



Son Hardware Limited v Ariumba Limited & another (Commercial Case E004 of 2022) [2024] KEHC 462 (KLR) (10 January 2024) (Ruling)

Neutral citation: [2024] KEHC 462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
COMMERCIAL CASE E004 OF 2022
SN MUTUKU, J
JANUARY 10, 2024**

BETWEEN

SON HARDWARE LIMITED PLAINTIFF

AND

ARIUMBA LIMITED 1ST DEFENDANT

DEVELOPMENT BANK OF KENYA LTD 2ND DEFENDANT

RULING

The Application

1. The Plaintiff (Applicant) has brought this application through Notice of Motion dated 11th April, 2022 under Order 40 Rule 1 & 2 of the Civil Procedure Rules and Rule 3(2) of the Judicature Act seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this application, an order do issue restraining the 1st Respondent whether by itself, its agents, servants, nominees or in any way whatsoever from taking over the management of Great Grace Hostels located on LR No. Ngong/Ngong/33632 or in any way interfering with the said hostels and or aforesaid property.
 - d. That pending the hearing and final determination of the suit, an order do issue restraining the 1st Respondent whether by itself, its agents, servants, nominees or in any way whatsoever from taking over the management of Great Grace Hostels located on LR No. Ngong/Ngong/33632 or in any way interfering with the said hostels and or aforesaid property.
 - e. That costs of this Application be provided for.



2. The grounds in support of the application are found on the face of it and in the supporting affidavit sworn by Peter Muinami Juma, Director of the Plaintiff, on 11th April 2022.
3. The case for the Applicant, as can be discerned from the grounds in support, is that on 6th July, 2021 the 2nd Defendant sold the Applicant's property known as Ngong/Ngong/33632 (suit property) by public auction to the 1st Defendant. That on the same day the 2nd Defendant advertised to sell the Applicant's other property known as Ngong/Ngong/24258 by different auctioneers known as Taifa Auctioneers. That these properties had been charged to the 2nd Defendant to secure a financial facility and are also subject of litigation in 2 cases being ELC No. 10 of 2021 and HCC No 44 of 2018. That the Applicant filed the former case when the 2nd Defendant sold the suit property, seeking orders to set aside the sale and also filed an application dated 16th July, 2021 to stop the completion of the sale.
4. The Applicant has explained the process that had taken place between the two parties, which this court has read and understood. The Applicant asserts that a day after the directions were given the 1st Defendant proceeded to the Lands Office Ngong and caused a transfer to itself in blatant contempt of court. That it was in bad faith that the parties continued appearing in court but the 2nd Defendant did not inform the Applicant or the court that the subject matter of the litigation had changed ownership. That the Defendants sneaked into the suit property and took over the management of the same. That the 1st Defendant was a 2 months' old company formed by the 2nd Defendant for the sole purpose of the auction and that the Defendants have conspired to clearly defeat the cause of justice.

1st Defendant's Response

5. The Application is opposed by the 1st Defendant through a Replying Affidavit dated 5th May, 2022 in which it is averred that the 1st Defendant is the owner of the suit property after purchasing it in a public auction and therefore the Plaintiff has no claim over the property nor can it manage it. The 1st Defendant has stated that it has never been a party to any suit challenging ownership or the process of ownership of the suit property and therefore could not have been aware of any contentious issues over the property.
6. The 1st Defendant stated further that the 2nd Defendant transferred the suit property to it. That it has been collecting rent from tenants and managing the property.
7. It is the case for the 1st Defendant that this court has no jurisdiction to deal with the issue of ownership of land and the transfer of land; that the Plaintiff has not demonstrated how it would suffer irreparable injury and therefore the interim orders issued should not be extended; that the Plaintiff has not given evidence to show that it is the bona fide proprietors of the suit property; that the Plaintiff has not demonstrated a prima facie case to warrant grant of the orders sought; that the balance of convenience tilts in its favour as it has been in occupation of the property and that the orders sought are a final determination of the main suit and that this amounts to abuse of court process.
8. The Plaintiff filed a further affidavit dated 28th July, 2022 in which it is deposed that the allegations that the matter herein is the similar to what was filed in Kajiado HCC No 44 of 2018 and Civil appeal No. 3 of 2019 are false; that what is for determination in this matter is to nullify an illegal sale and an order of injunction restraining the 1st Defendant from interfering with management of Plaintiff's Hostels known as Grace Hostels and that what is at the core of all the suits filed by the plaintiffs is the issue of whether the statutory power of sale had arisen.
9. It is the case for the Plaintiff that it had never been served with proper statutory notices before the sale; that the Defendants annexed letters which served as notices dated 26th July, 2017 and 17th November,



2017; that the same cannot act as notices as they were on “without prejudice” basis; that the letters were served in 2017 while the sale took place in 2021; that they also negotiated for a loan restructuring and the same was accepted by the 2nd Defendant and they repaid an amount of 800,000/; that as a result, the statutory notices stood cancelled.

10. It is the Plaintiff’s case that the validity of the notices is what is pending determination in Civil Appeal No. 129 of 2019; that the 2nd Defendant’s act of selling the securities while the matter was still pending in the Court of Appeal is against the doctrine of *lis pendens*; that their right of redemption was not extinguished at the fall of the hammer; that the sale was void and a nullity as the same was done in total disregard of the court order barring them from the sale; that fraud vitiates any sale irrespective of whether the sale was by public auction or by private treaty; that the 2nd Respondent has not rendered any accounts to the Plaintiff which is necessary before issuing a statutory demand; that it has raised a *prima facie* case and is entitled to the orders sought and that the Plaintiff is in physical possession and occupation of the suit property.

Plaintiff’s Submissions

11. This matter was canvassed through written submissions as directed by the court. The Plaintiff filed its submissions dated 15th August, 2022. It submitted that the conditions for grant of injunction are set out in *Giella -vs- Cassman Brown* (1973)EA 360; that it has established a *prima facie* case as defined in *Mrao -vs- First American Bank of Kenya Limited & 2 others* (2003). It is submitted that the Plaintiff has demonstrated a *prima facie* case by showing that the sale and transfer of the property was done in disregard of the court orders issued by the ELC (Justice Gicheru) on 12th October, 2021; that the transfer took place on 21st December, 2021 when the said orders were in place and had been extended by the parties by consent.
12. It was submitted that the auctioneer who assisted in the completion of the sale by registration was a party to the suit and hence aware of the said orders; that the 1st Defendant did not acquire any title from the sale or transfer as it was done contrary to the court order and therefore cannot benefit from an illegality.
13. It was submitted that the 2nd Defendant conducted an auction without first serving the statutory notices as per Section 90 and 96(2) of the *Land Act*; that the sale is therefore invalid and ought to be set aside *ex-debito justitiae*; that the 1st Defendant could not acquire any rights of ownership from an invalid sale. The Plaintiff relied on *David Gitome Kubiguka -vs- Equity Bank Ltd* (2013) eKLR where it was held thus:

“Where a charge failed to issue a notice that strictly complied with the provisions of section 90(2)(b) of the *Land Act*, then such a notice should not be deemed to be valid.”

14. On whether damages can be an adequate remedy, it was submitted that a violation of property rights cannot be adequately remedied by damages; that a party who wilfully disregards court’s orders should not be allowed to benefit from his contempt; that from what has been demonstrated the scale should tilt in the Plaintiff’s favour of granting an injunction to preserve the subject matter so as the rights of the parties may be determined at trial.
15. It was submitted that the equity of redemption had not been extinguished at the fall of the hammer due to the fact that the statutory power of sale had not arisen; that the Defendants could not hide behind Section 99 of the *Land Act* as the Bank (the 2nd Defendant) had colluded with the 1st Defendant to buy the suit property by auction; that the 1st Defendant was formed for the sole purpose of purchasing the suit property and therefore the 2nd Defendant committed fraud.



16. The 1st Defendant did not wish to file submissions but instead relied on its Replying Affidavit. The 2nd Defendant has not filed submissions. On 14th November 2023 when this matter came for mention to confirm filing of submissions, Ms Bosibori for the 2nd Defendant informed the court that the 2nd Defendant had not filed submissions but would ensure that they are placed in the court file. As at the time of writing this Ruling, the submissions by the 2nd Defendant had not been placed in the court file.

Analysis and Determination

17. I have taken time to read and understand the application, the grounds in support, the Replying Affidavit by the 1st Defendant and the submissions. To my mind, the issues that seem to come up in this matter are the issue of jurisdiction of this court to handle this matter and secondly, whether the Plaintiff has met the threshold for grant of an injunction.
18. It is clear to me from the pleadings and submissions of the parties that the issue touching on the suit property is being litigated in both the High Court and the ELC. The Plaintiff has stated so and therefore this is not disputed. This brings into the fore, the issue of jurisdiction of this court to determine this matter. The 1st Defendant has stated that this court has no jurisdiction to deal with the issue of ownership of land and the transfer of land.
19. It is clear from the arguments of the parties that the issue central to the matter being argued before this court is whether the sale of the suit property by the 2nd Defendant to the 1st Defendant through public auction is valid. Indeed, ELC Case No. 10 of 2021 filed at Nairobi sought orders to set aside the sale of the suit property by public auction, nullify the same and to stop the Defendants from transferring the suit property.
20. The Supreme Court of Kenya in its advisory opinion reported as *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR at paragraph 30, stated that:

“The *Lillian ‘S’ case* [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

21. The application before this court seeks orders of injunction against the 1st Defendant or anyone claiming under the 1st Defendant from taking over the management of the hostels located on the suit property herein or in any other way interfering with the said hostels and the suit property.
22. I have noted that the pleadings in respect of the suit property emanate from a contractual engagement where one Irene Atieno Ajwang applied for a financial facility from the 2nd Defendant herein with the repayment of the said loan being guaranteed by the Plaintiff. A legal charge was created over the Plaintiff's land (the suit property herein). It seems that things did not work out and the Plaintiff's property fell victim of a public auction leading to filing of suit in both the High Court and the ELC as can be discerned from this application.
23. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* Civil Appeal No. 83 of 2016 [2017] eKLR stated as follows:

To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights



and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court..."

24. Understood in the context of the the above authority, it would seem that this Court is clothed with the jurisdiction to deal with the matter herein. It is however, not lost to this court that the matter has been litigated before both court (High Court and ELC) who have equal status save for exercise of distinct jurisdictions as spelt out in *the constitution* and the laws under it. Both the High Court and the ELC have issued orders in regard to this matter, which orders are still on record and have not been overturned. Neither of the two courts can overturn an order issued by the other and parties have to find recourse elsewhere or in a different way.
25. On the second issue, the principles for granting injunctions are well settled. In keeping with the principles in *Giella vs Cassman Brown & Co Ltd* [1973] E.A 358, all that this court is required to do, is to satisfy itself if (i) either party had shown a prama facie case with a probability of success; and (ii) whether, if the temporary injunction was refused, the party seeking it stands to suffer irreparable harm for which damages would not be an adequate remedy; and (iii) if in doubt, this court has to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lies with the applicant or with the respondents.
26. Injunctions are equitable remedies that are granted by the court using its discretionary powers. The Court of Appeal in *Charter House Investments Ltd vs. Simon K. Sang and others*, Civil Appeal No. 315 of 2004 had this to say on injunctions:

"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the *Giella* case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."

27. The issue of what amounts to a prima facie case was discussed in *Mrao Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 in the following terms:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing



itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

28. The Plaintiff has stated that it has demonstrated a prima facie case in that the sale and transfer of the property was done in disregard of the Court orders of Justice Gicheru issued on 12th October, 2021 and that the orders were existent during the transfer. Further that no statutory notices were issued before the sale by public auction as per sections 90 and 96(2) of the Land Act.

29. I have noted that the Plaintiff had brought an application for injunction in HCC No 44 of 2018. This matter was dealt with, and a ruling delivered by this court (Justice Nyakundi) on 18th day of December, 2018. In that ruling, the issue of statutory notices was dealt with when the Court noted as follows:

“.....the statutory notice dated 26th July, 2017 does comply with the requirements of Section 90(1) of the Land Act 2012. The particulars required by these provisions of law to be contained in a statutory notice have been captured therein. The clear language of the letters of offer as to the nature and structure of the facilities granted and secured by the various charges, guarantees, deed of assignment and debentures as well as the provisions of each charge as what constitutes the secured obligations in the contract render it difficult for this court to follow the plaintiffs allegations on the claim.

In my opinion even where there is a procedural defect as to the service and validity of the statutory notice, without more, it does not render it unenforceable. Why do I say so, the court is clothed with discretion to the effect of not restraining the mortgagor from exercising its statutory power of sale but to direct that a compliant statutory notice be issued. This legal proposition found its way in the case of *National Bank of Kenya Ltd v Shiners Plaza Ltd* [2009] eKLR where the court held:

‘An injunction is an equitable remedy we venture to say that where the court is entitled to grant an interlocutory order restraining a mortgagee from exercising its statutory power on ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law”

With respect to the facts of this case if that were so the court would in effect issue appropriate orders varying the statutory notice or declare them void as a consequence of the contravention of the provisions of Section 90 (1) of the Land Act. As for this case I find no basis for challenging the statutory notice required to be issued by the mortgagor under Section 90 of the Land Act. On these grounds no serious question arises to warrant exercise of discretion for grant of interlocutory injunction sought by the plaintiff company...”

30. The Plaintiff’s herein appealed this ruling in Civil Appeal No. 3 of 2019 where the Court of Appeal held thus:

“Finally, we note that the applicant is impugning the decision by the learned judge in dismissing an application for injunction. The grant of an injunctive order is at the discretion of the court. In Francis Wambugu – v- Babu Owino, Supreme Court Petition No. 15 of 2018, it was held that an appeal based on exercise of discretion can only be faulted if the discretion was exercised on whim or that the court did not take into account prevailing



circumstances or did not consider what ought to have been considered. In the final analysis, we decline to grant stay of negative orders.”

31. From the foregoing it is clear that the Plaintiff’s herein are bringing forth some issues that have already been determined.
32. The Plaintiff further claims that the sale was an illegality as the 1st Defendant did not acquire title to the property as the same was in contravention of court orders. I do note also that a Ruling was delivered in the ELC Suit No 10 of 2021 where that court (Justice Gicheru) stated as follows:

“I have carefully considered the Notice of Motion dated 16th July, 2021 including the affidavits and the annexures. I find that it has no merit for two (2) reasons. Firstly, I find the application to be Res Judicata having been heard and dismissed by a Court of equal status on 18/12/2018. Secondly, I find that contrary to the deposition by the applicant that there was no statutory notice issued to it before sale, the Respondents have demonstrated that they issued the requisite notice. Finally, even after the applicant was given ample time to avail evidence of payment of the loan, no such evidence was forthcoming. For the above reasons, I find that the Applicant has not established a prima facie case with a probability of success. The balance of convenience does not favour the applicant either.”
33. The findings of a court of equal status as captured in the above excerpt from the ruling of that court is that the issues being raised here are res judicata; that the Plaintiff has not demonstrated that he has a prima facie case or that he will suffer irreparable damage and that the balance of convenience is not in his favour. The way the Plaintiff is acting displays characteristics of forum shopping.
34. It is my finding therefore, and I so hold, that the Plaintiff has failed to persuade this court to rule in its favour. He has failed to demonstrate that he deserves the orders he is seeking and besides, the issues he is raising have been determined by this court and the ELC as well as Court of Appeal in Civil Appeal No. 3 of 2019. Consequently, the Notice of Motion dated 11th April 2022 lacks merit and it must fail. It is hereby dismissed with the effect that any interim orders issued based on the Notice of Motion collapses.
35. Costs of this application are payable by the Plaintiff to the Defendants. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 10TH JANUARY 2024.

S. N. MUTUKU

JUDGE

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