



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

INSOLVENCY CAUSE NO. 1 OF 2017

IN THE MATTER OF THE WINDING-UP OF NATURE GREEN HOLDINGS

AND

ON THE MATTER OF THE INSOLVENCY ACT (NO.18 OF 2015)

RULING

In an unprecedented procedure I have combined and consolidated the issues which arose in this matter and compressed the determination into one ruling. This first application has to do with the commitment I made to the parties to give reasons for my orders issued on 19th June 2018.

The history of this current interlocutory applications commenced with an initial notice of motion dated 8th June 2018 by Donald Muhonda Andolo applying for temporary injunction against the respondent under sections 429, 430, 431(3) of the Insolvency Act 2015, seeking the following orders

(a) A restraining order be and is hereby issued against Housing Finance Ltd and Muga Auctioneers & General Merchants, their servants and/or agents from disposing by way of public auction or in any other way or interfering with the parcel of land known as Kajiado/Kaputiei North/32257 together with the developments thereon known as House No. 3 pending the hearing and the determination of this application.

(b) A restraining order be and is hereby issued against Housing Finance Ltd and Muga Auctioneers & General Merchants, their servants and/or agents from disposing by way of public auction or in any other way or interfering with the parcel of land known as Kajiado/Kaputiei North/32257 together with the developments thereon known as House No. 3 pending the hearing and the determination of the petition herein.

(c) Conservatory orders be and are hereby issued prohibiting any person or entity or the parties herein from interfering with, disposing, transferring, alienating, sequestering, attaching, levying distress, levying execution or dealing in any way prejudicial to the interest of the company herein with any of its assets that are subject to this petition, that is to say land parcels known as Kajiado/Kaputiei North/32238, Kajiado/Kaputiei North/32240, Kajiado/Kaputiei North/32242, Kajiado/Kaputiei North/32244, Kajiado/Kaputiei North/32246, Kajiado/Kaputiei North/32248, Kajiado/Kaputiei North/32255, Kajiado/Kaputiei North/32257, Kajiado/Kaputiei North/32258 and Kajiado/Kaputiei North/32259 pending the hearing and the determination of this application;

(d) Conservatory orders be and are hereby issued prohibiting any person or entity or the parties herein from interfering with, disposing, transferring, alienating, sequestering, attaching, levying distress, levying execution or dealing in any way prejudicial to the interest of the company herein with any of its assets that are subject to this petition, that is to say land parcels known as Kajiado/Kaputiei North/32238, Kajiado/Kaputiei North/32240, Kajiado/Kaputiei North/32242, Kajiado/Kaputiei North/32244, Kajiado/Kaputiei North/32246, Kajiado/Kaputiei North/32248, Kajiado/Kaputiei North/32255, Kajiado/Kaputiei North/32257, Kajiado/Kaputiei North/32258 and Kajiado/Kaputiei North/32259 pending the hearing and the determination of the petition herein;

(e) A restraining order be and is hereby issued against commencement or continuation of any execution or any legal process or proceedings or otherwise against the following properties of the company, that is to say land parcels known as Kajiado/Kaputiei North/32238, Kajiado/Kaputiei North/32240, Kajiado/Kaputiei North/32242, Kajiado/Kaputiei North/32244, Kajiado/Kaputiei North/32246, Kajiado/Kaputiei North/32248, Kajiado/Kaputiei North/32255, Kajiado/Kaputiei North/32257, Kajiado/Kaputiei North/32258 and Kajiado/Kaputiei North/32259 pending the hearing and the determination of the petition herein;

(f) Costs be provided for from the assets of the respondent company herein

(g) The court be pleased to issue any other orders to meet the ends of justice in this petition

In his submissions Mr. Karanu Counsel for the Applicant argued that it was necessary to issue the temporary injunction to preserve the property from being wasted. He further argued that the purpose of this remedy of injunction was for a limited period until the winding up cause is heard and determined.

The Legal Framework

In our laws under Order 40 Rule 1 of the Civil Procedure Rules there is a need for an applicant to prove that the property is in danger of being wasted or alienated by the other party to the suit or a wrongful sale for an injunction to be granted.

For my part the celebrated case of **Giella v Cassman Brown & co Ltd 1973 E.A 358** set down three important principles namely that in order to support the grant of a temporary injunction an applicant must show a prima facie case with a probability of success and even when this has been shown, an injunction will not normally be granted unless the applicant will otherwise, suffer irreparable harm which cannot be compensated for in damages. Thirdly if the court is in doubt and only then will it decide the application on a balance of convenience.

In the case of **Nottingham Building Society v Euro dynamics Systems plc, [1993] FSR 468**, Chadwick J laid down tests for the granting of mandatory interlocutory injunctions, thus:

“In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be ‘wrong’Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought to consider whether the court does feel a high degree of assurance that the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.”

I am clear in my mind though the above principles seem to focus on the legal threshold of mandatory interlocutory injunction in consideration of the facts of this case the test is relevant in weighing the rights of the parties in granting or refusal of remedy of injunction in any event. The best principle which runs through in grant of injunctions is that the court should take whichever course which is likely to cause the least risk or prejudice or injustice to the other party.

The injunction sought was not meant to fully determine the dispute but to put a moratorium on all activities to the assets of the company awaiting the hearing and adjudication of the issues on the merits. The pleadings and affidavit evidence in support of the notice of motion by the applicant in this issue has been exhaustively dealt with in his disposition. When it came to the position of the respondent he was apparently served but did not file any rejoinder to the notice of motion. That being so the applicant prosecuted his claim as undefended motion and got away with the orders. There is nothing in my opinion on which the orders issued can be impeached. During the second hearing when a dispute arose as to the property charged to Housing Finance Company of Kenya by Nature Green the respondent filed a replying affidavit to challenge the order of injunction granted in favour of the applicant. That seems to me was another way of Mr. Okoth learned counsel for the respondent saying that the injunction was faulty because an important issue in the motion was not considered hence the orders should be discharged.

In looking at the matter there is no evidence that the respondent suffered injustice or hardship resulting from the orders granted by this court in exercise of its jurisdiction. I see no evidence of why the respondent did not at the earliest opportunity opt to defend the application upon being served with summons. Clearly the respondent and his counsel failed to turn up for the hearing of the application and they did not give any satisfactory answer or good reason for their absence.

On the application by the applicant even with the latest reply by the respondent the court holding the scales evenly between both parties based on the evidential material the scales still tilt in favour of the applicant. I have considered the rival submissions on this aspect of interlocutory injunction and am not persuaded that the version by the respondent presents any new evidence to dissuade me from the earlier position of sustaining the orders of temporary injunction under 40 of the Civil Procedure Rules.

In applying the above principles, I bear in mind that the petition resolution on the merits is still pending before court. However, from the facts of this winding up petition the applicant has shown a prima facie case with a probability of success at the trial. The question is would the respondent suffer irreparable harm which cannot be compensated for in damages. In my view by the nature of this claim I don't think so. It must not be forgotten that the applicant is a co director of Nature Green with a shareholder value of fifty percent ownership. As for the applicant he has a legal right or interest in the company in so far as the outcome of the winding up petition and the suit properties or assets are concerned. On careful consideration of the material I am satisfied there is a basis on company directorship other than other claims which is so fundamental to the applicant's case which could be taken up at the hearing inter parties.

It's evident from the reading of both versions of the case as placed before me the court enjoys wide measure of discretion to grant interlocutory relief. Secondly, being an equitable remedy the court would not labor in vain. In these circumstances I reiterate the legal proposition in the case of **Eric Makhoha & 4 Others V Lawrence Sagini & 2 Others C.A. at Nairobi 20 Of 1994**. The court held:

“so its grant must be made on principles by equity, one of it is represented by the maxim that equity would not grant its remedy if such order will be in vain.as is said equity like nature will do nothing in vain.”

It can be said straight away that there is a risk of dissipation of the assets of the company unless the respondent is restrained by way of injunction from further dealing with the business of the company without regard to the pending winding up petition. I consider that the

applicant has presented a good arguable case on compulsory winding up petition on one of the grounds that Nature Green is unable to pay its debts unless any dealings with the company is stopped which is the case here he will suffer irreparable damages and loss which is likely to cause him thunderous loss at the end of it all. This ground alone would suffice for an injunction to issue against the respondent. This therefore disposes the objection raised by learned counsel Mr. Okoth on behalf of Douglas Okeyo with regard to the legality and propriety of the injunction granted by this court when he failed to file any rejoinder to the motion.

I consider this to be the substratum of the reasons which compelled me in my earlier order to conclude that the applicant had discharged the burden of a fit and proper case for grant of interlocutory injunction against the respondent with orders on cost to abide the outcome of the petition.

The second motion was brought about by an application dated 18th June 2018, the applicant **RABDIYA CONSTRUCTION LIMITED**, instituted this suit seeking orders for an injunction prohibiting Muga Auctioneers from conducting an auction on **Title No. Kajiado/Kiputiei North/32257 House No. B1** and an order to enable for transfer of ownership of the unit to the Applicant herein.

The Applicant's Case

The crux of the applicant's case is that Nature Green Holdings and Rabdiya Constructions had agreed to a purchase price of Ksh. 7,500,000/- for the purchase of **Title No. Kajiado/Kiputiei North/32257 House No. B1 and No. Kajiado/Kiputiei North/32258 House No. B2**, but due to the fact that Rabdiya Construction Limited were also Contractors for the project owned by Nature Green Limited, the two mutually agreed that Rabdiya Construction Limited pay Ksh. 5,150,000/- for each premise and the remainder to be discounted from Rabdiya's total invoice. The applicant claims that it paid Kshs. 10, 350, 000/- by 10th October 2018, and the balance was deducted from an invoice they raised. According to the Applicant, Nature Green Holdings acknowledged the fact that it paid full purchase price and Nature Green Holdings were to effect transfer of ownership to the Applicant but are yet to transfer.

The applicant deponed that pursuant to the said agreement with Nature Green Holdings, Rabdiya Construction Limited made payments amounting to the total aggregate of 10, 350, 000/- (the applicant attached copies of statements showing transfer of funds from Rabdiya Construction to Nature Green and an acknowledgement of transfer marked as 'MNR 1').

It was further deponed that in accordance with the sale agreement, the Applicant issued to Nature Green Holdings an invoice dated 29th March 2014, of Kshs. 1,437,168/-, which sum was less than the actual sum of Ksh. 5,596, 127.03/- which the Applicant was supposed to receive, as per the relevant certification for the ongoing works for Nature Green Project. It was stated that parties agreed that the applicant had fully paid **Title No. Kajiado/Kiputiei North/32257 House No. B1 and No. Kajiado/Kiputiei North/32258 House No. B2**. (The applicant attached herein the letter of Billt Consultancy dated 14th October 2014, and an invoice No. 347 dated 29th March 2014 marked as 'MNR 2'). The applicant therefore stated that the said two properties, **Title No. Kajiado/Kiputiei North/32257 House No. B1 and No. Kajiado/Kiputiei North/32258 House No. B2**, stopped being the property of Nature Green and Rabdiya Construction became the beneficial owners of the 2 aforementioned units; that the title to the said properties were being held in trust by Nature Green for the applicant pending formal transfer of ownership and that Nature Green Holdings had no authority to enter into a charge or transfer the 2 properties, without the consent of the Applicant.

It was stated that the directors of Nature Green fraudulently or mistakenly entered into the charge 2 years after it entered into an agreement with the Applicant without the Applicant's knowledge when they were legally holding the title to the aforesaid properties in trust. The applicant further stated that from the time the payment of the purchase price by Nature Green there had established a constructive trust which meant that the charge on the suit properties is null and void. In its view, the lending institution could then attach any other security except the suit properties belonging to the Applicant. The applicant attached the Agreement to his supporting affidavit sworn on 18th June 2018 which is a copy the applicant was given by Namachanja and Mbugua Advocates who were acting for both parties. The said agreement was executed by the directors of Rabdiya. The Applicant maintains that they never agreed with Nature Green Holdings to charge the suit properties it had bought nor have any knowledge of the charge. The applicant alleged that the Petitioner was aware of the fraud that they were perpetrating and cannot purport to clear himself from the illegality.

It was also stated that Nature Green borrowed from HFC Bank in 2014 and deposited 4 titles as security including the 2 properties that had been sold to Rabdiya Construction. Nature Green Holdings after making some repayments have defaulted and as a result the bank has engaged auctioneers to sell **Title No. Kajiado/Kiputiei North/32257 House No. B1**.

The Applicant denied the assertion by the Nature Green Holdings got into arrangement with a lending institution to cover part of the purchase price for the subject premise. It said that the same is in all sense utterly false and unreasonable as after selling the premises to the Applicant. The applicant maintained that Nature Green Holdings was holding the title in trust and could not purport to charge the same.

The Applicant in its submissions resorted to a maxim which says that, "Equity treats as done that which ought to be done. In support of its applicant, the applicant placed reliance on the Court of Appeal case of *Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR*. It was the applicant's position that equity is one of the national values which binds the court in interpreting the law. According to the applicant, in the above case, the court agreed with the appellant who had received the full purchase price but did not transfer the purchased land constituted constructive trust. The applicant also stated that equity treats as done that which ought to be done. It's his view, that by the time nature green charged the suit properties in 2014, its beneficial interest in the property had passed to Rabdiya awaiting formalization by way of transfer of title of the 2 parcels to Rabdiya. It was further averred that the act of charging the suit property was detrimental to Rabdiya and that the said transaction was done without the applicant's knowledge.

The applicant also submitted on the doctrine of trust. It stated that at the time the suit property was charged, Nature Green was a constructive trustee of the applicant since full purchase price had been disbursed to Nature Green's account as acknowledged and confirmed by a director of Nature Green, Douglass Okeyo in the affidavit sworn on 23rd July 2018. The applicant maintained its argument that the charge cannot be construed to be valid since it is tainted by fraud on the part of Nature Green for failing to disclose the purchase by Rabdiya or seeking its

consent.

HFCK Limited's legal position and response to the Applicant's case

HFCK's response is couched in a replying affidavit sworn by BELINDA NGANGA, the Legal Manager of HFCK Limited (hereinafter "HFC"), dated 16th July 2018. HFCK limited denied each and every averment contained in the Supporting Affidavit of the Applicant dated 18th June 2018. It was its averment that the applicant illegally and unlawfully laid a claim to **L.R No. KAJIADO/KIPUTIEI NORTH/32257** and **House No. B2**, the suit property and is not the legal nor beneficial owner of the same. The deponent stated that there is no agreement for sale attached to prove that the appellant bought the suit property on 16th May 2012 as alleged. She also challenged the sale agreement attached by the Applicant saying that it was undated but bears the year 2015. It was also stated that the said sale agreement lacks the seal of the respective companies whose directors purportedly executed it. She also noted a contradiction with regard to the date the applicant claims to have entered into an agreement with Nature Green Company Limited and the date of the agreement attached. A contradiction was also noted as regards the consideration paid to acquire the suit property saying the in the affidavit Ksh. 5,000,000.00/= was indicated and in the purported sale agreement it is quoted as Kshs. 5, 150, 000.00/=.

The deponent averred that there lacks proof the said consideration was paid by the applicant as the attached letter dated 6th March 2014 purporting to show acknowledgement of receipt of the purchase price for some 2 houses, which is executed by Douglas Okeyo Oluochi, and bears a rubber stamp of Nature Green Holdings Limited. The deponent questioned the lack of cogent explanation as to which property it relates to and the co-director of the purported company has not signed the letter. The deponent doubted if the payment was made for the suit property as it pre-dates the agreement which was supposedly prepared in the year 2015 and the house number indicated does not confirm to the House No.3 restrained from being sold in the Court order issued on 13th June 2018.

It was also deponed on behalf of HFCK Limited that there is no proof of transfer or title documents attached or produced before the court to show that the suit property was transferred to the applicant. The fact that the applicant paid the alleged purchase price the terms of the attached agreement does not show effective transfer of the suit property to the Applicant.

It was averred that HFCK advanced to Nature Green Holdings Limited a construction loan of Kshs. 19, 600, 000.00/= secured the project's fixed assets located on **LR No. Kajiado/Kiputiei North/32255, 32256, 32257, 32258** (four titles) all in the name of Nature Green and the restriction and encumbrance was duly indicated on the respective title deeds. (See BN-1 copies of the title deeds).

Further it was argued on behalf of HFCK that the applicant ought to have conducted a search and done due diligence before entering into the contract for sale of the suit property with Nature Green Holdings as it would have helped then to detect existence of encumbrances upon the suit property. The applicant, according to HFCK failed to conduct due diligence and that in its view goes to show that the suit property is fictitious or was done with ulterior motives to unlawfully stall HFCK from exercising its statutory remedies under the charge.

It was also averred by the dependent that the applicant entered into the agreement with Nature Green Holdings for the sale of the suit property before the charge was created and registered against the suit property in favor of HFCK, there was no restriction, inhibition or encumbrances registered or noted against the title deed of the suit property nor a transfer of the suit property effected in favor of any party. Further that no discharge of a charge of the suit property was executed in favor of the Applicant.

HFCK reiterated that Nature Green Holdings is solely to blame for failure to exercise due diligence and the applicant's claim lies against the company and the individual directors as the vendors and she distanced HFCK from liability stating that it was not privy to the alleged contract. It was also argued that equity does not come to the aid of the indolent and therefore the applicant cannot purport to seek refuge under the provisions of equity as there is an admission at paragraph 17 of the supporting affidavit that the Applicant has been in occupation of the suit property as from the year 2012, in the full knowledge that it was not the registered owner of the suit property.

It further averred that if it is not to exercise its statutory powers under the charge at the expense of the applicant, the loan will continue to escalate at the detriment of HFCK. In that respect it was stated that the applicant approached the court with unclean hands and that it is not privy to the arrangement between HFCK and Nature Green Holdings. It was also stated that the principles of equity and justice allows the lender to realize the property given to it as security for a loan in case the borrower fails to repay the loan.

The Respondent argued that the applicant is forum shopping as the reliefs sought in its application relate to Judicial Review application disguised as an application seeking injunctive reliefs contrary to the basic tenets of the law. The Respondent contented that the application dated 18th June 2018 is grossly incompetent and a nonstarter craving to be struck out with costs as it is aimed at delaying the determination of the pending application and otherwise an abuse of the court process. The respondent urged the court to dismiss the application as it lacks merit and does not meet the threshold for granting injunctive reliefs which are equitable remedies.

The Petitioner's Case

The Petitioner, Donald Muhonda Andolo joined this application through a supplementary Affidavit sworn on the 26th July 2018. He brought to the attention of the court the fact that some properties that the company under liquidation has interest in have been transferred to third parties while there were orders in force prohibiting any dealing with such properties. He averred that Nature Green Holdings Ltd had acquired Kajiado/Kiputiei North/32238 and was in the process of acquiring the following parcels of land when the directors fell out; Kajiado/Kiputiei North/32240; Kajiado/Kiputiei North/32242; Kajiado/Kiputiei North/32244; Kajiado/Kiputiei North/32246 and Kajiado/Kiputiei North/32248.

He averred that Nature Green Holding Ltd executed sale agreements for the above said properties of land through its directors on or about 3rd and 4th June 2015 and subsequently paid for the parcels of land. He also averred that the sale agreement in Kajiado/Kiputiei North/32248 was rescinded by the Vendor, but the Company is yet to be refunded a portion of the amount paid as provided by the sale agreement.

On the 24th July, 2018 he received the result of the green card searches, that as the insolvency cause was underway and there were orders in force prohibiting any dealings with the parcels of land that were subject to the court order, three of them were transferred to third parties on 22nd June, 2018 and new title deeds issued on 25th June, 2018. He produced certified copies of green cards marked as DMA3 (a).

FINDINGS AND DETERMINATION

I have considered the plaintiff's application together with the affidavit filed in support thereof and replying affidavits which were filed in opposition to the application. I have also considered both written and oral submissions which were made before this court by the counsels for the parties and the various authorities that were cited in support thereof. The issues that arise for determination in the application before me are, whether or not the Applicants have a legal interest in the suit property, whether or not the charge that HFCK Limited entered into with Nature Green Holdings is valid.

This being an application for an injunction, my point of departure as far as this case is concerned is anchored on the case of *Kenleb Cons Ltd. Vs New Gatitu Service Station Ltd. & Another*,^[1] justice Bosire thus remarked:

“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction.”

In the instant case, the applicant tried to establish that he has interest in the suit property. He claims that he bought the suit property from Nature Green Holdings but they had not effected transfer of the said land from Nature Green Holding to the Applicant's name at the time HFCK Limited sought to sell the property in exercise of its statutory power of sell envisaged under section 90 of Land Act, 2012, Laws of Kenya. The Applicant also claimed that there existed constructive trust from the time it paid full purchase price for suit property. In the foregoing, it is not in doubt even though the applicant is claiming existence in of legal interest in the suit property, title had not passed to it.

Section 2 of the Land Registration Act^[2] define a transfer as follows:

“Transfer” means passing of an estate or interest in land or lease under this Act, whether for valuable consideration or otherwise”.

Thus in other words, a transfer refers to the passing land, lease or a charge from one party to another by an act of the parties and not by operation of the law. The same also includes the instrument that effects the passing of the title. This aspect is clearly missing as far as the facts of the instant case are concerned.

Further, Section 43(2) of the land Act^[3] states that:

“(3) The transfer shall be completed by the registration of the transferee as proprietor of the land, lease or charge.”

The same position is also taken under Section 43(2) of the Land Registration Act provides *inter alia* that:

“(2) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.....”

The above section clearly entails that transfer process can only be said to be complete after the instrument has been registered. The transfer of the land must comply with both the substantive law and statutory procedures relating to transfer of land as a sell. In view of the fact of the case at hand, it is not in dispute whatsoever that there was no attempt by the parties to the contract of sale of the suit property to transfer the suit property from the vendor (Nature Green Holdings) to the buyer (the applicant). The same is supported by the fact that there is no evidence in the entire proceedings in form of any transfer document, instrument or title deed tendered before court to prove that indeed the purported transaction took place between the parties. As clearly envisaged in the above section, proof of registration of the instrument affecting the transfer of the land herein is of intrinsic importance. The applicant produced a sale agreement and proof of payment marked as MNR-1 in a bid to prove that indeed a transaction took place but however this court takes the view that the same is not enough to prove ownership save that one has legal interest in the land in question. For the Applicant's claim to succeed, there must be prima facie evidence in form of a title documents tendered to prove ownership of the suit property by the Applicant. As to the ownership of the property it remains in suspense from the moment the sale agreement was concluded without effecting the necessary transfer. While I agree that Rabdiya sale agreement can provide a defence to the claim on the property but am unable to rely on the submissions that can circumvent the statutory requirements to apply for transfer to convey the newly acquired rights.

I am of the conceded view that the procedure for addressing grievances arising out of the contract of sale at an opportune time may be by way of asserting the rights under specific performance or refund of the purchase price. Secondly, in the same vein as pleaded in the main winding up cause Rabdiya joins the long list of creditors constituting the subject matter of the petition. By virtue of section 88 (1) of the Land Act which is applicable to this case in respect to HFCK the implied covenants in the legal charge binds Nature Green Ltd to pay the principal amount and interest in the charge agreement. The legal effect of any failure to liquidate the debt HFCK has a right to give a statutory notice under section 90(1) to Nature Green Ltd to commence the action for recovery. If the chargor remains in default of payment under section 96(1) of the Act the chargee's power of sale is to be invoked to realize the debt. There is material on record to demonstrate that HFCK has sufficient legal right in the disputed suit property with Rabdiya which is protected by the provisions of the Act granting them overriding interest. In the absence of any other consideration to the contrary, the court is unable to agree with the Applicant's claim in the circumstances of this case which tends to extinguish the legal charge registered in favor of HCFK. It's quite obvious that the two applicants

find themselves in this quagmire due to the conduct of the directors of Nature Green Ltd for non-disclosure of material facts to the parties while entering into the respective contracts. There was clearly a major legal change of status of the suit properties following the registration of the legal charge to secure the debt advanced to Nature Green Ltd by HFCK. So in that case there is an issue of nomenclature before me when construing the construction of the two agreements on the same suit land making Rabdiya's inoperative. It should suffice for me to say that I decline at this interlocutory stage to make any definitive findings as to the legal implications in the sale agreement entered between Rabdiya and Nature Green Ltd. The legal issues and available remedies are better left to be determined at a full hearing of a suit.

On whether the charge herein was valid, the applicant contends that the Directors of Nature Green Holding used the suit property as security for the loan facility in favor of HFCK Limited without its consent hence the charge cannot be construed as a valid charge. In the court's view, the charge in contention was valid as per between HFCK Limited and Nature Green Holding. It is not in doubt that title to the suit property had not passed from Nature Green Holdings to the Applicant at the time the charge was created. The four copies of the documents of titles produced before this court by the Respondent marked as BN-1 are true copies of the original title deeds for the respective parcels of land indicating the details of the charge on the proprietorship section and the encumbrance section. All the documents of titles produced bears the name Nature Green Holdings as the proprietor of the properties in question. Had the transfer been registered as required under section 43(2) of the land Act, the respondent would have noticed upon search at the land registry that the suit property was subject to some sort of inhibition, restriction or encumbrance before accepting it as security for the loan facility. In the premises, this court finds no evidence whatsoever that supports the applicant's claim that the charge is invalid and therefore the claim ought to fail.

Having found that the legal interests in land claimed by the Applicant are recognizable in law, it is a further finding of this court that the best the Applicant can be in regards to the main suit of insolvency is to be regarded as a creditor and it shall be seen as such. In the same respect the court also recognizes the need to protect the properties which Nature Green Holdings has a lien or right so that the same will not get wasted since its directors have a protracted legal tussle which as pleaded seeks compulsory winding up of the company pending the determination before this court.

In light of the foregoing, having considered the affidavits, the submissions and averments both in support and opposition of the applications, I now look at the applications, Donald Anondo, Nature Green Ltd, the legal interest by Rabdiya and HFCK in the lens of the principles on injunctions pronounced in such landmark decisions like **Giella V Cassman Brown & Co. Ltd** (1973) EA 358 and **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** (2003) KLR 125.

In **Giella V Cassman Brown & Co. Ltd**, 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”

The Court in **Giella** identified three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.

Explaining what amounts to *prima facie* case, the Court in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** (supra) said;

“I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”. (per Bosire, JA).

In view of the above and the instant case herein, HFC Limited sought to exercise its statutory power of sale pursuant to relevant sections under the Land Act, no.6 of 2012. I note that HFC Limited served Nature Green Holdings Limited with the requisite statutory Notices as required by the law. The contents and the process as regards the issuance of the said noticed is not subject to contention herein hence I find that the same was done in compliance with the Law. BN-7 is a copy of the Statutory Notice.

Further, I have also seen a valuation report prepared for the purposes of the intended sale of the suit property by Public Auction. Again the contents of the same are not controverted by the opposing parties herein. Despite the efforts by the Applicant herein to prove that they have an interest, legal or beneficial to the suit property, this court has not found sufficient and credible evidence to that effect. Clearly, there is no proof of ownership on the part of the Applicant (Rabdiya) since the transfer of the title in respect of the suit property had not taken effect. An agreement for sale is not enough to prove proprietary interest in land. One has to furnish the court with registered documents of title which act as *prima facie* evidence of ownership of the respective parcel of land in question. Therefore, this limp was not proved on a balance of probabilities by the applicant and thus the parameters set out in **Giella v Cassman Brown** (supra) have not been met.

In the foregoing this court takes cognizance of the fact that HFCK Limited Company has a legal and overriding interest in the suit property taking into consideration the fact that sufficient evidence was produced before court to prove that fact on a balance of probability. Having made the above findings, taking into consideration the circumstances of this case and in the interest of justice, this court takes the trajectory that the suit property between HFCK and the Applicant (Rabdiya) be preserved until the main suit, Insolvency Cause No.1 of 2017 is heard and determined substantively or on merits. In that respect, I'm of the view that since this suit is not a stand-alone application and it emanates from the main petition in the Insolvency cause aforementioned. There is no doubt whatsoever that the property in question herein is also part and parcel of the properties in question in the said main suit, hence it would not be prudent to allow the HFCK to proceed to sell the suit property before the main suit is heard and determined on the merits.

Applying the principles set out in **Giella v Cassman Brown** (supra) to Nature Green's case, as regards the properties which were alleged to have been bought from Wakisons Investments Limited, this court finds that there was no ample proof tendered in form of title documents in relation to the particulars of the transactions. It would be a miss to say that this court grants an injunction against Wakisons investments without the applicant admittedly joining them as a party to the ongoing proceedings. The applicant has not discharged the burden of proof

that Wakinsons is an associate company with Nature Green Ltd. There is no other tangible evidence that shows the dealings upon which Nature Green Holdings transferred of the said properties to Wakinsons Investments besides the entries in the Green cards in the lands registry. As such the transfer effected as per the prima facie evidence on record required an answer from Wakinsons in rebuttal who is not joined or has prior notice of the claim by the applicant. The standard of proof under section 107(1) of the evidence Act was not discharged to warrant this court grant the orders sought in favor of the applicant. Thus the same cannot suffice for the grant of a restraining injunction against Wakinsons Investments Limited who is not a party to these proceedings.

In the final analysis, as this litigation has come to be crowded by the interested parties from the initial dispute between the petitioner and the respondent for the reasons advanced elsewhere in this ruling the following orders ought to issue:

In so far as the litigation between Nature and the Defendant in the Insolvency Cause No.1 of 2017 is concerned, there are still delicate and substantial issues which parties are expected to ventilate and yet to be determined by this court on merits. Therefore, all the properties which were identified and registered in the name of Nature Green be preserved by way of an interlocutory injunction pending the hearing and determination of the Insolvency Cause aforementioned to avoid wastage. In light of the evidence and in particular the interest and rights illustrated by HFCK and Rabdiya as of now they are not entitled to the reliefs claimed in their respective applications. So far as the state of the winding up petition remains unresolved the weight as to their rights taken either singly or collectively has a direct correlation with the outcome of the petition.

It's however right to direct that the Land Registrar Kajiado do enter a restriction on such identified properties in this motion by the applicant to the main insolvency cause registered in the name of Nature Green Ltd until further orders from this court.

That this court pursuant to the provisions of section 1(A) of the Civil Procedure Act on overriding objective to facilitate the just, expeditious and affordable resolution of this petition shall not entertain any more interlocutory applications touching on the winding up petition save with leave of the court to avoid unnecessary bites at the cherry by the claimants and escalating the cost of litigation.

It is so ordered.

Dated, Delivered and Signed in open court at Kajiado this 8th November, 2018.

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R. NYAKUNDI

JUDGE

Representation

Mr. Karanu Advocate for Petitioner/Respondent present

Mr. Okoth Advocate for Applicant/Defendant - present

Mr. Okoth Advocate holding brief for Mr. Muthuri and Mr. Adano Advocates for Interested Parties

[1] [1990] KLR 559.

[2] No. 6 of 2012.

[3] No. 3 of 2015.