



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1154 of 2004

BENSON WAWERU NGERU.....1ST PLAINTIFF

GRACE WANJA WAWERU.....2ND PLAINTIFF

-VERSUS-

KARUGU GUANDAI.....1ST DEFENDANT

KENYA INDUSTRIAL ESATES LIMITED.....2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED..... 3RD DEFENDANT

R U L I N G

In the amended Plaint dated the 26th November 2004 and filed the 29th November 2004, Benson Waweru Ngeru and his wife on Grace Wanja Waweru (to whom I shall hereinafter refer to as "the plaintiffs) seek various relief's including the following: -

(a) "A temporary injunction restraining the 1st and 3rd defendants, whether by themselves, their servants, agents or employees from selling, alienating transferring or in any way dealing with L.R. No. 209/11470 and from evicting the plaintiffs from Shed 16(2) L. R. No.209/11470 or in any way interfering with the plaintiffs quiet possession thereof pending the hearing and determination of the suit."

(b) A declaration that Grant Number 1. R 74770, L. R. No. 209/11470 dated 3rd October 1997 issued in favour of the 1st Defendant and the charge registered thereon on 1st September 2000 in favour of the 3rd Defendant are' both illegal, null and void.

(c) An order directing the 1st and 3rd Defendants to deliver up Grant Number 1. R. 74770, L. R. No. 209/11470 dated 3rd October 1997 and the charge registered thereon on 1st September 2000 to the Commissioner of Lands for cancellation from the register.

(d) An order directing that the commissioner of Lands to cancel the Grant Number 1. R. 74770, L. R. No. 209/11470 dated 3rd October 1997 and the charge registered thereon on 1st September 2000."

(e) An order directing the 2nd defendant to procure and release to the plaintiff a deed plan for Shed 16(2) L. R. No. 209/11470."

“(f) In the alternative to prayers (b), (c) and (d) above, general damages for fraud and misrepresentation”

Pending the hearing and determination of their suit, the Plaintiffs took out a Chamber Summons application dated the 26th November 2004 and filed on the 29th November 2004, under Order 39 rules 1 and 3 of the Civil Procedure Rules, in which the Plaintiffs have moved this court for an order of a temporary injunction to restrain the 1st and 3rd defendants respectively from-

“Selling, alienating, transferring or in any way dealing with L. R. No.

209/11470 and from evicting the Plaintiffs from Shed 16(2) L. R. No.

209/11470 or in any way interfering with the plaintiffs’ quiet possession ‘thereof’”

The application is premised on the eight grounds as set forth therein and supported by the affidavit of the First plaintiff, Benspn Waweru Ngeru, made on the 26th November 2004 on his own behalf and that of his wife, the Second plaintiff.

In opposition to the application, Karugu Guandai, the First Defendant, filed grounds dated the 23rd January 2005 on the 26th January 2005 but elected not to file an affidavit in response to the averments made in the supporting affidavit to the application.

The National Bank of Kenya Ltd-, the Third Defendant, also opposes the application on the basis of the affidavit of its Legal Manager, Z. K. Mogaka, sworn on the 16th December 2004.

From the depositions made by the First Plaintiff in the supporting affidavit, it would appear that the Second Defendant as the developer of L. R. No. 209/11470 (“**the suit property**”) caused to be erected thereon two sheds, Commonly known as Industrial Estate Sheds 16 (1) and 16(2) respectively. The first plaintiff deposes that under and by virtue of agreement for sale dated 21st May 1996, the plaintiff purchased Shed 16 (2) the initial allottee thereof, one Richard Gichuri Kagathi, at the price on sum of KSh. 2.5 million which the Plaintiffs paid in full and took immediate possession of Shed 16 (2) aforesaid. Subsequently, and with authority of the said allottee and the Second Defendant respectively, the Commissioner of Lands issued a dated the 24th May 1999 to the Plaintiffs. It is also evident that Shed 16 (1), initially allocated to one Eric Bomett and subsequently to one Stephen M Ngetich was, with the the 2nd Defendant's approval, allotted to the First Defendant. First Plaintiff further deposes. that the Second Defendant the inadvertently instructed the Commissioner of Lands to transfer the whole of the suit property to the First Defendant notwithstanding the sub-division thereof and the clear intention of the Plaintiffs, the first Defendant and the second Defendant respectively that the portions of the suit property on which Sheds 16 (1) and 16 (2) were respectively erected would be transferred to the First Defendant and the Plaintiffs respectively. As a result of this error, the First Defendant is now the registered proprietor of the whole of the suit property and he has charged the same to the Third Defendant.

In her submissions and on these facts, Miss Njeri Mucheru, the learned counsel for the Plaintiffs, contended that the Plaintiffs, being the beneficial owners of Shed 16(2), are entitled to the orders sought in the application particularly as the First Defendant's title, being tainted with misrepresentation and fraud as pleaded in paragraphs 12A and 12B of the amended Plaint, is a null and void as is the Third Defendant's charge as Consequence thereof.

Mr. Omwonyo for the Second Defendant, in supporting the application, associated himself fully and agreed with the submissions made by learned counsel for the plaintiffs.

In reply, Mr.' Kimani Muhoro, learned counsel for the First Defendant, contended that the Plaintiffs are not entitled to the equitable remedy sought as they had not shown that the suit property was in danger of being alienated as is required under Order 39 rule 1 (a) of the Rules aforesaid. Further, and relying on the decision of the Court of Appeal in **Mureithi -v- City Council of Nairobi** [1981) KLR 332, learned counsel argued that a temporary injunction should not issue as in any event, damages would be an adequate remedy for any loss or damage which the Plaintiff have or may suffer.

Defendant, I have been obliged to ignore the rest of Mr. Muhoro's In the absence of a replying affidavit by the First Defendant, I have been obliged to ignore the rest of Mr. Muhoho's submissions which addressed matters of fact.

In associating himself with Mr. Muhoro's submissions and citing various judicial and other authorities, Mr. Alex Thangei, learned counsel for the Third Defendant, argued that the Plaintiffs had not disclosed a cause of action against the Third Defendant, against whom no fraud had been alleged in the Amended Plaintiff, and the Third Defendant's charge is, by virtue of section 23 of the Registration of Titled Act, valid.

I have considered the evidence before me in light of the submissions made by respective counsel and the principles enunciated in **Giella - v - Cassman Brown & Co. Ltd.** (1973) E A 358.

Dealing first with Mr. Muhoro's submissions, he had failed to persuade me that the application is bad in law, frivolous, mischievous or otherwise an abuse of the process of the court. The First Defendant has not at all contravened any of the averments in the supporting affidavit contained. In particular, and the First defendant having become the registered proprietor of the suit property in October 1997, he has not explained why he did not seek vacant possession thereof from the Plaintiffs until November 2004 nor has the First Defendant sought to explain the circumstances in which the Plaintiffs came to be in possession of what he claims to be his Property Since 1996.

Turning to the grounds upon which the Third Defendant opposes the application, and given that the Third Defendant may at any time exercise its statutory power of sale as chargee of the suit proper either by public auction or by private contract without notice to the plaintiff, I consider the plaintiffs apprehension that the suit property may be alienated to be well founded. I also have great difficulty in comprehending or accepting what is deponed to in paragraph 3 of Z. K. Mogoka's said affidavit sworn on 16th December 2004. The deponent states that " **I am a stranger to the averments Contained in paragraphs 2, 3.....of the affidavit of BENSON WAWERU NGERU.....**", yet the deponent is herself the very author of some of to: refers annexed to the supposing affidavit of the First Plaintiff. While it is plausible that the Third Defendant may be a stranger thereto, the deponent cannot possibly be a stranger to her own letters.

Finally, and having noted that the Third Defendant's charge was registered in September 2000, it is not unreasonable to presume that the suit property was, as is common practice, valued prior to the creation and registration of the said secure-. If that be the case, the valuer, on diligent enquiry, would no doubt have discovered the Plaintiffs occupation of Shed 16 (2) and the elaborate business conducted thereat and, in the absence of a satisfactory explanation as to the Plaintiffs' occupation of the suit property, brought these facts to the attention of to: Third Defendant for further investigation prior to the completion and perfection of the charge.

In the absence of any explanations by the First and Third Defendants respectively of any of the matters referred to hereinabove, the Plaintiffs have, in my judgment, well met the conditions laid down in the **Giella case** (supra). As between the Plaintiffs and the First Defendants the Plaintiffs are likely to suffer far greater loss in their well established business if an injunction is not granted. The right to earn a livelihood is a fundamental human right and I am not prepared to sign away the Plaintiffs' means of doing so without allowing them the opportunity to prosecute their case. In the circumstances, the balance of convenience appears to me to favour the Plaintiffs. Accordingly, the Chamber Summons application date the 26th November 2004 and filed on the 29th November 2004 Succeeds and is allowed and granted accordingly and it is ordered that an injunction in terms of prayer No. 3 thereof do issue forthwith and be and is hereby granted With costs to the Plaintiffs.

Dated and delivered this Fourth day of March 2005

P. Kihara Kariuki

Judge