



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 390 OF 2017

(formerly MACHAKOS ELC NO. 170 OF 2014)

JOSEPH KAHURO KIGIO.....PLAINTIFF

VERSUS

JOSEPH KAHURO KIGIO.....1st DEFENDANT

MOLYN CREDIT LIMITED.....2nd DEFENDANT

SAMUEL W. MUGO T/A SANNEK AUCTIONEERS 3rd DEFENDANT

RULING

The application before court is a Notice of Motion dated 14th November, 2014 filed by the Plaintiff brought pursuant to Article 40, 50 and 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1 and 4 of the Civil Procedure Rules and all the other enabling provisions of the Law. The application is based on the grounds that the plaintiff is the bona fide owner of land parcel number NGONG/NGONG/ 36238 hereinafter referred to as the suit land, having bought it from the previous owner for valuable consideration. The 1st Defendant fraudulently and through misrepresentation illegally/unprocedurally obtained title to the suit land and Charged it to the 2nd Defendant. In reliance on the Charge, the 3rd Defendant pursuant to instructions from the 2nd Defendant has served the Plaintiff with a notice of sale of suit land. The 1st Defendant has no legal interest in the suit land as he never purchased it for valuable consideration and hence did not have the legal capacity to Charge it. Unless restrained by the court, the Defendants shall sell the suit land which is the Plaintiff's matrimonial home and also the only property he owns thereby leaving him destitute causing untold suffering to him and his family which cannot be compensated by way of damages.

The application is supported by the affidavit of JOSEPH KAHURO KIGIO ID NO. 6*****9 who is the Plaintiff herein where he deposes that they share the same name with the 1st Defendant save for the identity card numbers. Further that the 1st Defendant being his nephew was very close to him and since his mother was not married, he raised him. He avers that in 2005, he bought a portion of the suit land from JOSEPH SOLEI NTORE at a price of Kshs. 110,000 and in 2007 he bought the remaining portion of the suit land for Kshs. 100,000. He claims upon completion of paying the purchase price, he requested the 1st Defendant to assist him process the transfer of the suit land to his name since he could not read and write. He states that the 1st Defendant agreed to assist him and brought him some documents which he informed the Plaintiff were transfer forms and further asked him for a copy of the Identity Card and three coloured passport size photos which he availed. He contends that he gave the 1st Defendant Kshs. 10,000 to process the title and on 4th October, 2014 he was served with notification of sale for the suit land to allegedly recover Kshs. 2,321,528 owed to the 2nd Defendant. Further that he was shocked and protested to the 3rd Defendant that the 1st Defendant does not own the suit land but he was informed that the ID Number on the title to the suit land is 2*****4 and not his, and that is the reason 1st Defendant obtained credit facilities from the 2nd Defendant and charged the suit land. He further claims that he made a report to the CID office Ngong accompanied by his witnesses JOSEPH SOLEI NTORE(vendore), PAUL NJUGUNA RUKUNGU and GIDEON SANE who had witnessed him purchase the suit land. He insists the 1st Defendant never bought the suit land for valuable consideration and cannot have a legal interest over it and title to the suit land bearing the 1st Defendant's ID number was issued illegally/unprocedurally through fraud and misrepresentation by the 1st Defendant. He denies procuring credit facilities nor Charging suit land to the 2nd Defendant. He further denies guaranteeing anybody to obtain credit from the 2nd Defendant and insists the 2nd Defendant's Charge over the suit land is a nullity ab initio having been created by a person who obtained the title illegally and fraudulently.

The 2nd Defendant opposed the application and filed a replying affidavit sworn by MOSES ANYANGU who is its Finance Director where he deposes that the 1st Defendant obtained credit facility of Kshs. 756,000 from the 2nd Defendant at an interest rate of 5% to be repaid in 48 monthly instalments of Kshs41,821 beginning 31st March, 2013 and in default of any instalment, the 1st Defendant was to pay a penalty of the higher of Kshs. 2000 or 5% of the outstanding loan balance for every month defaulted. He avers that the 1st Defendant charged the suit land to the 2nd Defendant as a security of the loan and the 2nd Defendant conducted a search which confirmed the 1st Defendant as the legal owner of the suit land. He contends that the 1st Defendant has failed to repay the loan together with interest despite notices and the balance as at 12th May, 2014 was Kshs. 2,321,528. He states that the 2nd Defendant is a stranger to the Plaintiff's allegations of fraud and insists the Plaintiff should have known the 1st Defendant is the legal and registered owner of suit land. He insists the Plaintiff's claim cannot supersede

or extinguish the 2nd Defendant's Chargee's rights of statutory power of sale with respect to the suit land. He reiterates that all the 2nd Defendant demands is payment of the loan plus interest and penalties which continue to accrue until payment in full or in default the realization of the security which is the suit land. He affirms that the Plaintiff does not stand to suffer any damage since he is not the registered owner of the suit land; does not have a good case with a probability of success and has not advanced any cogent reasons to warrant the grant of an injunction.

The 1st and 3rd Defendants never entered appearance nor file any response to the application.

Both the Plaintiff and the 2nd Defendant filed written submissions which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated 14th November, 2014 including the supporting and replying affidavits and written submissions, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive orders sought pending the outcome of the suit.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an 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 would 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."

Bearing this principle in mind, it is upon this honourable court to interrogate whether the plaintiff/applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the plaintiff/applicant has demonstrated a prima facie case with probability of success, it is the Plaintiff's contention that he is the proprietor of the suit land but the 1st Defendant who is his nephew and share the same name and only different Identity Card Numbers, registered himself fraudulently and unprocedurally on it. I note the Sale Agreement marked as annexure 'B' in the supporting affidavit indicates the agreement of sale of suit land was between JOSEPH SOLEI NTORE (vendor) and JOSEPH KAHURO KIGIO ID. NO. 6*****9 (purchaser), and this is the Plaintiff's ID Number. However the title deed to the suit land bears the name of JOSEPH KAHURO KIGIO with the ID No. 2*****4 which belongs to the 1st Defendant. I note in the Charge document it bears the name of JOSEPH KAHURO KIGIO with a different ID No. 2*****4 belonging to the 1st defendant. I note that the Plaintiff stated in paragraph 19 of his supporting affidavit that he reported the matter to the CID. The Plaintiff has further included the names of the witnesses who were present when he purchased the suit land. These issues have not been controverted by all the 1st Defendants especially the 1st defendant who failed to enter an appearance nor file a replying affidavit. I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22 '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 I find that it would be pertinent if the Plaintiff is granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land. With the facts above, I find that the Plaintiff has established a prima facie case with a probability of success .

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. The Plaintiff contends that the suit land is his matrimonial home and the only property he owns. This averments are not rebutted by the Defendants. Since this is his matrimonial home, I find that the Plaintiff will indeed suffer irreparable loss which cannot be compensated by damages if the suit parcel is sold through auction.

On the question of balance of convenience, from the evidence presented, I find that the balance of convenience tilts in favour of the Plaintiff and I am not in doubt that if the title to the property is not preserved, it may be wasted away.

The upshot of the matter is that I find the Plaintiff's Notice of Motion dated 14th November, 2014 is merited and allow it. Costs will be in the cause.

Parties are urged to comply with Order 11 and fix the matter for hearing and final determination.

Dated signed and delivered in open court at Kajiado this 1st day of November, 2017.

CHRISTINE OCHIENG

JUDGE