



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 73 OF 2019

**ANNA WAMBOI JOSEPH (Suing as the personal representative of the Estate of
JOSEPH NGIGE GITAU).....PLAINTIFF**

VERSUS

CENTURY MISCROFINANCE BANK LTD.....1ST DEFENDANT

ESMOND DEVELOPMENT LTD.....2ND DEFENDANT

THE COUNTY LAND REGISTRAR TRANS-NZOIA.....3RD DEFENDANT

RULING

The Application.

1. By a notice of motion dated **11/12/2019** and filed on **20/12/2012**, the plaintiff seeks the following orders against the defendants:

(1) ...spent

(2) ...spent

(3) **That this court be pleased to issue a temporary injunction restraining the defendants either by themselves, their servants, agents, employees or otherwise by any person acting under the direction or authority of the defendants from trespassing onto, advertising for sale, negotiating, selling either by public auction or otherwise transferring or in any other way interfering and/or dealing with Title No. SINYERERE/KIPSAINA BLOCK 2/KESOGON/280, pending the hearing and final determination of the suit herein.**

(4) **That costs of this application be provided for.**

2. The application is brought under **Sections 1A, 1B and 63(e) of the Civil Procedure Acts and Order 40 Rules 1, 2, 3 and 4, Order 50 Rule 1 of the Civil Procedure Rules 2010.**

3. The application is grounded on the following grounds: that the applicant is the administrator of the estate of Joseph Ngige Gitau, deceased to which the suit land belongs; that 2nd and 3rd defendants fraudulently and without taking out succession proceedings transferred and registered the suit land in the 2nd defendant's name; that thereafter the 2nd defendant fraudulently secured a loan with the title so obtained; that the suit property is now threatened with sale in realization of security by the 1st defendant yet the charge registered against it is invalid.

4. The application is supported by an affidavit of the plaintiff sworn on **11/12/2019**. It reiterates the above grounds. The plaintiff also filed a further affidavit filed on **17/2/2020**.

The Response.

5. The 1st defendant filed a replying affidavit dated **14/1/2020** and further affidavit dated **21/1/2020**, sworn by **Calistus Aliera Selebwa**, its **Debt Recovery Officer**. In those affidavits, the respondent's response is that one *Simon Karanja Ngige* approached it for a loan and after

due diligence it established that the 2nd defendant owned the suit land and that the 2nd defendant existed as a company. that minutes of the 2nd defendant were presented to the 1st defendant showing that the 2nd defendant had consented to offer its land as security for a loan to the said Simon; that the 1st defendant's advocates also carried out a due diligence exercise prepared a third part charge with Simon as the borrower had it registered after execution by Simon and the 2nd defendant's directors and the loan monies were disbursed to Simon; that a land control board consent was obtained for the transaction; that Simon began defaulting on the loan at the second instalment and failed to offer any explanations; that Simon failed to honour demands by the bank and it called and authorized auctioneers to repossess the security.

Submissions.

6. The plaintiff filed her submissions on **9/3/2020**. The 1st defendants never filed any submissions. I have considered the application and the response as well as the filed submissions.

Determination

7. The issue that arises in the instant application is whether an interim injunction should issue in favour of the plaintiff.

8. The crucial test for an application of this nature is whether the applicant has established a prima facie case and whether he or she would suffer irreparable damage. See the case of **Giella Vs Cassman Brown 1973 EA 358**. If the court is in doubt it may rule on a balance of convenience.

9. I have noted that the 2nd defendant has not responded to the application. I have also noted that there is a claim of fraud which is a serious thing indeed if it occurred. Besides there is a claim that the registration of the land in the name of the 2nd defendant was done without succession proceedings having been taken out. Though the 1st defendant claims that it was not aware of the alleged fraud, in the absence of an explanation as to how the 2nd defendant obtained registration of the land in its name, I find that the plaintiff has established a *prima facie* case in the instant suit.

10. As to whether the plaintiff would suffer irreparable loss I have noted that the suit land was left to the plaintiff and her family upon the demise of their patriarch. It is therefore family land and sale thereof before the trial of this suit is likely to affect many persons besides the plaintiff. The place they call home may be lost. I find that the 2nd defendant has already been enjoined to this suit to answer for its actions but that there are no orders sought against him yet; however, the suit is still in its early stages. Notwithstanding the foregoing I find nothing that may rule out the fact that the plaintiff may obtain a remedy against the 2nd defendant in the final analysis if she wishes to do so. I am inclined to think therefore that there is no danger of irreparable loss.

11. Notwithstanding the above and for the reason that the course of a suit may not be predictable with certainty from the beginning. The claims of involvement of the 1st defendant, in whose favour the impugned charge was made, in the fraud have to be tested by way of evidence. This court is for that reason inclined to rule on the instant application on a balance of convenience.

12. Therefore, I hereby issue a temporary injunction restraining the defendants either by themselves, their servants, agents, employees or otherwise by any person acting under the direction or authority of the defendants from trespassing onto, advertising for sale, negotiating, selling either by public auction or otherwise transferring or in any other way interfering and/or dealing with **Title No. SINYERERE/KIPSAINA BLOCK 2/KESOGON/280**, pending the hearing and final determination of the suit herein.

13. The costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi via electronic mail on this 29th day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.