

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 929 of 1999

JEREMIAH NGUGI GAKUNJU & 4 OTHERS.....PLAINTIFF

-VERSUS-

CONSOLIDATED BANK FINANCE LIMITED.....DEFENDANT

RULING

The applicants are asking for orders that the defendant be restrained from selling the property known as LR No. 74/15 Kasarani pending the determination of this application. To support this application the plaintiffs are advancing the arguments that there are two mortgages related to the money borrowed and that there are no proper records showing how the money was advanced by the defendant bank following the registration of the mortgages.

The plaintiffs raised other arguments related to the absence of Land Control Board consent to enable the borrowing and subsequent charging of the land. It was also the plaintiffs contention that there were a number of entries into the debts side of the accounts which has not been explained. By the replies filed so far other reasons for the application are to be found in the supporting ground but these were the main grounds in support of the application as explained by the Learned Counsel for the applicant Mr. Kimani.

The application is opposed on the grounds that the grounds in support of this application do not satisfy the conditions for an injunction. Mr. Raji the Learned Counsel for the Defendant submitted that there are disagreements on the accounts is no ground for an injunction. He said that the defendant had annexed copies of the Land Control Board consents and in any case the persons now appearing as plaintiffs/applicants in this application are but strangers as they have no interest in the suit land, the same having been sold and transferred to two chargees Simon Mwotto Gakunju and Gladys Wanjiku Gakunju who are the owners of the land. These two are the only persons who in law can complain.

I have read the affidavits in support and I have considered the submissions by the Learned Counsels. It appears that there was at one stage a sale of property subject to the mortgage by Jeremiah Ngugi Gakunju and his brother conveyancing the property to the other brother Simon Mwotto Gakunju and their late mother. This transfer is dated 16.3.1983. The first mortgage was registered simultaneously with the transfer. I have read and considered the replying affidavit of Samuel Kimunya Kogi, the Manager of the defendant company but I am afraid to say that the information he gives in his affidavit leaves a number of disturbing questions. For one it does not come out in any of the affidavit how it came about that Jeremiah and Zacharia Gakunju sold the land to a brother and their mother. It is also not explained how the transfer of this property was being registered at the same time with the mortgage. This might appear a small issue but not when there are allegations of fraud in the plaint. It is true that according to the mortgages and the transfer apart from Jeremiah Ngugi Gakunju the rest of the plaintiffs are not registered owners of the land in question. On the other hand they are members of the family and would be beneficiaries of the estate of their late mother and therefore they have some interest in the land. They would obviously want to know why one brother would sell the land to the mother and one brother. It would be expected that they will also want to know why the loan which is now depriving them of what would be their inheritance was for. These are legitimate questions and even if Jeremiah would be precluded from asking these questions, those entitled to the estate of their mother are within their rights to ask.

The issue of fraud cannot be determined by the kind of information to be found in the affidavits filed herein. It has to be determined through a hearing when all the evidence will be considered. Neither do I share the view that the allegations of fraud are remotely far from the bank's transaction. What happened between those brothers and their mother on one hand and the rest of the family could well affect the transaction between the bank and the borrowers.

The issue of whether any monies were actually advanced is another matter clouded with unclear statements in the affidavit. It has been said that the plaintiffs by making arrangement to pay the loan and by writing letters to the bank to acknowledge the existence of the loan precludes them from challenging the transaction and the sale.

These assertions are to be found in the replying affidavit. I do not agree with this argument. They could have made these suggestions in desperation to save the land from sale.

For these reasons, I would hold that the sale should be stopped until the hearing of the main suit when those issues will be gone into.

I allow the application as prayed for in prayer 2 of the Chamber Summons only that the sale shall be stopped until the determination of the suit.

Costs shall be in cause.

Delivered and dated this 3rd day of April, 2000.

KASANGA MULWA

JUDGE