REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 5 OF 2020

JOSEPH KAHUGA NDERITU

MICHAEL MUIRURI MWAURA

JACKLINE WANJIRU MWANGI

JACKSON MWAI WAMBUGU

JAMES WANJOHI GATERU

(SUING ON THEIR BEHALF AND ON BEHALF OF

THE PANORAMA GARDENS RESIDENTS ASSOSSIATION).....PLAINTIFFS/APPLICANTS

VERSUS

URITHI HOUSING CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT/RESPONDENT

FAMILY BANK LIMITED..... 2ND DEFENDANT/RESPONDENT

RULING

1. The application before me seeks the following orders;

a. That in the interim and pending the hearing and determination of the suit, this Court be pleased to issue a temporary barring and restraining the Respondents either by themselves their agents or servants from selling transferring and or otherwise disposing of the suit property.

b. That corollary to the forgoing and at the time appropriate this Court be pleased to grant leave for the extension of time within which the land control board consents can be obtained to enable completion of subdivision of the suit property and the subsequent transfer of titles to the Applicants and that this application be deemed properly filed and served.

c. That the costs be provided for

d. Any other order that this Court deems fit and appropriate in the circumstances.

2. The application is supported by the grounds stated thereto and the supporting affidavit of the 1st Applicant. That he is the chairman of Panaroma Gardens Association and a beneficial owner of plot No 300 a portion to be excised from LR No 11486/6. They purchased various plots from the 1st Respondent and consequently formed themselves into Panaroma Residents association for purposes of tending to the welfare of the plot owners. That it was a term of the agreement that the sale was by way of subdivision and that titles would be issued upon full payment of the purchased price which purchase was payable in installments.

3. That as at 27/12/2015 some of the Applicants have paid and others are still serving their payments installments. That the 1st Respondent has failed to transfer the titles to those fully paid up purchasers. That on 28/12/2015 the 2nd Respondent crated a charge over the suit land without notice to the fully paid up purchasers. That part of the sale proceeds went to repay the 1st Respondents loan at the bank. That the 1st Respondent has failed to discharge the plots and has been engaged in the renumbering and resurveying of the plots creating new plots

numbers.

4. That the 1st Responded is in default of the payment of the loan and the bank has issued notice to exercise its statutory power of sale. This prompted a restructuring agreement between the 1st and 2nd Respondents to forestall the public auction of the suit land.

5. That todate the 1st Respondent has failed to issue them with title contrary to their legitimate expectation despite having fulfilled their obligations under the agreement and taken possession of the plots. That the Respondent through the charge has purposed to disenfranchise the Applicants of their right to property created under contract trust and equity.

6. That this suit is different from the ELC 25 OF 2019 based on the categories of purchasers in this application and suit.

7. The 1st Respondent opposed the application and stated that the suit land is charged to the 2nd Respondent and that the said fact was disclosed in the agreement of sale executed by the Plaintiffs. That the subdivision of the suit land awaits the sale of all the plots before the suit land is discharged. That the purchasers who appear on the face of the agreements are not parties to the suit. That the prayers for interim injunction is now spent in view of the orders issued in ELC 25 of 2019 involving the same subject matter thus making this suit an abuse of the process of the Court. It objected to the proposal to open an escrow account stating that this will stall the servicing of the loan.

8. The application is opposed by the 2nd Respondent and averred that the Applicants have come to Court with unclean hands and therefore not deserving of the reliefs sought. That the purchasers on the face of the agreement s are not party to the suit. That the bank was not party to the agreements between the Applicants and the 1st Respondent. That the 1st Respondent offered the property to the bank as security to cover the loan of Kshs 500 million. That at the time of charging the said suit land the same was owned by the 1st Respondent and that the Applicants are strangers to the said charge. That the property was unencumbered. That the 1st Respondent has a duty to service the loan and that partial discharges are not available. That the notices for the exercise of statutory power of sale were issued in compliance with the law. It admitted that the loan restructuring agreement was entered between it and the 1st Respondent. That the titles cannot be issued because the mother title is subject of a charge instrument that is proper in both form and substance. It denied infringing on the Plaintiffs' right to property and averred that the Plaintiffs are strangers to the charge.

9. That the rights of the bank supersedes the alleged rights of the Plaintiffs and the bank stands to suffer prejudice if the loan is not repaid. That the bank is entitled to recover the outstanding loan. That any harm to be suffered by the Plaintiffs is capable of being compensated with by an award of damages. That there is no primafacie case established to demonstrate a primafacie case to warrant the orders being sought.

10. Parties filed written submissions which I have read and considered.

11. The key issue for determination is whether the Applicants are deserving of the orders sought.

12. The Applicants' case is that they are fearful that their rights to property guaranteed under Article 40 of the Constitution risks being violated by the 2nd Respondent's intended statutory power of sale over the suit property. However, under Article 40 (6) it is clear that such rights do not extend to any property that has been found to have been unlawfully acquired.

13. The legal provision for grant of temporary injunction is provided for under Order 40 Rule 1& 2 of the Civil Procedure Rules which provides;

> **1. Cases in which temporary injunction may be granted [Order 40, rule 1.]**
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> 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.
>
> **2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]**
>
> > (1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
> >
> > (2) The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court deems fit.

14. It is trite that the power to grant an injunction is discretionary and such discretion must be exercised judiciously on the basis of law and

evidence. The criteria for grant of such order was set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd EA 358** that;

> "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 harm which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."

15. The case of **Mrao Limited** supra elaborated what constitutes a prima facie case as follows;

> "A prima facie case in a Civil Case include but is not confined to a "genuine or 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

16. Have the Applicants established a prima facie case? As already stated, it is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicants' case upon trial The Applicants annexed various sale agreements for instance the agreement by Reuben Chiira dated 10/7/2015, Gerald Wachania Ndungu dated 11/11/2016 and two undated agreements by Esther Wanjiru and Simon Kabiro in support of their case. Paragraph 9 of the Applicants' Supporting affidavit averred that by 27/11/2015 there existed 2 categories of purchasers; fully paid up and partially paid up purchasers. It is their position that the impugned charge was created after without notice of the fully paid up purchasers. This position is not supported going by the sale agreements highlighted above being annexure **JKN- 4** ***a,b,c&d***. It is only **JKN4a** (Reuben's agreement that was entered prior to the date of the charge if at all i.e 10/7/2015) the rest of the agreements were entered in 2016 or thereabouts as shown above after the creation of the charge.

17. It is my opinion therefore that based on the Applicants' agreements filed before Court, the Applicants have not established the first limb for grant of temporary injunction.

18. The Second test is that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Indeed the Applicants claim is subject to the 2nd Respondent's charge over of the suit land being the security of the loan advanced to it. That charge takes precedence over any proprietary rights that may have been subsequently created. An award for damages in case of breach will therefore suffice.

19. Lastly in such an application, if the Court is in doubt it will decide an application on a balance of convenience. Having enumerated the issues above, there is no iota of doubt in the mind of the Court. The balance of convenience in this case does not tilt in favor of the Applicants. There is an admission of default in service the loan advanced to the 1st Respondent by the 2nd Respondent. Any allegations of infringements of rights if at all can only be ascertained upon full hearing of the case.

20. On the second issue, the Applicants relied on Section 8 (1) of the Land Control Act which states;

> 8. Application for consent
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> (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:
>
> > Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

21. In my view, this prayer is not tenable because the Applicants have not proffered cogent reasons for such an extension. The prayer is made in anticipation of the making of the application for consent at the Land Control Board. The 1st Defendant submitted the issue will be dealt with at the time of seeking approval for subdivision by changing user from agricultural to residential and as such the prayer is not ripe for consideration at this stage.

22. In the end, the application dated 14/5/2020 is found to be without merit and the same is dismissed. Costs shall be in the cause.

23. It is so ordered

DATED, SIGNED & DELIVERED AT MURANG'A VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2021

J. G. KEMEI

JUDGE

In the Presence of ;

Mr Migiro HB for Mr Senaji for the Plaintiffs

Ms Gitau for the 1st Defendant

Ms Wangu for the 2nd Defendant

Ms Phylis Mwangi – Court Assistant