicant and was therefore able to pay damages if ordered to. The court was therefore urged to dismiss the application.

Submissions made by 2nd respondent's Counsel:

Mr. Kandere who argued the application on behalf of the 2nd respondent adopted the submissions made by Mr. Frazer and submitted that the applicant was silent about the Charge debt which had not been paid. Mr. Kandere maintained that Section 23 of the Registration of Titles Act has given the 2nd respondent an indefeasible title by virtue of his registration. It was submitted that under Section 24 of the Registration of Titles Act, only a right to damages existed where fraud has been proved. It was maintained that in this case no allegation of fraud had been made against the 2nd respondent. It was submitted that the applicant was not complaining about the statutory power of sale but was complaining about the documents. The court was asked to note that the applicant was in fact admitting executing a fresh charge.

Mr. Kandere argued that under Section 24 of the Registration of Titles Act, the 2nd respondent was a bona fide purchaser for value and that the applicant's remedy if any can only lie in damages. It was therefore submitted that the applicant has not established a prima facie case to justify the granting of the orders sought.

Submission made by 3rd respondent's Counsel:

For the 3rd respondent, Mr. Amoko argued that orders sought by the applicant cannot be issued as they are orders against the 2nd respondent against whom no case has been made out. Mr. Amoko submitted, that although the applicant's case is anchored on the fact that the 3rd respondent was an agent for the 1st respondent, the applicant was not disclosing the fact that the 3rd respondent was also acting as agent for the applicant for the extension of the expired lease pursuant to specific instructions given by the applicant. Mr. Amoko argued that section 59(2) of the Registration of Titles Act has no application to documents which have not been registered nor was Section 84(2) of the Registration of Titles Act applicable. It was maintained that the allegations of forgery had no factual basis, as there was no alteration relating to any agreed terms, but only pages relating to dates were substituted. The court was therefore urged to dismiss the application.

Rejoinder to respondent's submissions:

In reply to the submissions made on behalf of the respondent, Mr. Singh maintained that Section 23 of the Registration of Titles Act is only applicable where a "proprietor" sells property, and that "proprietor" is defined in Section 2 of the Registration of Titles Act as the "registered owner". It was maintained that the sale herein was not by a registered owner. Mr. Singh urged the court to weigh the applicant's conduct in coming to court late against the respondent's conduct of altering documents and find the applicant more deserving of the exercise of the court's discretion. Mr. Singh further submitted that although the applicant had executed a Charge, he denies having executed the document before the court, as it ceased to be the same document by virtue of the alterations. Mr. Singh identified the issue before the court as whether, a property can be sold pursuant to a Charge document which has been unilaterally varied.

Finally Mr. Singh maintained that Section 24 of the Registration of Titles Act is permissive. Damages was therefore only one of the options available, and the applicant was not precluded from preventing further transfer of the suit property.

The applicant's main prayer is essentially the prayer for interlocutory injunction. In order to succeed the applicant must meet the conditions for granting such an injunction. Those conditions are now well settled, having been stated and restated in several authorities. The conditions are as follows: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience." EA Industries vs Trufoods (1972) EA 420.

In this case, the applicant's alleged cause of action is based on the alleged illegal transfer of the suit property based on the Charge alleged to be null and void. Without making any conclusive findings it is necessary to determine whether on the evidence laid before this court a *prima facie* case with a probability of success has been established.

Findings and conclusions:

First, it is not disputed that the 1st respondent had a Charge and a further Charge registered in its favour against the title to the suit property prior to the expiry of the leasehold. It is clear from the affidavits in support and in reply to the application, that the understanding between the applicant and the 1st respondent, was that upon expiry of the leasehold in respect of the charged property, the 1st respondent would be entitled to a Charge over the new lease when it is renewed. This is evident from the fact that a Discharge of the Charge and further Charge, was prepared by the parties, together with the replacement Charge over the new lease. The applicant has not denied that the debt in respect of the original Charge and further Charge still owed. Indeed, it seems that is why it was necessary to have the Replacement Charge registered over the new lease. Although the applicant does not appear to deny signing the Replacement Charge which was actually registered over the new lease, the applicant maintains that the document was vitiated by the forgery or alterations which were made on the document without his

knowledge, and also the fact that the 1st respondent's directors purported to have signed the document were not directors on the date they are purported to have signed the documents. The 3rd respondent has however explained the circumstances in which the alterations were made. It will be for the trial court to determine the propriety of those transactions and what role if any that the applicant may have played. However, in preparing the documents, pursuing the renewal of the new lease, and having the document registered, the 3rd respondent was not just pursuing the interest of the 1st respondent, but was also acting for and on behalf of the applicant who was the primary beneficiary of the renewed lease. *Prima facie* the 3rd respondent was an agent for both the applicant and respondent. The applicant cannot therefore solely lay blame on the 1st respondent for a mistake made by the 3rd respondent.

Secondly, the applicant contends that there was no consideration for the Replacement Charge as the Discharge of Charge and further Charge purportedly signed by the 1st respondent was not valid. That is a matter which is debatable. But even assuming that to be so, in the absence of the Replacement Charge, there having been a Charge and further Charge in existence at the time of the expiry of the leasehold, and there having been no agreement to the contrary, the 1st respondent as the Chargee in respect of the Charge and further Charge, was entitled by virtue of Section 71 of the Transfer of Property Act to a Charge over the new lease, even without the Replacement Charge having been registered. Thus either way, the 1st respondent statutory power of sale would remain intact, and the 1st respondent could lawfully sell and transfer the suit property subject to service of an appropriate statutory notice.

It was averred by the 1st respondent through the affidavit of Henry Khejeri that statutory notices were served on the applicant prior to the sale of the suit property to the 2nd respondent. The statutory notices were exhibited and it is evident that the last such notice was forwarded to the applicant on 31st May, 2006. This fact was not controverted by the applicant. Although the applicant maintained that no valid statutory notices could exist in respect of forged charged instruments, that argument would not hold if Section 71 of the Transfer of Property Act is applied. Moreover, the applicant has not given any explanation for his failure to challenge the statutory notices served upon him until more than 1½ years later. Further, the applicant has not demonstrated that the 2nd respondent was a party to the alleged forgery or that he had any knowledge regarding the improprieties on the questioned Charge. Although the applicant claimed that the suit property was sold at an undervalue, that is an allegation that is yet to be proved. *Prima facie*, the applicant has no cause of action against the 2nd respondent in whose name the suit property is now registered as it is a *bonafide* purchaser for value, nor has the applicant revealed any cause of action that it may have against the 4th respondent. Under Section 69B of the Transfer of Property Act, the applicant's remedy if any would lie in damages against the 1st respondent.

In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others, (2003) KLR 125*, the Court of Appeal held *inter alia* that:

“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.”

In this case, the applicant has totally failed to demonstrate the infringement of any right such that would justify the granting of the orders sought by him. In the light of the above, I find that the applicant has failed to establish a *prima facie* case upon which the interlocutory injunction which he seeks can be predicated.

Further, the applicant has remained silent about the Charge debt, it is evident that the applicant does not appear to have repaid the amount owing in respect of the debt to the 1st respondent. The equitable maxim “he who seeks equity must do equity” must apply. Equally applicable in view of the applicant's delay in questioning the 1st respondent's exercise of its statutory power of sale is the maxim, “equity only aids the vigilant and not the indolent.” The applicant does not therefore deserve the equitable remedy of

interlocutory injunction.

From the application under consideration prayer No.(5) seeks a declaratory order to the effect that the sale and transfer of the suit property by the 1st defendant to the 2nd defendant under the Charge dated 11th July, 2005 was null and void. Such a prayer can only be made after evidence has been adduced and a finding has been made that the Charge dated 11th July, 2005 was indeed null and void. At this interlocutory stage, there is no evidence before the court upon which such a conclusion can be arrived at, nor does the court have the mandate to make such conclusive findings.

For the above reasons, I dismiss the applicant's chamber summons filed on 18th December, 2007. I award costs of the application to the 1st, 2nd and 3rd respondents.

Those shall be the orders of this court.

Dated and delivered this 21st day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mituga for the plaintiff

Lubano for the 1st defendant

Kandere for 2nd defendant