



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. E009 OF 2021

IBRAHIM WANENE KIINGATI NUTHU.....PLAINTIFF

VERSUS

JAMPUR AGENCIES LIMITED.....1ST DEFENDANT

JAMES MUCHEMI KIHARA.....2ND DEFENDANT

PURITY WAKIURU WAITHAHA.....3RD DEFENDANT

GROFIN SGB KENYA LIMITED.....4TH DEFENDANT

ANTIQUA AUCTIONEERS AGENCIES.....5TH DEFENDANT

JAMES GATHARA MWARANGU.....6TH DEFENDANT

RULING

INTRODUCTION:

1. By a Notice of Motion application dated 3rd February 2021 and brought under Order 22 Rule 69(1), Order 40 Rule 1(a), Order 51 Rule 10 of the Civil Procedure Rules and Sections 1A, 1B and 3A the Civil Procedure Act, the Plaintiff sought for an order for a temporary injunction restraining the 6th Defendant by himself, agents, servants or whosoever from selling, transferring, disposing off, parting with ownership and or possession or in any way dealing with the suit property known as **TITLE NO. MAVOKO TOWN BLOCK 3/2024** pending hearing and determination of this suit.

2. The application is premised on the grounds found on its face as well as the affidavit of the Plaintiff sworn on 3rd February 2021. The Applicant has deposed that the 1st Defendant secured a credit facility from the 4th Defendant in the sum of Kshs. 62,000,000/- and the same was guaranteed by the applicant and the 2nd Defendant in respect of their properties known as **MAVOKO TOWN BLOCK 3/2024** and **L.R. 209/16500** respectively. The Applicant further averred that he did not benefit from the loan and that the 1st Defendant defaulted in the loan repayment which prompted the 4th Defendant to seek to realize the securities charged.

3. The Applicant deposed that the 1st Defendant filed Milimani Commercial Suit No. E418 of 2019 in an attempt to stop the sale and that the suit was compromised through a mediation agreement which allowed the sale of the Applicant's suit property. The applicant complained that he was not party to the mediation agreement and the same was fraudulently and illegally entered into. It is the Applicant's contention that the sale of his property by public auction in accordance with the mediation agreement vitiated by the illegality of the mediation agreement. He also stated that the property was undervalued and sold at Kshs. 58, 500,000/- when the correct value was Kshs. 110,000,000/-; that the suit property was sold without a correct valuation report and that the 6th Defendant failed to pay 25% of the purchase price at the fall of the hammer on the auction day. He concluded that the sale cannot pass on a good title to the 6th Defendant and the same should be set aside; wherefore he sought for a temporary injunction to restrain the 6th Defendant from selling, transferring, charging, parting with ownership and or possession of the suit property pending determination of the suit to preserve the same; and that the suit shall be rendered nugatory if the suit property is not preserved.

4. The application is opposed. Rita Odero the Investment Executive working with the 4th Respondent swore an affidavit dated 7th May 2021

on behalf of the 4th and 5th Defendants and stated as follows; that in July 2015, the 1st Defendant obtained a loan of Kshs. 62,000,000/- from the 4th Defendant which was secured by a charge over L.R. No. 209/16500 (I.R. No. 103208) House No. 8 South C Nairobi and L.R. No. Mavoko Town Block 3/2024. She deposed further that in July 2018, the 1st Defendant began defaulting in the payment of the loan which led the 4th Defendant to commence the process of realizing the securities by issuing the relevant Notices to both the borrower and the guarantors. She also stated that at some point parties began negotiations which culminated in a promise by the 1st Defendant to pay the loan, which promise they did not honour.

5. The 4th and 5th Defendants further stated by their replying affidavit that when the 1st Defendant failed to honour their promise, the 4th Defendant instructed the 5th Defendant a licenced Auctioneer to proceed with the process of realizing the securities. That the 5th Defendant duly advertised for sale the properties used as securities, but the same was not sold on the scheduled date due to lack of bids above the forced sale value. That as the parties were already in court, parties sought for time to attempt an out of court settlement which culminated in the court referring the matter to the court annexed mediation. That the property was advertised following the mediation and the same was sold in a public auction to the highest bidder, the 6th Defendant at the sum of Kshs. 58,500,000/-; that the whole transaction involved a discussion between the 4th Defendants representing the Plaintiff and the 6th Defendant for purposes of the Plaintiff giving the 6th Defendant vacant possession which the Plaintiff agreed to.

6. It was the 4th and 5th Defendants' contention that it is conceded to by the Plaintiff, that he offered the suit property as security for the loan, and therefore the sale cannot be vitiated merely because it could fetch a higher price in an open market. The 4th and 5th Defendants opined that the Applicant having admitted offering his property as security, and that there was default in the payment of the loan, therefore, he has no right capable of being protected by the honourable court.

7. It was emphasized on behalf of the 4th and 5th Respondents that failure to include the Applicant in the suit in Nairobi ought to be blamed on the 1st, 2nd and 3rd Defendants; that the suit property was sold in exercise of the 4th Defendant's statutory power of sale as the chargors and borrowers had defaulted to settle the loan and not by virtue of the mediation agreement and that in any event, the mediation process gave more time to the Applicant to redeem his property, in vain; that the property was sold at a forced market value which was also the reserve price and that valuation had been done on 25th June 2020; that 25% of the price of the property was paid at the fall of the hammer which according to conditions of sale, required that payment could only be made upon the acceptance of the 4th Defendant; that no prima facie case with a likelihood of success had been made out.

8. Further opposition to the Plaintiff's application was through the affidavit of James Mwarangu Gathara, the 6th Defendant, filed on 3rd June 2021 where he deposed that he learnt of an auction of the suit property through an advertisement in the Newspaper, thereafter he attended the auction on the 9th October 2020, where he was the only bidder of the property when he offered to purchase the same at Kshs. 58,500,000/-. That having been informed that the bid was subject to the 4th Defendant's acceptance, he was only allowed to pay 25% of the price of the property upon the acceptance of the 4th Defendant. That later he paid the balance and assumed vacant possession thereof. That he was a bona fide purchaser and upon the property being transferred to him, he transferred the same to a third party.

9. The application was canvassed by way of written submissions. The Applicant filed his submissions on 18th October 2021 while the 4th, 5th and 6th Respondents filed their submissions on 14th October 2021.

THE APPLICANT'S SUBMISSIONS

10. The Applicant submitted that he had demonstrated a prima facie case with a probability of success by showing that he was the owner of the suit property which was fraudulently and irregularly sold to the 6th Defendant. The Applicant/Plaintiff relied on the case of ***Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** on what constitutes a prima facie case. He argued that where there is fraud, misrepresentation or other dishonest conduct on the part of the chargee, the purchaser cannot be protected under Section 99(3) of the Land Act. Further counsel for the Applicant relied on the case of ***Mwathi vs. Kenya Commercial Finance Co. [1987]*** for the proposition that deposit must be paid at the fall of the hammer and not later.

11. Counsel argued that the Applicant stands to suffer irreparable injury if the injunction is not granted. Reliance was placed on the cases of ***Paul Gitonga Wanjau vs. Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No. 28 of 2015*** and ***Samuel Nganga Kiambuthi vs. Eric Munene Gitonga & 4 Others [2020] eKLR***, for the proposition that property rights cannot be adequately compensated by an award of damages. Counsel argued that if the property is sold by the 6th Defendant to a 3rd party without notice of the fraud, it will be impossible for the Plaintiff to recover the suit property. Counsel referred the court to the case of ***Lawrence P. Mukiti vs. Attorney General & Others [2013] eKLR***, which the court has considered.

12. Counsel contended that if the injunction is denied, the Plaintiff will suffer more injury than the injury that may be suffered by the Defendants if the injunction is granted. Counsel relied on the case of ***Pius Kipchirchir Kogo vs. Franck Kimeli Tenai [2018] eKLR*** on his argument in regard to the balance of convenience, and argued that the balance of convenience tilts in favour of the Plaintiff/Applicant.

THE 4TH, 5TH AND 6TH DEFENDANTS' JOINT SUBMISSIONS

13. Counsel for the 4th, 5th and 6th Defendants submitted that the statutory notice and notifications were served on the Plaintiff through registered post as provided in Rule 15 of the Auctioneers Rules 1997. Counsel stated that such service was acceptable and referred to the case of ***Enoka Watako Makokha vs. Cooperative Bank of Kenya Limited Civil Appeal No. 76 of 2012***. Counsel argued that the Plaintiff does not deny receipt of both the Redemption Notice and the Notification of sale. Counsel contended that the Plaintiff was aware of the suit before the commercial court but chose not to seek to be joined to the suit. That in any event, his issues were raised by the Plaintiffs in that suit. Counsel observed that the mediation was ordered by court and since the 4th Defendant did not initiate the suit, they were not obligated to involve the

Plaintiff.

14. It was further contended on behalf of the 4th, 5th and 6th Defendants that a valuation report had been done dated 25th June 2020 and that the 4th Defendant had discharged the duty of care under Section 97(2) of the Land Act. Counsel argued that the Plaintiff having admitted defaulting in loan repayment, he cannot maintain an action without repaying the loan amount. Reliance was placed on the case of *Maithya vs. Housing Finance Company of Kenya & Another [2003] 1 EA* as cited with approval in the case of *Simon Njoroge Mburu vs. Consolidated Bank of Kenya Ltd [2014] eKLR* where the court held as follows;

“Those who come to equity must do equity. Failure to service the loan or to pay the lender or to pay in to court what had been admitted took the applicant outside the realm of exercise of the court’s discretion.”

15. Counsel therefore contended that the Plaintiff had failed to establish a prima facie case. Relying on the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others Civil Appeal No. 77 of 2012*, counsel argued that as the Plaintiff had failed to establish a prima facie case, then there was no need for the court to establish whether he would suffer irreparable injury and the balance of convenience. Counsel also placed reliance on the case of *Nahashon K. Mbatia vs. Finance Company Limited [2006] eKLR* to argue that where the Plaintiff, charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained and its loss can always be made good by monetary compensation. Counsel emphasized that the 4th Defendant is a stable and financially sound lending institution with business presence all over Kenya and would not have challenges compensating the Plaintiff if the Plaintiff is ultimately successful.

16. It was argued for the 4th, 5th and 6th Defendants that payment of the 25% deposit was in accordance with the conditions of sale, which was that deposit could only be done upon acceptance of the bid by the chargee. Counsel argued that acceptance of the bid by the 4th Defendant was on 26th October 2020 and payment of 25% deposit was on 27th October 2020. Counsel further argued that as the ownership of the property had already passed to a third party, the balance of convenience tilted in favour of denying the injunction. Counsel concluded that granting the injunction would be absurd as the 6th Respondent had already parted with ownership and placed reliance on the cases of *Giella vs. Cassman Brown Company Ltd [1973] EA 358* and *East Africa Development Bank vs. Hyundai Motor Kenya Limited [2006] eKLR*.

ANALYSIS AND DETERMINATION

17. I have considered the application, the replying affidavits and the submissions as well as cited authorities. The issue for determination is whether the applicant is entitled to the orders sought. I have considered the parties pleadings and I note that it is not in contention that;

- a. The 1st Defendant obtained credit facilities in the sum of Kshs. 62,000,000/- from the 4th Defendant.
- b. The Plaintiff was one of the guarantors of the said facility whereof he offered the suit property as security.
- c. The 1st Defendant defaulted in the payment of the loan.
- d. The 4th Defendant set in, motion the process of realization of the securities which led to the sale of the suit property to the 6th Defendant by public auction.

18. What is in contention is whether the process of realizing the security was in compliance with the relevant legal provisions.

19. Principles for grant of temporary injunctions are well settled. In the case of *Giella vs. Cassman Brown Company Ltd [1973] EA 358*, the court stated as follows;

“The conditions for granting a temporary injunction in East Africa are well known. First the Applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others Civil Appeal No. 39 of 2002*, the court described a prima facie case as follows;

“in a civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exist a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

20. Clearly for a court to grant orders of temporary injunction, the Applicant must demonstrate having a prima facie case with a likelihood of success, that there is a threat of irreparable injury incapable of being compensated in costs and in the event the court is doubtful of the nature of the injury then it ought to decide based on the balance of convenience.

21. The Plaintiff having admitted that he offered the suit property as security in respect of the credit facility to the 1st Defendant and that there was default in the loan repayment, in my view he admits that the 4th Defendant has a right in law, to seek to realize the securities in respect of the said credit facility. Therefore the Plaintiff cannot legitimately evade the consequences of the charge registered against the suit property unless he redeems the same. In addition the Plaintiff does not dispute being served with the redemption notices and notices of sale.

His major complaint is that the sale was due to a fraudulent mediation agreement filed in Milimani Commercial Suit No. E418 of 2019. He has however not demonstrated that he sought to be joined in that suit and challenged the mediation agreement. In my considered view therefore, I find and hold that the Plaintiff has not demonstrated a prima facie case with a probability of success.

22. On the question of whether the Plaintiff shall suffer irreparable injury that cannot be compensated in damages, the Plaintiff has argued that if the suit property is sold by the 6th Defendant to third parties, it may be impossible for him to recover it. The 4th Defendant on the other hand has argued that the suit property has an ascertained value and therefore should the Plaintiff eventually succeed in this matter the 4th Defendant who is a stable lending institution will accordingly compensate him. On that issue I associate myself with the reasoning in the case of *Nahashon K. Mbatia vs. Finance Company Limited [2006] eKLR* where the court held as follows;

“Having charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the defendant will not be in a position to meet such award.”

I therefore find that the charge placed the suit property in the hands of the chargee and unless and until redemption was done, the property remained the chargee’s property, in which case the Plaintiff could not plead irreparable injury in respect of a property he had not redeemed.

23. On the issue of the balance of convenience, the Plaintiff has argued that the same tilts in his favour as he stands to suffer greater injury if the injunction is not granted as compared to the injury likely to be suffered by the Defendants in the event the injunction is granted. The 6th Defendant has stated that he has already transferred the suit property to a third party. In view of the fact that the Plaintiff has not redeemed his property or made any proposal for such redemption it will be against the principles of equity for him to have an injunction on property he willingly offered as security, but which he has no intention of redeeming. Therefore the balance of convenience tilts in favour of denying the prayer for temporary injunction.

24. In the premises, the Plaintiff’s Notice of Motion application dated 3rd February 2021 lacks merit and the same is hereby dismissed with costs.

25. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Kofuna for the 4th, 5th and 6th Respondents

No appearance for the Applicant

No appearance for the 1st, 2nd and 3rd Respondents

Ms Josephine Misigo – Court Assistant