



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 25 OF 2021

CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

VERSUS

PETER MAMBO KARINGA.....1ST RESPONDENT

EDWARD CHEGE KARINGA.....2ND RESPONDENT

ALBERT MBURU KARINGA.....3RD RESPONDENT

(Being an appeal against the Ruling and orders of Honourable Grace Omodho (SRM))

dated and delivered on 26th February 2021 in Kiambu CMCC 73 of 2009)

JUDGMENT

The Appellant **Cooperative Bank of Kenya Ltd** was an Interested Party , the 3rd Respondent **Albert Mburu Karinga** was the Defendant/ Applicant while the 1st & 2nd Respondents were the Plaintiffs in **Civil Suit No. 73 of 2009**. Vide an Application dated **5th August 2020**, the 3rd Respondent herein had sought for Interlocutory Injunction restraining the Plaintiffs(1st & 2nd Respondents) from selling by way of Public Auction **L.R No. Kiambaa/ Thimbigua / 5162**, pending the hearing and determination of the suit and Appeal.

The Application was premised on the grounds that the suit property forms part of an Estate which had been subdivided but whose subdivision was successfully challenged at the ELC Court in **ELC 27 of 2014**, and the matter referred back to the **lower Court** for fresh hearing. Further that the suit property had been sold to a third party who had used it as a security which the Interested Party were in the course of realizing .

The 1st & 2nd Plaintiffs(Respondents) opposed the Application and averred that they had successfully done succession with the Defendant's (3rd Respondent's) participation, who later refused to sign the transmission documents. That they moved to Court to get the orders and the same was subdivided and the 2nd Plaintiff (2nd Respondent) disposed off his portion to a third party without any encumbrance . That the Defendant (3rd Respondent) like all other beneficiaries also got their portions.

The Interested Party(Appellant) further opposed the Application and challenged the Defendant's(3rd Respondent's) locus standi over the suit property as he is not a registered owner of the suit property and further that it is merely a financier and a stranger to the averments being made .

The Application was canvassed by way of written submissions and on **26th February 2021**, the trial Court allowed the Application and ordered each party to pay its own costs of the Application. The Appellant was aggrieved by the said Appeal and filed a Memorandum of Appeal dated **16th March 2021** and sought for orders that ;

- a. The Appeal be allowed**
- b. The Ruling and orders issued on 26th February 2021 in favour of the 3rd Respondent be set aside**
- c. The Appellant be awarded the costs of this Appeal.**

The grounds upon which the Appeal is premised are;

1. **The Learned Magistrate misdirected herself and based her findings on a wrong consideration of the law regarding the nature of the Application filed by the 3rd Respondent**
2. **The Learned Magistrate erred in Law in failing to appreciate all the principles of granting an injunction being that ;**
 - a. **The 3rd Respondent did not make out a prima facie case with reasonable chances of success;**
 - b. **The 3rd Respondent did not prove that they will suffer irreparable injury which would not adequately be compensated by an award of damages; and**
 - c. **The Court did not weigh the matter on a balance of convenience noting that the Appellant was seeking to exercise its valid statutory power of sale under Section 90(3) (e) of the Land Act 2012.**
3. **The Learned Magistrate erred in Law and fact by failing to appreciate that the 3rd Respondent did not fall within the class of individuals listed under Section 103 of the Land Act 2012 to enable him file, seek and maintain the orders sought in his Application dated 5th August 2020.**
4. **The learned Magistrate erred in Law by failing to consider and appreciate that the 3rd Respondent had no locus standi to stop the Appellant's valid exercise of its statutory power of sale as donated under Section 90(3) (e) of the Land Act 2012.**
5. **The Learned Magistrate erred in law by failing to consider and appreciate that an order of temporary injunction cannot be granted in vacuo**
6. **The Learned Magistrate erred in Law and in fact by granting the 3rd Respondent a temporary injunction without the 3rd Respondent having a Defence on record seeking a permanent injunction against the Appellant from exercising its statutory power of sale under Section 90(3) (e) of the Land Act 2012.**
7. **The Learned Magistrate clearly misdirected herself in granting the injunctive orders /Application in the absence of a Defence noting that in her final order she ordered the 3rd Respondent to file and serve its Defence within 14 days of the ruling**
8. **The Learned Magistrate erred in failing to consider the legal implication of the orders granted in ELC appeal 27 of 2014 and proceeded on the wrong consideration leading to a conclusion that the 3rd Respondent obtained any proprietary and or beneficial right over L.R Number Kiambaa/ Thimbigua /5162 .**
9. **The Learned Magistrate erred in law and in fact by failing to consider the responses and submissions of the Appellant and therefore led to an erroneous finding noting that Nairobi ELC Appeal 27 of 2014 had not made any determination with regard to third parties who had acquired properties pursuant to the subdivision of L.R No. Kiambaa/ Thimbigua / 630 into five portions which included L.R 4885, from which L.R 5162 was subdivided from .**
10. **In view of the circumstances set out herein above, the Honourable Magistrate misdirected herself in delivering the Ruling in favour of the 3rd Respondents by failing to consider and appreciate the prevailing law on grant of injunctions.**

The Appeal is opposed and **Albert Mburu Karinga, the 3rd**

Respondent herein swore a Replying Affidavit on **9th April 2021** and averred that the prayer sought by the Appellant can be issued after hearing and determination of the suit as issuing the same will greatly prejudice any chance he has of redeeming the suit property . That the suit property was originally a subdivision of **L.R 630** which belonged to their father **Karinga Njihia**, who died on **7th December 1986** while domiciled in Gilgil. That the Deceased died intestate leaving behind 5 sons as his beneficiaries namely **Peter Mambo Karinga, John Gitonga Karinga, Albert Mburu Karinga Edward Chege Karinga and Njihia Karinga** . That when they applied to be executors of his Estate, the same was granted to **Peter Mambo Karinga, John Gitonga Karinga and Edward Chege Karinga** on **6th May 1988**, in **Succession Cause No. 140 of 1988**, and the Certificate of confirmation of grant was issued on **22nd December 1988**, where the Deceased Estate of **L.R Kiambaa/ Thimbigua /630 and Kiambaa /Karuri/ T.476** was shared equally between his 5 sons. That they then physically subdivided the land equally on the ground by planting boundary features based on where they had constructed their homes and his portion was on the main road where he had constructed his matrimonial home and the **1st Respondent's** portion was next to his.

That without his knowledge on **4th March 2008** , the **1st Respondent** obtained orders directing the Deputy Registrar of the High Court to sign necessary documents on his behalf in order to allow subdivision of **L.R 630 and L.R T.476** and around **May 2008**, a Land Surveyor subdivided the land on ground in to **4889**. That the **1st & 2nd Respondent's** caused his portion of land to be registered in the name of the **2nd Respondent** yet it was the portion next to the **1st Respondent**. Further that the **2nd Respondent** caused **L.R 4888**, which was meant to be registered in **John Karinga** name to be subdivided into **L.R 5162 and 5164**, and he registered it in the name of the **2nd Respondent** and one **Joseph Mwangi Njonge**, who is the Appellant's Bank Account holder . That the **1st & 2nd Respondents** registered

L.R 4887 in **Njihia Karinga**, name but since he had died before the issuance of the title deed they obtained the original title deed, from the lands office and have neglected to hand it over to his widow..

Further that the 1st & 2nd Respondents also subdivided **L.R T.476** into **L.R T.1013**, and registered them in the name of **John Karinga & Edward Karinga** and **T.1014** was registered in the name of **Peter Mambo Karinga**, and the 1st & 2nd Respondent's actions disinherited **Njihia Karinga**, as he did not receive any portion of the land. That the 2nd Respondent sold **L.R T.1013** to **Daniel Muriithi Ndungu** and the 1st & 2nd Respondents filed **Civil Suit 73 of 2009**, where they sought eviction orders against him from **L.R 4885 & L.R T.1014**. That the matter proceeded ex parte and the 1st & 2nd Respondents obtained orders against him without his knowledge and only learnt of the suit when he was served with eviction orders. That he then filed an Appeal in which the said orders were vacated and the matter was ordered to be set down for hearing. Further that on or about **2010**, he learnt that his property had been fraudulently registered in the 2nd Respondent's name and he reported the matter to the CID and upon investigations it was determined that they indeed fraudulently transferred the said property and they were prosecuted. That it further came to his knowledge that they had sold the land to one **Joseph Mwangi Njonge**, and when he realized the land had been sold to him fraudulently he took out a loan of **Kshs.2,500,000/=** and failed to service the loan which increased to **Kshs.5,700,000/=** that caused the Appellant to issue him with a **Statutory Notice of sale** and they advertised the land for Public Auction.

That he then filed an Application for injunction and a Ruling was delivered. That the 1st & 2nd Respondents did not have a good title to pass to **Joseph Mwangi Njonge**, due to the fraudulent and unlawful subdivision and the Appellant ought to have conducted due diligence. That the issue of the illegal subdivision of the suit properties and interests of those of the other beneficiaries of the Estate to have the property sold can only be dealt properly after evidence is adduced. That the 1st & 2nd Respondents are unable to compensate him due to their old age and the fact that they are unemployed. Further that the fact that **Joseph Mwangi Njonge** never serviced the loan meant that he knowingly defrauded the Appellant into giving him money knowing they would not be in a position to sell the land. That the matter has a hearing of **30th July 2021**, and the Appeal is only meant to delay the hearing

That the Appellant seeking to exercise the chargee's Statutory Power of sale is premature and unlawful and the Appellant would not suffer any prejudice, since the suit property is charged in its favour and it is still holding the title documents and realizing the security prematurely will cause irreparable loss and greatly prejudice his interest as it will be impossible to replace the same in case of a sale.

The Appeal was canvassed with by way of written submissions and the Appellant filed its written submissions through the **Law Firm of Mwenje & Karanja Advocates** dated **12th July 2021**, and relied on various decided cases and submitted that the Ruling of the Learned Magistrate was erroneous and ought to be set aside.

The 3rd Respondent filed his submissions through the **Law Firm of Maina Kingara & Company Advocates** dated **12th July 2021**, and sought for the Memorandum of Appeal be dismissed with cost as it is misplaced. Despite service the 1st & 2nd Respondents did not participate in the Appeal.

The Court has carefully read and considered the findings of the trial court, the rival written submissions by the Counsels, the Memorandum of Appeal, the Replying Affidavit and finds as follows:-

Being a first appeal, the Court has a duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

The Court too will take into account that it will only interfere with the discretion of the trial Court only where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Mbogo vs Shah (1968) EA at Page 93**, where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

The Court finds that the issues for determination are;

- 1. Whether the 3rd Respondent had the requisite locus standi**
- 2. Whether the Appeal is merited**

1. Whether the 3rd Respondent had the requisite locus standi

The Appellant has contended that the 3rd Respondent had no **locus standi** to challenge the exercise of its Statutory Power of Sale as he is neither a registered owner of the suit property nor is he a party to the charge nor a spouse to the chargor. That the 3rd Respondent is not amongst the persons contemplated under **Section 103 and 104 of the Land Act**.

Section 103 of the Land Act provides for reliefs by the chargor. It provides that ;

103. (1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 85 (3) (a) and (b) may be made by—

- (a) the chargor; (b) if two or more persons are joint chargors, by one or more of them on their own behalf;**
- (c) a spouse of the chargor;**
- (d) a lessee of the chargor; or**
- (e) the trustee in bankruptcy of the chargor.**

Is the 3rd Respondent therefore seeking remedies under **Section 85** of the **Land Act**? Certainly not. It is not in doubt that the 3rd Respondent contends that **L.R Kiambaa/ Thimbigua/ 5162**, is a subdivision of **L.R 630**, which belonged to his father's Estate, which he and others are beneficiaries and which he alleges that the 1st & 2nd Respondents fraudulently subdivided and sold **L.R 5162** which was sold to a Third Party. All these facts have not been rebutted and therefore being a beneficiary of **L.R 630**, which upon subdivision produced **L.R 5162**, there is no doubt that the 3rd Respondent has an interest and right over the same.

Locus standi connotes '*a right to bring an action*'.

In the case of **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR** while referring to the matter of **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010** the Court held that ;

“...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”

Further in the case of **Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR** the Court held that ;

“...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”

Does the 3rd Respondent therefore have an interest over **L.R 5162**?

It is not in doubt that the said **L.R 5162**, is a subdivision of **L.R 630**, which the 3rd Respondent has an interest over by virtue of being a beneficiary of his Father's estate which he alleges was fraudulently transferred to the 2nd Respondent and subsequently to the Third Party. Therefore, it follows that he has a right to protect and seek reliefs over the said property. The Court notes the Appellant's reliability on the case of **Mohamed Abdallah Swazuri ...Vs...Consolidated Bank of Kenya & Anor (Ltd) (2019)** and having gone through the same , the Court finds that the same is distinguishable as the Plaintiff in the said decided case was seeking to stop the exercise of the Statutory Power of Sale basing their **locus** on an agreement that was never produced in Court, claiming to have bought the suit property from the chargor.

This Court finds and holds that the 3rd Respondent has demonstrated that he has sufficient interest over the said property and therefore possess the requisite **locus standi** to seek for Interlocutory Injunction over the said property .

2. Whether the Appeal is merited

In order to determine whether or not the Appeal is merited, the Court should first determine whether the grant of the injunction orders was proper. The Application was brought under the provisions of **Order 40 Rule 1 and Section 1A, 2B 7 3A Of the Civil procedure Act**. It is evident that the Plaintiff/Applicant has brought this application under **Order 40 Rule 1** which provides that:-

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable**

probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

Further the application is anchored under *Section 3A* of the *Civil Procedure Act*, which grants the Court the power to issue any orders that are necessary for the end of justice to be met or to prevent abuse of the court process. Given that the Application was anchored under *Order 40* of the *Civil Procedure Rules*, then for the Court to issue the interlocutory orders, the Court need to be satisfied that the property is in danger of being *wasted, damaged* or *alienated*. See the case of *Noormohammed Jan Mohammed...Vs...Kassam Ali Virji (1953) 20 LRK 8*, where the Court held that:-

“To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition.”

Further an Applicant having sought for injunctive orders is only entitled to either grant or denial of the same at the Interlocutory stage. The Court is not supposed to deal with the merit of the case at the said interlocutory stage. See the case of *Airland Tours and Travel Ltd...Vs... National Industrial Credit Bank, Milimani HCCC No.1234 of 2003*, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

The principles that guide the Court in deciding whether or not to grant injunctive orders are enumerated in the case of *Giella...Vs... Cassman Brown Co. Ltd 1973 EA 358*. These are:-

- a) The Applicant must establish that he has a **prima facie** case with probability of success.
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.
- c) When the Court is in doubt, to decide the case on a balance of convenience.

A *prima-facie* case was described in the *Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, to mean:-

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

From the above, in making a determination on whether or not the 3rd Respondent had **locus standi**, the Court has already found that the 3rd Respondent who was the Applicant in the trial Court has demonstrated that he had sufficient interest over the suit property and thus has a right. It is not in doubt that the Appellant is seeking to exercise its Statutory Power of Sale and in essence seeking to alienate the said property. For a party to establish a *prima facie* case, the party need to prove that there exist a rights that has apparently been infringed.

The 3rd Respondent has laid claim to the suit property, and it is alleged that the said property had been sold to a third party and had been charged. The 3rd Party having rights to the said property, that have apparently been infringed by the alleged illegal sale, these issues cannot be determined at this stage. Therefor, the 3rd party has established a *prima facie* case with a probability of success at the trial.

The Applicant also needed to establish that he will suffer irreparable harm, which cannot be compensated by an award of damages. Land is a unique commodity and the instant property being ancestral land cannot be wished away. If the Appellant was to exercise its Statutory Power of Sale, it is not in doubt that the 3rd Respondent would suffer irreparable harm that cannot be compensated by way of damages. Further a party should not be subjected to damages while the Court can protect the property by issuing an injunction. Interlocutory injunctions are meant to preserve the substratum of the suit, pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case, the Appellant would be able to be compensated by way of damages if the court finds that the 3rd Respondent did not deserve the grant of the injunction, as the damages can be quantified bearing in mind that the Appellant is seeking to exercise its Statutory Power of Sale.

If the Court is in doubt, it is required to decide on a balance of convenience, the Court is not in doubt as it is clear that the Appellant seeks to alienate the suit property. Further the balance of convenience always seeks to maintain the status quo. In the case of **Robert Mugo Wa Karanja ...Vs... Ecobank (Kenya) Limited & ano.[2019] EKLR** where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”

The Court notes that **L.R 5162**, on which the injunction are being granted against was sold to a third party. However, it is trite that a suit and in this instant Application cannot be defeated on misjoinder or non joinder of parties. As the Court is only preserving the suit property and maintaining **status quo**. Further as no adverse orders are granted as against the said third party, the Court finds no reason as not to grant the Interlocutory Injunctive orders sought, so as to preserve the said property. The third party can be enjoined in the suit for the

determination of the issues in dispute and grant of orders that may be adverse to him.

The Upshot of the foregoing, is that the 3rd Respondent did meet the threshold for grant of Interlocutory Injunctive Orders as sought and therefore was entitled to the same. Consequently this Appeal seeking to set aside the said orders granted is not merited.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal**, together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reasons to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal dated **16th March 2021** is found **not merited** and consequently the said Appeal is disallowed and dismissed entirely and the Ruling and Order of the trial Court is upheld with costs to the 3rd Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy