



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
Civil Case 127 of 2005

TENDE DRIVE VILLAS LTDPLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT

BANK LIMITED1ST DEFENDANT

CHARLES BOSIRE 2ND DEFENDANT

ESTEHR MUBOKA BOSIRE..... 3RD DEFENDANT

AZIZ MOHAMMED PIRAK4TH DEFENDANT

RULING

The Chamber Summons dated 9th March, 2005 is brought under Order XXXIX Rules 1,2, and 3 of the Civil Procedure Rules, Section 106 of Government Lands Act Cap.280, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is seeking one primary prayer which is that the Defendants by themselves, agents, servants or any other person acting on their behalf be restrained from levying out any distress or otherwise against the Plaintiff on L.R. No.3734/1141 and 3734/1143 Lavington and/or evicting or interfering with the peaceful enjoyment or quiet possession by the Plaintiff in L.R. No. 3734/1141 and 3734/1143 Lavington until the hearing and determination of this Application and/or suit.

The reasons for the Application are that:

- 1) **The Defendants intend to forcefully evict the Plaintiff without a Court Order.**
- 2) **There is a pending matter in Court between the Plaintiff and the 1st Defendant yet the Defendants have disregarded this position.**
- 3) **The 1st Defendant has never served any notice on the Plaintiff or at all.**
- 4) **The suit property has been sold off fraudulently.**

The Application is supported by an affidavit sworn by one Gladys Njeri a co-director of the Plaintiff to which affidavits are annexed 5 exhibits. The Respondents opposed the application and filed Replying Affidavits. The 1st Respondent's affidavit was sworn by one Reuben Nyangaga the Assistant Manager – Legal in its Debt Management Unit. Attached to the Replying Affidavits are various exhibits.

The Application was canvassed before me on 10th, 18th and 30th May 2005 by Mr. Muli Learned Counsel for the Applicant, Mr. Njeru Learned Counsel for the 1st Respondent and Mr. Kerongo, Learned Counsel for the 2nd, 3rd and 4th Respondents. Earlier on 26th April, 2005 by consent one David Kamau was joined in the suit as the 2nd Plaintiff. He filed a Replying Affidavit on 3rd May 2005.

Counsel for the Applicant recited the averments in the Supporting Affidavit and emphasized that the Applicant's case was based on fraud particulars whereof Counsel submitted were in the said supporting affidavit. In Counsel's view L.R.No.3734/1141 was at all material times the property of the Plaintiff having bought the same from the 2nd Plaintiff who in his Replying Affidavit confirms that position thus confirming that the transfers to the 2nd and 3rd Respondents were fraudulent.

In response to the Plaintiff's allegations the 1st Respondent relied on the said Replying Affidavit of Reuben Nyangaga and in view of the averments in the said Affidavit, Counsel argued that the Plaintiff had not shown a *prima facie* case with a probability of success at the trial as it had no legal right in the suit properties. Reliance was placed upon the case of **Nairobi Mamba Village –v- National Bank of Kenya: Nairobi HCCC No.1838 of 2001 (U.R.)** for the proposition that, it is only a chargor who is entitled to complain and as the 1st Plaintiff was not a chargor his application was misconceived.

It was further argued that there has been previous litigation in which the present complaints by the Plaintiff were made and determined at interlocutory stages with the main suit still pending before the Court and as the Plaintiff had not been candid about the previous litigation he was guilty of material non-disclosure.

Counsel for the 2nd, 3rd and 4th Respondents also recited the averments in the replying affidavits filed by the said Respondents. From the said affidavits Counsel argued that the suit properties belonged to the 2nd, 3rd and 4th Respondents and no fraud had been shown. Counsel further referred the Court to the contradicting positions taken by the Plaintiffs in previous suits over the same properties. Reliance was placed upon the case of **Priscillah Krobought Grant –v- Kenya Commercial Finance Co. Ltd & 2 Others C.A. Civil Appl. No.227 of 1995 (UR)** for the proposition that even if the Plaintiff were to prove fraud it would only be entitled to damages.

Further reliance was placed upon the case of **Zachary Warwimbo Ruhangi and 2 Others –v- Standard Chartered Bank Ltd & 2 Others HCCC No. 885 of 1999 (UR)** for the proposition that fraud is not easy to prove as a higher than normal Standard is applied.

Before proceeding to consider this Application further, I think it is convenient to set out the principles applicable for the grant of an interlocutory injunction. The same were set in the precedent setting case of **Giella –v- Cassman Brown & Co. Ltd & Another (1973) E.A.358**. First the Applicant must show a *prima facie* case with a probability of success at the trial but if the Court is in doubt, it should decide the Application on a balance convenience.

Secondly normally an interlocutory injunction will not be granted unless the Applicant would suffer an injury which cannot be compensated in damages. It must be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted where it is shown that the Applicant's conduct with respect to matters pertinent to the suit does not meet the approval of a Court of equity.

In the Application at hand, the Applicant has not satisfied me on the allegations that the transfers to the 2nd, 3rd and 4th Respondents were fraudulent. This finding is only on a *prima facie* basis and is not

conclusive. I am however not alone in this view of the allegations made by the Plaintiff.

By its Complaint dated 20.2.2003, filed in HCCC No.92 of 2003, the Plaintiff herein sought an injunction against the 1st Respondent to restrain it from selling the very same titles. Fraud was alleged against the intended sale. The injunction application was dismissed by Ringera J. as he then was on 26.3.2003 because the Applicant did not have a *prima facie* case that the properties sought to be sold belonged to it. The Learned Judge indeed found on *prima facie* basis that the properties belonged to the 2nd Plaintiff and the Applicant was not entitled to be served with a statutory notice of sale.

By its Notice of Motion dated 4.7.2003, the Applicant moved the Court in the same suit for an injunction against the 1st Respondent to restrain it from disposing off the same properties pending an intended appeal against the decision of Ringera J. aforesaid. That Motion on Notice came up before Mwera J. who on 29.9.2003 dismissed the Application and observed that nothing had changed since the time the Applicant's application had been dismissed by Ringera J. aforesaid. The Judge said "***the properties belong to David Kamau and the Plaintiff Company (the applicant herein) which was anticipating to be purchaser-transferee still remains anticipating.***" The Learned Judge also found that the Applicant could be compensated with money.

When the Applicant's applications were dismissed the 1st Respondent was at liberty to dispose of the properties.

The 2nd Plaintiff had his own set of litigation. On 14.9.2000, he instituted HCCC No.1650 of 2000 seeking an injunction against the 1st Respondent to prevent it from exercising its statutory power of sale. The Application was dismissed by Khamoni J. on 6.2.2001 who found that the properties were charged to the 1st Respondent. The 2nd Plaintiff appealed against that decision but on 12.7.2001 the Court of Appeal dismissed the Application and observed that the injunction being an equitable remedy would not issue in favour of the Applicant as he had by his conduct openly demonstrated that he was undeserving of the equitable relief.

On 4.11.2002, the 2nd Plaintiff was back in Court in the said suit i.e. 1650 of 2000 seeking mandatory injunctions against the 1st Respondent for Accounts and certificates for the suit properties. This time the Application was heard by Nyamu J. who dismissed it on 30.1.2003.

It is in the light of the above that I said earlier that the Applicant has not satisfied me on the allegations of fraud. The Applicant seems to be owned by the 2nd Plaintiff and his wife Gladys Njeri the deponent of the supporting affidavit. I cannot resist the conclusion that the Applicant is a smokescreen used by the 2nd Plaintiff to obtain what he could not obtain himself.

In the result I have found that the Applicant does not have a *prima facie case* with a probability of success at the trial and in any event its anticipated loss can adequately be compensated in damages.

As I have alluded to above, the conduct of the Applicant is not deserving of the equitable relief of injunction. The relationship between the Applicant and the 2nd Plaintiff is not disclosed. The Supporting Affidavit is sworn by Gladys Njeri who merely deposes that, she is a co-director of the Applicant without disclosing her relationship with the co-director who turns out to be her husband. In my view the Applicant's non-disclosures appear to have been designed to mislead the Court in granting it the orders sought. The Applicant has not done equity. It is not entitled to equity.

The upshot of the above consideration of the 1st Plaintiff's Application dated 9th March 2005 is that the same is dismissed with costs to the Respondents.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE