



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 646 OF 2003

THOMAS NYANGERI MOGAKA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.1ST DEFENDANT

JOSEPH MUNGAI GIKONYO trading as

“GARAM INVESTMENTS”.....2ND DEFENDANT

MOUNT ELGON ORCHARDS LIMITED.....3RD DEFENDANT

R U L I N G

The Plaintiff herein, TOM NYANGERI MOGAKA, seeks by chamber summons dated 20th November, 2003 the following main orders:-

- 1.) In prayer No. 3, that pending hearing and determination of the suit the 1st and 3rd Defendants by themselves, their officers, agents and/or servants be restrained “from executing any document transferring, alienating, charging, interfering in any way whatsoever and howsoever dealing with the title and property known as L.R. No.7993, Trans-Nzoia District.”
- 2.) In prayer No. 4 that a mandatory injunction do issue “directed at the 3rd Defendant by itself, its officers, agents and or servants to remove themselves and all its agents and/or servants together with their materials and equipment, if any, from and/or around L.R. No.7993, Trans-Nzoia District and to allow the Plaintiff free access thereto and further to re-fence the property and rebuild the bridge leading to the suit property and restore the property to the condition it was in before the said destruction.”

The application is brought under Order 39, Rules 1, 2 and 9 of the Civil Procedure Rules (the Rules) and also under sections 3A and 63 of the Civil Procedure Act, Cap. 21 (the Act) and all other (unstated) enabling provisions of the law. Some eleven grounds are set out on the face of the application. These may be crystallized into six grounds as follows:-

- (1) The suit land was purportedly sold to the 3rd Defendant at a mock public auction that was tainted with fraud, illegality and malice and at such a low price as to be itself evidence of fraud.
- (2) All the requisite steps necessary before holding a public auction were not followed, and the 2nd Defendant was guilty of misconduct in the conduct of the alleged public auction.

(3) The charge and further charge relied upon by the 1st Defendant are null and void and did not give it any statutory power of sale. In any event the 1st Defendant is in fundamental breach of the terms of the charge and further charge.

(4) The suit land is still in the name of the Plaintiff though the 3rd Defendant intends to effect transfer of the same unto its name.

(5) The 3rd Defendant has sent its hirelings to evict the Plaintiff's employees from the suit land.

(6) The Plaintiff stands to suffer irreparable loss and damage unless the orders sought are granted.

There is an affidavit sworn by the Plaintiff in support of the application and filed therewith. There is a further affidavit sworn by the Plaintiff and filed on 22nd June, 2004 in response to the replying affidavits sworn and filed for the Defendants. These affidavits are one sworn by ZIPPORAH MOGAKA, the manager/legal services, of the 1st Defendant and filed on 2nd December, 2003, and another one sworn by ROBERT ANDERSON, the managing director of the 3rd Defendant and filed on 21st April, 2004. In addition to these affidavits there are grounds of objection dated 27th November, 2003 filed for the 3rd Defendant. Some 18 grounds are set out. They may be re-cast as follows:-

(1) The application is made in bad faith one year after the sale by public auction with the object of delaying or defeating transfer of the property to the 3rd Defendant, a bona fide purchaser for value, and is an abuse of the process of the court.

(2) The 1st Defendant's statutory power of sale had arisen, the property was duly sold at a public auction and the Plaintiff's right to redeem the property thereby lost under section 60 of the Indian Transfer of Property Act.

(3) The 3rd Defendant has acquired a title which is not subject to challenge except on grounds of fraud.

(4) The 3rd Defendant has been in possession and control of the property since the day of the auction on 3rd October, 2002 and is presently in control and occupation of the property.

(5) The Plaintiff is guilty of material non-disclosure in that his wife instituted H.C. Misc. Case No. 1418 of 2002 (OS) at the Central Registry raising similar issues, which case is yet to be heard, and in which the Plaintiff herein is named as a Defendant.

(6) The legal conditions for the granting of the reliefs sought have not been met.

On 14th October, 2003 the Plaintiff filed this suit by a plaint dated a day earlier in which two prohibitory injunctions, one mandatory injunctions, two declarations, two other orders and damages are sought. The Defendants entered appearance and filed defences. I have perused all these pleadings. I have also read the affidavits sworn in support of and in opposition to the application. The learned counsels for the Plaintiff and the 3rd Defendant submitted at length and quoted many authorities. Quite a large proportion of their respective submissions were on matters best left for the trial judge to deal with. Learned counsel for the 1st and 2nd Defendants was more restrained in his submissions. I have considered the submissions of the learned counsels in so far as they are relevant and germane to the present application and do not stray into the province of the trial judge. It is to be noted that on 22nd April, 2004 the 3rd Defendant had raised a preliminary objection to the Plaintiff's present application upon the ground that no injunction lies as the equity of redemption was extinguished upon execution of a sale agreement at the public auction. That preliminary objection was dismissed on 8th June, 2004. As is now well known, an applicant will not get an interlocutory prohibitory injunction unless he can show, firstly, that he has a prima facie case with a probability of success and, secondly, that he stands to suffer irreparable loss or damage, that is loss, or damage that cannot be made good by an award of damages. If the court cannot decide the matter upon these two principles, then it will decide it upon the balance of convenience. These three principles were established in the well-known case of GIELLA -VS- CASSMAN BROWN (1973) 358. With regard to

interlocutory mandatory injunction, the same principles apply. But in addition, an interlocutory mandatory injunction will be granted only in exceptional and clearest of cases. See the case of KENYA AIRPORTS AUTHORITY –VS PAUL NJOGU MUNGAI AND OTHERS, Court of Appeal, Nairobi Civil Application. No. NAI 29 of 1997 (unreported).

I will consider first the prayer for interlocutory prohibitory injunction. In his plaint the Plaintiff has pleaded breach by the 1st Defendant of the two contracts between him and the 1st Defendant. Detailed particulars of those alleged breaches are given. The two contracts are the charge and further charge executed by the two parties and registered in favour of the 1st Defendant against the suit land. Further, the Plaintiff has pleaded that the charge and further charge are illegal and did not confer upon the 1st Defendant any statutory power of sale. Grounds for the alleged illegality are given. The sale itself of the property to the 3rd Defendant in an auction conducted by the 2nd Defendant has been challenged on various grounds particularized in the plaint. Those grounds include the pleas that there was not any or proper statutory notice served upon the Plaintiff; that there was not any or proper notification of sale served; and that the sale itself was tainted with fraud. Many particulars of the alleged fraud are given.

The Defendants have of course denied all these allegations by the Plaintiff. The allegations are repeated in the Plaintiff's affidavits sworn in support of the application and in equal measure denied in the replying affidavits. All these are weighty issues that cannot be adjudicated upon at this stage upon the affidavits. They will have to await trial of the action. Furthermore, it is pleaded in the replying affidavits that the 1st Defendant already has judgment in another case against the Plaintiff for the sums of money owed upon the charge and further charge. An important issue arises from this –whether the 1st Defendant could, in the face of that judgment, be entitled in law to exercise its statutory power of sale. This issue, just like the others, will have to await adjudication at the trial.

Having read the main pleadings and the various affidavits I am satisfied that the Plaintiff has a prima facie case with a probability of success. It is to be noted that fraud is not alleged against only the 1st Defendant and the 2nd Defendant (the auctioneer). It is also alleged against the purchaser (3rd Defendant) as an active participant in the alleged fraud. Does the Plaintiff stand to suffer irreparable damage? Should the Plaintiff ultimately prove at the trial the various serious allegations pleaded the trial court may well find that the 1st Defendant had no statutory power of sale to exercise, or that the same had not accrued, or that the auction as conducted was a complete fraud and that therefore the sale of the Plaintiff's land was null and void. In that event would an award of damages be adequate compensation? I think not. I am of the same view as Ringer, J (as he then was) in the case of SIMIYU –VS- HOUSING FINANCE COMPANY OF KENYA LTD., (2001) 2 EA 540, that where a Defendant in his conduct has been in flagrant breach of the law the court will issue an injunction to protect the proprietary interests of the Plaintiff, notwithstanding that damages would be adequate compensation and that the Defendant would have the ability to pay such damages. In the present matter there are serious allegations of breach of statutory provisions, and, looking at the various affidavits filed, and without purporting to decide the issue, it cannot be said that they are without serious basis. I would therefore be inclined to grant the temporary prohibitory injunction sought.

What about temporary mandatory injunction? This is not a clear-cut case. There is a dispute as to whether the Plaintiff was in possession or not at the time of sale. There is also a dispute as to whether the 3rd Defendant has taken possession of the entire parcel of land or just a portion of it, and, in its manner of taking possession. It is a large parcel of land measuring 340 acres. All these disputed facts cannot be settled upon the conflicting affidavits. From what was said during arguments I get the impression that the 3rd Defendant may not yet be in occupation of the entire parcel of land and that the Plaintiff may be in possession of a portion thereof. But as I have said, these disputed facts are not settled by the affidavits. I hold that there are no special circumstances here as would warrant the issuance of a temporary mandatory injunction as sought.

In conclusion therefore I will allow prayer No. 3 of the chamber summons dated 20th November, 2003. This will be upon the condition that the Plaintiff files by 1.00p.m. on 21st February, 2005 an appropriate undertaking as to damages. Prayer No. 4 of the application is dismissed. Costs of the application shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 18TH DAY OF FEBRUARY, 2005.