



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NUMBER 189 OF 2019

JANE WANJIRU RIRIANI.....PLAINTIFF

VERSUS

ABDINUR HASSAN ADAN.....1ST DEFENDANT

DIAMOND TRUST BANK KENYA LIMITED.....2ND DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 6th June 2019. The application is brought by the Plaintiff/Applicant who seeks an injunction restraining the Defendants/Respondents from in anyway interfering with LR NO. 209/8294/119 (suit property). The Applicant had entered into a sale agreement with the 1st Respondent in which the 1st Respondent sold the suit property to the Applicant on 22nd February 2016 at a consideration of Kshs.12,500,000/=.
2. The suit property had been charged to Co-operative Bank of Kenya Limited. The purchase price was to go towards offsetting the loan which was owed to Co-operative Bank of Kenya Limited. The Applicant was granted possession upon payment of the entire purchase price. The Applicant incurred Kshs.5,000,000/= to re-do the roof of the suit property and construct an additional one room to the property. The Applicant then put in a tenant who was paying a monthly rent of Kshs.60,000/= .
3. The Applicant who owned a property adjacent to the suit property then started the process of change of user from a single dwelling to a multistorey building. This was started in anticipation of the 1st Respondent transferring the suit property to her name.
4. Unknown to the Applicant, the 1st Respondent had approached the 2nd Respondent who took over the loan which the 1st Respondent owed Co-operative Bank of Kenya Limited. The suit property was discharged by Co-operative Bank of Kenya Limited and the same was charged to the 2nd Respondent.
5. The 1st Respondent defaulted in payment of the loan. The 2nd Respondent then went ahead to advertise the suit property for sale. This is when the Applicant moved to court and obtained an injunction stopping the sale. The Applicant contends that the 1st Respondent having sold the suit property to her and granted her possession, the charge to the 2nd Respondent was fraudulent because the 1st Respondent had nothing to charge the property having been purchased by the Applicant.
6. The Applicant blames the 2nd Respondent for failure to carry out proper due diligence because the charge in its favour was registered over seven months after she had purchased the suit property and possession granted to her. It is on this basis that the Applicant is seeking the prayers in the Notice of Motion of 6th June 2019.
7. The 1st Respondent who was served through substituted service neither filed any grounds of opposition nor replying affidavit to the Applicant's Notice of Motion.
8. The 2nd Respondent opposed the Applicant's application based on a replying affidavit sworn by Amaan Kassam on 11th June 2019. The 2nd Respondent contends that the 1st Respondent approached its officials and asked them to take over a loan which he had at Co-operative Bank of Kenya Limited which as at May 2016 stood at 12,416,817.52. The 1st Respondent was taking a loan facility in favour of a company called Wild Rose Construction Company Limited.
9. As the suit property was registered in the 1st Respondent's name, the 2nd Respondent took over the loan which was at Co-operative Bank of Kenya Limited and a charge was created in its favour. The 1st Respondent failed to repay the facility. All the requisite notices were served

upon the 1st Respondent who still did not make good the demand. The suit property was finally advertised for sale but the sale did not take place as the court had granted an injunction stopping the sale.

10. The 2nd Respondent contends that failure to register the sale agreement by the Applicant against the title rendered the sale incomplete and that the Applicant has no basis for stopping its exercise of statutory power of sale and that the suit property can be valued and the Applicant compensated. As such, the Applicant has not met the threshold in the **Giella Vs Cassman Brown and Co.Ltd** case as relates to grant of injunctions.

11. I have carefully considered the Applicant's application as well as the opposition to the same by the 2nd Respondent. I have also considered the submissions by the Applicant and the 2nd Respondent. The issues which emerge for determination are firstly whether the Applicant has met the threshold for grant of an injunction and whether this court should order investigative agencies to investigate the fraudulent activities of the 1st Respondent and file a report in court within 30 days for further action.

12. On the first issue, there is no contention that the 1st Respondent sold the suit property to the Applicant on 22nd February 2016. By 9th March 2016, the Applicant had completed paying the purchase price. Possession was granted on completion of the purchase price. The Applicant actually even over paid by Kshs.623,000/= which the 1st Respondent promised to refund. Aware that he had sold the suit property and granted possession, the 1st Respondent signed a charge on 17th June 2016 with the 2nd Respondent. This was barely four months after he had granted possession to the Applicant. The charge to the 2nd Respondent was registered on 19th September 2016.

13. The fact that the suit property had been sold and possession granted to the Applicant and that the 1st Respondent being aware of this but going ahead to charge what he had already sold shows that the Applicant has demonstrated that she has a prima facie case with probability of success which calls for grant of an injunction to preserve the suit property.

14. The Applicant was keen on purchasing the suit property as it was next to her property. She had intention of amalgamating the two properties into one title upon getting a transfer registered in her favour in respect of the suit property. This is confirmed by her application through her husband who applied to the Nairobi City County to start the process of amalgamation and change of user in order to construct apartments to boost her income. To lose such an opportunity to have two adjacent properties amounts to loss which is irreparable in that it will not be easy to get such parcels which are adjacent to one another in a prime area.

15. There is need to preserve the suit property as the weighty issues raised by the Applicant are investigated in a full hearing. The Court of Appeal in the case of **Co-operative Bank of Kenya Limited Vs Catherine Kanini Kioko & 2 Others (2018) eKLR** upheld the decision of Lady Justice Omollo who had granted an injunction to preserve a property which faced imminent auction under similar circumstances as in this case.

16. On the second issue, I did not think it is the business of this court to direct investigative agencies to investigate the conduct of the 1st Respondent and make a report to this court. If the Applicant wants to pursue the criminal aspect of the conduct of the 1st Respondent, she is at liberty to make a complaint to the relevant investigative agencies who would then do their part and I do not think a report arising from such investigations will be of help to the court given the circumstances of this case. I therefore decline to direct any investigative agencies to undertake investigations and file a report in court as urged.

17. I therefore find merit in the Applicant's Notice of Motion dated 6th June 2019 which is allowed in terms of prayers (2) and (5). The Applicant shall file a bank guarantee of Kshs.1,000,000/= or in the alternative deposit a sum of Kshs.1,000,000/= in an interest earning account in the joint names of counsel for the Applicant and 2nd Respondent within 60 days from the date of this ruling failing which the injunction shall automatically lapse.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** on this **6th** day of **May 2021**.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Opolu for Applicant

Mr Kistingner for 2nd Respondent

Court Assistant: John

E. O.OBAGA

JUDGE