



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 23 OF 2020

NICHOLAS MUCHINA MUIRURI.....1ST PLAINTIFF

KEVIN MBAKA MUIRURI.....2ND PLAINTIFF

VERSUS

SALESIO KIARIE THATHI.....1ST DEFENDANT

ABDIWAHAB HAJI ISSAK.....2ND DEFENDANT

CHRISTOPHER NDWIGA NJIRU.....3RD DEFENDANT

NCBA BANK LTD.....4TH DEFENDANT

ATTORNEY GENERAL

(Sued on behalf of the Registrar of Land, Kajiado North Registry)..5th DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 8th May, 2020 brought pursuant to Article 40 and 159 (2) (d) of the Constitution, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules. The Plaintiffs seek for prohibitory injunction against the 3rd and 4th Defendants , their employees, servants or agents prohibiting them from entering, remaining, transferring, leasing, creating a further charge or exercising statutory power of sale in respect to land parcel number NGONG/ NGONG/ 38954 hereinafter referred to as the ' suit land', pending the determination of this suit. The application is premised on the grounds on the face of it and the supporting affidavit of KEVIN MBAKA MUIRURI where he deposes that together with the 1st Plaintiff they jointly own the suit land. He explains that the suit land initially belonged to their father Peter Karanja Muiruri who passed away on 24th July, 2011 but they inherited the same from him. He contends that prior to the father's demise he had charged the suit land to Family Bank Limited and Equity Bank Limited but they successfully managed to discharge the Charge in favour of Equity Bank Limited. He contends that on 5th March, 2020 their guard on the suit land informed them there were people who had come to undertake valuation thereon with a view to selling the property to third parties. Further, they applied for an extract of title Deed and discovered there was an entry showing they had transferred suit land to the 1st Defendant on 18th October, 2018 which fact they deny. He proceeds to explain that the 1st Defendant thereafter transferred suit land to the 2nd Defendant on 11th January, 2019 while on 19th February, 2019, the 2nd Defendant transferred it to the 3rd Defendant. Further, on 8th August, 2019, suit land was transferred to one Anthony Gaita Warui who transferred the said land back to the 3rd Defendant on 8th August, 2019. He avers that on 2nd October, 2019, the 3rd Defendant charged the suit land to the NIC Bank Limited Now NCBA Bank Limited (4th Defendant herein) for Kshs. 15, 200,000. He states that upon learning of the fraud, they reported matter to the Criminal Investigations Department (CID) who are currently investigation the case. He reiterates that they have established a prima facie case and the balance of convenience tilts in their favour.

The 1st Defendant though duly served failed to enter appearance nor file a response to oppose the instant application.

The 2nd Defendant in response to the application, filed a replying affidavit where he deposes that he does not know nor own the suit land. He denies knowledge of the suit land nor having carried out a transaction in respect to the same. He denies purchasing the suit land from the 1st Defendant nor transferring the same to the 3rd Defendant. He insists the nature of the purported transaction in his name is fraudulent, misconceived and illegal. He reiterates that he has never obtained a title in respect to the suit land from the Land Registrar. He explains that the signatures on the face of both the transfer documents are different and not his. Further, that the transfer documents do not bear any consideration to show how the suit land was registered and transferred in his name. Further, he denies authorizing any transaction and contends that any document in his name is a forgery and falsification of information he did not provide.

The 4th Defendant opposed the application and filed a replying affidavit sworn by STEPHEN ATENYA its Senior Legal Counsel where he deposes that the 3rd Defendant was their customer and pursuant to Letters of Offer dated 16th July, 2019 and 17th September, 2019, they advanced several loan facilities among them a Commercial Term Loan Facility in the sum of Kshs. 15, 200,000/= to finance the balance of the purchase price in respect of the acquisition of the suit land, by the 3rd Defendant. Further, the facility was to be secured by a First Legal Charge of Kshs. 15, 200, 000 over suit land. He contends that the 3rd Defendant furnished them with copies of the Agreement for Sale between the Vendor and himself including Title Document in the name of the Vendor. He explains that as part of due diligence, the 4th Defendant obtained a Valuation Report from messrs Dominion Valuers Limited and a Certificate of Official Search dated 20th August, 2019, in respect to suit land. Further, the Certificate of Official Search revealed that the suit land was at the material time registered in the name of Anthony Gaita. He avers that the 4th Defendant proceeded to create a First Legal Charge dated the 30th September, 2019 over the suit land which was duly registered on 2nd October, 2019. He claims the 3rd Defendant failed to service the loan culminating in the 4th Defendant instructing its advocates to issue the requisite 90 days' statutory notice. He reiterates that the 4th Defendant is a stranger to the Plaintiffs and was not a party to the alleged fraud. Further, in absence of a caution, inhibition or Court Order over the suit land, the 4th Defendant could not determine whether there was any dispute nor competing interest in respect to the said land. He insists the 4th Defendant was entitled to presume that the vendor and the 3rd Defendant held a good title. Further, that the Application and suit do not disclose any cause of action against the 4th Defendant and the orders sought would occasion an injustice to it.

The 5th Defendant never filed any response to the instant application.

The application was canvassed by way of written submissions which were only filed by the Plaintiff, 2nd and 4th Defendants.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 8th May, 2020 including the rivaling affidavits and submissions the only issue for determination is whether an order of temporary injunction should issue in respect to the suit land, pending the determination of the suit.

The Plaintiffs in their submissions reiterated their claim and contended that they had established a prima facie case with a probability of success. They denied transferring the suit land to the 1st Defendant and insisted in the absence of the said transfer, the same must have been fraudulent. They insisted 1st Defendant did not have a good title to pass hence the 2nd and 3rd Defendant did not acquire a good title. They submitted that they will suffer irreparable loss which cannot be compensated by way of damages and the balance of convenience tilts in their favour as they have been in possession of the suit land. They relied on the following decisions; **Republic Vs District Commissioner Machakos & Another Ex parte Kakui Mutiso (2014) eKLR; Francis Maina Njogu V Nicolas Kiragu Ngacha (2017) eKLR; Elijah Nyakeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) eKLR; Esther Ndegi Njiru & Another V Leonard Gatei (2014) eKLR; Susan Njeri Karo V Catherine Njeri Njoroge t/a Licat Enterprises & 2 others (2016) eKLR; William Kiprotich Cherus V Stanley Kiplangat Rono & another (2014) eKLR; Peter Njoroge Nganga V Statutory Manager For United Assurance Company Limited & Another (2020) eKLR; and Board of Governors, Moi High School , Kabarak & Another V Malcolm Bell (2013) eKLR** to buttress their averments.

The 2nd Defendant in his submissions insists he had no link to the transaction to warrant the Plaintiffs herein, ensure he complies with the orders. Further, that the Plaintiffs have not established a prima facie case as against him. He reiterates that he shall not be prejudiced. He prays that the application and suit be struck off against him. To support his arguments, he has relied on the case of **Giella Vs Cassman Brown & Co. Ltd (1974) EA 358**.

The 4th Defendant in its submissions relied on their averments above and insists the Plaintiffs have not established a prima facie case to warrant the orders sought. They contend that they conducted due diligence before the registration of the Charge and acquired an equitable interest in the suit land as an innocent chargee for value without notice of the defect in title. They averred that the Plaintiffs will not suffer any substantial loss which cannot be compensated by way of damages. Further, that the balance of convenience tilts in its favour. To buttress their averments, they relied on the following cases of **Mrao Limited V First American Bank of Kenya Limited (2003) eKLR and Nguruman Limited V Jan Bonde Nielsen & 2 Others, Civil Appeal No. 21 of 2014; Kennedy Muchilwa V Charles Peterson Ogowok & 2 others (2018) eKLR and Paul Gitonga Wanjau Vs Gathuthis Tea Factory Ltd & 2 Others (2016) eKLR**.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**. As to what constitutes a prima facie, the Court of Appeal in the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** stated that this is a case in which on the materials presented to the court or tribunal, there will be a conclusion that there is an apparent right which has been infringed upon by the adverse party to call for an explanation or rebuttal.

The Plaintiffs claim they did not transfer suit land to the 1st Defendant. The 2nd Defendant has also denied transacting with the 3rd Defendant. He was categorical that he has never transacted over the suit land and his documents were forged. The 3rd Defendant whose name appears twice in the Green Card failed to enter appearance nor file a response to the Plaintiffs' averments. The 4th Defendant insists it is an innocent chargee for value. Further, it conducted due diligence and granted a loan to the 3rd Defendant who used the suit land as security. It insists it shall suffer irreparably if the orders sought by the Plaintiff are granted. On perusal of the Green Card which was one of the annexures herein, it is clear the Plaintiffs were indeed registered as proprietors of the suit land on 27th February, 2015 and a title deed issued to that effect. Looking at the other documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiffs over the suit land is not baseless. The Plaintiffs have also alleged fraud on the part of the Defendants and confirmed that the issue of the transaction over the suit land is pending investigations by the CID. In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'. In the instant case the 2nd defendant, has denied undertaking any

transaction in respect to the suit land. To my mind, I find there is hence a missing link as to how the 3rd Defendant acquired the title to the suit land. I find that it would be pertinent if both the Plaintiffs and the 3rd and 4th Defendants were granted an opportunity to be heard to enable the court make a proper determination on the ownership of the suit land. Based on the facts before me, at this juncture, I find that the Plaintiffs have indeed established a prima facie case with a probability of success.

On the second principle as to whether the Plaintiffs stand to suffer irreparable loss which cannot be compensated by way of damages. From the Court record the 1st, 2nd and 3rd Defendants have not denied the Plaintiffs' averments. Further, from the Green Card and the Certificate of Title, it is evident that the Plaintiffs had indeed been the registered proprietors of the suit land prior to its being transferred to various parties until it was finally charged to the 4th Defendant. The Plaintiffs insist they have been in possession of the suit land which fact is not controverted by any of the Defendants. The Plaintiffs have further alleged fraud and denied ever transferring the land to the said Defendants. The suit land is now charged to the 4th Defendant who is in the processing of exercising its statutory power of sale as the 3rd Defendant who used it as security to secure a loan, has failed to repay the said loan. In the **case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'**

Based on my analysis above and associating myself with this decision, I find that the Plaintiffs' injury are not speculative as they will indeed suffer grave and irreparable injury if the suit land is disposed of through a public auction before the court has made a determination on its ownership.

On the question of balance of convenience, from the evidence presented by respective parties, I am not in doubt that if the suit land is not preserved pending the determination of the dispute herein, it will indeed be wasted away. Insofar as the 4th Defendant insists the balance of convenience should tilt in its favour, at this juncture I beg to disagree as it already holds a charge over the suit land whose title is in dispute. In the circumstance, I find that the balance of convenience indeed tilts in favour of the Plaintiffs.

It is against the foregoing that I find the Notice of Motion application dated the 8th May, 2020 merited and will proceed to allow it.

Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF MARCH, 2021.

CHRISTINE OCHIENG

JUDGE