



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 214 OF 2016**

**JAMES KIARIE KAMAU.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. The Application herein is a Notice of Motion dated 2<sup>nd</sup> June 2016. It is brought under Order 40 Rule 1, 2, 3, 4 & 5 of the Civil Procedure Rules, Sections 3 & 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, the Inherent Jurisdiction of this Honourable Court and all other enabling provisions of the Law.

2. It seeks for Orders:

- *That the Honourable Court be pleased to issue an Order for mandatory injunction compelling the Defendant to cause the Plaintiff's name to be removed from Credit Reference Bureau's list of Defaulter pending the hearing and determination of this Application and/or suit.*
- *That the Honourable Court be pleased to issue an order of injunction to restrain the Defendant from charging any interest on the alleged mortgage scheme for Account Number 202505358 from the date of eviction (15<sup>th</sup> July 2015) pending the hearing and determination of this Application and/or suit.*
- *That the Honourable Court be pleased to issue an order of injunction restraining the Defendant from taking any action prejudicial to the Applicant in recovery and/or attempted recovery of the alleged outstanding amounts in the alleged mortgage scheme for Account Number 202505358 pending the hearing and determination of this Application and/or suit.*
- *That the Honourable Court be pleased to issue an order for mandatory injunction order compelling the Defendant to render statements of accounts of monies received and the alleged outstanding amount in regard to the alleged mortgage scheme for Account Number 202505358.*
- *That the Defendant/Respondent be ordered to pay the costs of this application.*

3. It is supported by the grounds on the face of it and the Affidavit sworn by **JAMES KIARIE KAMAU**. The Application was served for inter-parties hearing on the 16<sup>th</sup> June 2016, but it was heard ex parte as the Respondent did not respond to it and/or appear for the hearing.

4. The Applicants case is that on or about the 14<sup>th</sup> day of June 2011 the Defendant herein and the Applicant entered into a sale agreement with one Margaret Waithira Kinuthia wherein the Applicant was to purchase from the said Margaret Waithira Kinuthia. The land was a parcel of land known as Title No. **KIKUYU KIKUYU/BLOCK 1/1243** at an agreed price of Kshs.11,500,000/=. That the Applicant was to pay 10% of the purchase price being Kshs.1,150,000 while the Defendant herein, was to finance payment of the balance of 90% of the purchase price being Kshs.10,350,000. The Defendant was to pay **directly** to the seller, and **ONLY** after the Defendant had conducted all the due diligence including but not limited to conducting a search at the Lands Registry and confirming that Margaret Waithira Kinuthia was the registered owner of all that parcel of land at the time of the transaction. The Defendant successfully registered a Charge in its favour over the land which was transferred into Applicant's name. The Applicant then took possession and occupation of the said land and the premises thereon and carried further and substantial developments while repaying the monies paid by the Defendant to Margaret Waithira Kinuthia. However, on or about 12<sup>th</sup> July 2013, officers of Kenya National Highways Authority [hereinafter referred to as **KENHA**] earmarked the house for demolition citing that KENHA had compulsorily acquired the Plot from Margaret Waithira Kinuthia and fully compensated her and that her title ought to have been cancelled. The Applicant was forced to move out of his lawfully acquired premises on 15<sup>th</sup> July 2015 and seek alternative residence at extra costs some which are recurrent costs. He then filed a complaint over the fraud by the said Margaret Waithira Kinuthia with the relevant authorities and she was arrested and is currently being prosecuted at **Kikuyu Law Court in Criminal case number 848 of 2013**. He also filed a recovery suit **Nairobi High Court Civil Suit No. 299 of 2013** against Margaret Waithira Kinuthia, KENHA, Ministry of Lands, Housing and Urban Development, The National Land Commission and the Honourable Attorney General. For Nine months after eviction, the Applicant continued servicing the loan of Kshs.10, 350,000 until he could no longer afford it. Unfortunately, the Defendant has been subjecting him to unwarranted pressure and demands for repayment of the mortgage. He appealed to the Defendant to suspend the loan repayment but his pleas have been futile hitherto. Subsequently Defendant forwarded his name to the Credit Reference Bureau (CRB) and directed its Debt Recovery Unit to take appropriate measures against him. He argues that the fraudulent actions of Margaret Waithira Kinuthia affect both his title and the Defendant's Charge over the title, that is that if he does not have a good title, it follows logically that the Defendant has no valid Charge over a bad title and therefore the Defendant has no right to label him as a loan defaulter and report him to the Credit Reference Bureau on the basis of the Charge dated 22<sup>nd</sup> July, 2011. Those are the facts, in so far as the Applicant's case is concerned.

5. I have considered the Application based on the grounds, and the Affidavit sworn in support thereof, and the Annexures thereto I find that, the issue for determination is whether the Application has merit and meets principles for granting the orders sought for. As aforesaid, the Application was served but was heard un-opposed due to non-appearance of the Respondent, and or filing of any response thereto.

6. The celebrated case of **Geilla vs Cassman Brown & Co. Ltd 1973 EA 358** clearly lays down the principles that govern issuance of Injunctive Orders as follows:-

- *Firstly, the Applicant must show they have a prima facie case with a probability of success.*
- *Secondly, the Applicant must show that they will suffer irreparable injury, which cannot be adequately compensated by an award of damages.*
- *Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.*

7. If indeed it is true, based on the facts herein that the Defendant charged a property which was subject to Government acquisition and the same was not detected during the due diligence process, then case will require to be heard fully to determine the validity of the Charge over the paid property herein.

8. The Applicants case is not rebutted. He alleges name and personal details have already been forwarded to Credit Reference Bureau, evidenced by Annexure to the supporting affidavit marked "JKK-7". I have looked at the said annexure. It is a letter dated 4<sup>th</sup> August 2014 entitled "**INTENTION TO LIST YOUR ACCOUNT(S) INFORMATION WITH CREDIT REFERENCE BUREAU (CRB)**".

There are two CRBS referred to in that letter namely, the **Credit Reference Bureau Africa Ltd** and **Metropol Credit Reference Bureau**. It's not clear to me whether the **"intention"** has been actualised as no evidence was provided to that effect, save for averment by the Applicant under paragraph 15 of the Supporting Affidavit, where depones that his name has been so forwarded. In that regard he seeks in prayer 2, that a **Mandatory Injunction** be issued to compel the Defendant to cause his name to be removed.

9. In relation to a Mandatory injunction two issues arises, can a Mandatory injunction be issued at an Interlocutory Stage? And more so, can it be issued to compel a party to do a **"thing"** or carry out an action, in particular **"removing a name"** from a list of defaulter? Can an Injunction order issue against a person not a party to the suit. I say so because none of the CRBS referred to are parties to this matter.

10. A mandatory Injunction is a final order. It cannot be issue at an Interlocutory stage. Indeed the order sought for under paragraph 2 of this Application is similar to prayer (9) in the Plaintiff. If I were to grant prayer 2 of the Application then prayer 9 in the Plaintiff will be spent.

11. I make reference to the cases of in relation to grant of Mandatory injunction at interlocutory stage:

- *Yugo v Tuiya & Another (1986) KLR 726*
- *Kenya Breweries Ltd v Okeyo (2002) 1 EA, 109*
- *Royal Media holding*

12. Again, my understanding is that, an Injunctive order prohibits the doing of a thing. It does not compel the performance of an action. In my opinion, the orders applied for expunging the name of the Applicant, as prayed, should have been sought for immediately the Applicant was issued with the letter of the **"intention"** to list him with the Credit Reference Bureau. After the same has been done, Injunction order will not serve any purpose. You do not shut stable door after the horse has bolted. Similarly the Credit Reference Bureau is the one that has listed the Applicant. That Credit Reference Bureau is not a party to this suit, the question is, and will an order directing the Defendant to cause the name of the Applicant to be removed from Credit Reference Bureau's list of defaulters, be effective for reasons stated. I declined to grant prayer 2 of the Application.

13. As regards prayer 3, I have held that generally an Injunction order, will not be granted at an Interlocutory stage and neither can it be issued to enforce contractual rights between the parties. Such rights Cannot be determined on sworn by the Applicant without full hearing neither can an Injunction order be used to restrain a party from exercising a right under the contract, when such a right can be enforced within the provisions of the said contract. In view of the aforesaid, I decline to grant the order sought for under prayer 3 of this Application

14. I now turn to prayer 4 of the Application and I find that it is supported by the facts outlined herein. The issue of the ownership of title herein, legitimacy and or validity of the charge are matters for trial and or for determination. I grant prayer 4 the same pending the hearing and determination of the suit.

15. Finally as regards prayer 5, I find from the matters deponed herein, the Applicant has not made any request for the bank statements and the request has been declined. At least no evidence to that effect has been attached to the Affidavit in support of the Application. To the contrary I find there are statements of accounts annexed to the Supporting Affidavit. The Applicant requires a **"mandatory"** injunction order to be provided with the statements of accounts I disallow that prayer.

16. The upshot of all this is that:

- *The Application dated 2<sup>nd</sup> June 2016 is allowed in terms of prayer 4 thereof only.*
- *The other prayers 1, 2, 3, and 5 are not granted.*
- *Costs of the Application to the Applicant.*

Ordered accordingly

**READ, DELIVERED AND DATED, AT NAIROBI IN AN OPEN COURT THIS 8<sup>th</sup> DAY OF JULY 2016.**

**G. L. NZIOKA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Mwathe for the Plaintiff/Applicant

Mr. Kibe for the Defendant/Applicant

Teresia – Court Clerk