



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCCC NO. 98 OF 2015

MOHAMMED OMAR MWACHILI.....1ST PLAINTIFF

SAAAD ABDALLAH BOGA.....2ND PLAINTIFF

WESA KARUKA WESA.....3RD PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

KATIBA SALIMU JUMA.....2ND DEFENDANT

RULING

Before the court for determination is the plaintiff application dated 2nd July, 2014 seeking orders of injunction directed at the defendants and restraining them from entering upon, trespassing, alienating, advertising for sale, auctioning or in any dealing with the plaintiff position of land forming part of parcel of Land known as L.R. No. KWALE/LUNGALUNGA/759 pending the hearing and determination of the suit.

The application is premised on the affidavit of MOHAMED OMAR MWACHU and on grounds that the plaintiffs purchased portions of the suit lands from the 2nd defendant and have since constructed thereon residential houses which they occupy with their families as only houses; that while there as such purchasers, the 2nd defendant offered the parcel of land to secure the borrowing of a 3rd party and that having so charged the property there was default and the 1st defendant then commenced the process of realisation of the security based on a valuation report which has taken into account the developments by the plaintiffs

As a consequence of the said facts the plaintiff now have the apprehension that the defendants have set in motion a process, which if not stopped by an injunction, will disposes them of their property in the portions of land and the houses developed thereon.

The 2nd defendant has filed a statement of defense and a replying affidavit in which he acknowledges having charged the suit property to secure the borrowing of SAMUEL OTIENO OLAGE but contends that in charging his land he was tricked by the said borrower that within six months the borrower would replace the suit title with his own. The said defendant equally admits the contention by the plaintiff that they bought portions of the suit land and have developed same and live thereon. In totality the 2nd

defendant doesn't contest the plaintiff suit but support it and adds that he has sued the said borrower and two other persons in **Mombasa CMCC No. 1600 of 2013** seeking injunction against sale and an order compelling the borrower to pay the sum borrowed from the bank.

On its part the 2nd defendant has equally filed a statement of defense and a replying affidavit whose gist is that it only knows the said defendant as the only registered proprietor of the suit land and not the plaintiffs. It adds that the borrower having failed to service and repay the loan advanced, its rights as chargee to realise the charged property has accrued and it is entitled to proceed and sell the security to recover the debt owed. To the plaintiffs' pleaded rights as purchasers, the 1st defendant contends that the documents of purchase having not been registered do not qualify as instruments effecting sale of land in terms of section 43(1) and (2) of the Land Registration Act. On those grounds the 1st defendant contends that the plaintiffs' suit and application are candidates for dismissal and should not be allowed.

When the matter appeared before Hon. Anne Omollo, J, on the 22.7.2015, the court directed that the matter be transferred from the Environment and land Court to the High Court being a dispute over a legal charge. It was additionally ordered that the parties file and exchange written submissions in respect of the application now under consideration. Pursuant to those directions, the plaintiff filed its submissions on 20.8.2015 while the defendant did so on the 14.9.2015 and both attended court on the 4.12.2016 to highlight the filed submissions.

Submissions by the Plaintiff

In the written submissions as highlighted in court, the Plaintiff contends that the fact that they bought the portions of the land prior to the same being charged, and having been in occupation at the time the charge was created, the 1st defendant was in law bound to establish the actual status of land prior to creating the charge and seeking to exercise the right of sale as a chargee. Reliance was placed on the provisions of section 96, 97 and 98 of the Land Act 2012. The Plaintiff then relied on the decided cases of **Gielu =vs= Casrein Brown [1973] EA 358 Mrao Limited =vs= First America Bank [2003] eKLR** and **Kisauni Holdings Limited =vs= Fidelity bank Limited [2013] eKLR** to support their application.

Submissions by the 1st defendant

The 1st defendant largely reiterated its contentions in the defense and replying affidavit to the effect that the plaintiff have no registered interests over the land and that documents exhibited did not disclose proprietorship besides asserting that it had complied with the law regarding issuance of statutory notices before having the property valued and offered for sale.

Emphasis was equally placed on the provisions of sections 24 and 25 of the Land Registration Act as well as section 43 of the Land Act and lastly that the bank was not party to the contract of sale between the parties and that it was not aware about the same. The defendant then relied on the decision in **Palmy Company Limited =vs= Consolidated bank of Kenya Limited [2014] eKLR** to the effect that the chargee's right of sale is not a favour by the charger but a statutory right, **Mrao =vs= First American Bank Limited, [2003] eKLR** to the effect that an injunction will only issue to a charge if it demonstrate that damages would not be an adequate remedy as well as the decision **Argos Furnishers Limited =vs= Eco Bank Kenya Limited** to the effect that the more the debt delays repayment the more the debt grows and outstrips the value of the security.

The 1st defendant concluded his submissions by pointing out the existence of a suit in the Lower Court between the 2nd defendant, as plaintiff and against the 1st defendant and two others in which an application for injunction was dismissed.

Analysis and determination

I have taken into account the pleadings by the parties as well as the affidavits filed, the written submissions supported with authorities and the oral submissions. I have equally taken time to read the

statutes referred to by both parties.

Being an application for orders of injunctions, the first stop must be at the doors of the decision of **Giella =vs= Cassman Brown [1973] EA**. The Plaintiff must demonstrate that he has a *prima facie* case with probabilities of success; that he stands to suffer an irreparable injury incapable of repair by an award of damages if the injunction is not granted and; should the court be in doubt on the two preconditions, the court then considers the balance of convenience of the parties.

Before I venture into those crystallised principles, it is noteworthy to take note of the 1st defendant's contention that the plaintiff documents exhibited to show their proprietary interests over the suit land are irreparable of acting or showing a *prima facie* case and the reliance on section 43 of the Land Registration Act. In my appreciation of that provision, it relates to the process of transferring an interest in land. It does not pretend to be the only way of creating an interest in land. I so hold having taken into account the fact that section 43 has been cited without regard to section 30, Land Act, which provides for actions on contracts for disposition of interests in land and extends to protect interest created by operation of law with regard to resulting, implied and contractive trusts. In the present case, the plaintiff have demonstrated that they had, by written agreements, duly witnessed, purchased identified portions of the suit land from the 2nd defendant and paid for the consideration in full. Equally section 28(i) of the Land Registration Act, has that very wide category of rights which need no registration as overriding interest disclosed as **"any other rights provided for under any written law"**. To this court the plaintiff have demonstrated an interest in the suit land which cannot be justly ignored before giving them a chance to canvass on the merits.

I have pointed out that the right to enforce a contract for the disposal of an interest in land is conferred by section 30 of the Land Registration Act. That right is further recognized by section 96 (3) i of the Land Act imposing an obligation on a chargee to serve the notice of intention to sell on any person known to have a right to enter on and use the land so charged. These facts and obligations were well known to the 1st defendant/applicant because by the letter dated 28.2.2013 to the valuers, **annexure "RC 5"** in the 1st defendant's replying affidavit, it sought to know from the valuers, among other facts, the occupancy of the property, whether self-occupied or rented, the number of occupants and the relationship between the owner and the occupants. Indeed when the valuer compiled his report dated 11.6.2013 it had this to tell the 1st defendant:

"We did note that the property is subdivided into four sub plots and the owners have developed the same. The registered owner has developed his sub plot up to the foundation level. Whereas the owner the other three sub- plots might not have legal documents to prove ownership they nevertheless have an interest in the property which interest might hinder sale of the property in a public auction..."

In our valuation here below we have considered all the development therein whether owned by the Registered owner or not". (emphasis provided)

From the instructions to the valuer and the report by the valuer, it is clear to the court that the 1st respondent was aware of its obligation and became aware of the existence of the plaintiff and their interests over the suit land. Having so become aware the 1st defendant was under obligation under section 96 (3) 1 to serve the statutory notice by, among other modes, fixing it at a conspicuous part of the property. This it did not do. That failure is in breach of the law and in terms of the Court of Appeal decision in *Mrao =vs= First American Bank Limited (Supra)* it was an infringement that entitles the plaintiffs to an injunction.

In the instant matter the plaintiff lay claim to property on account of the purchase price and the development effected by them on the portions of land, the value of the sub-plots. It must always be remembered that it is unconstitutional to arbitrarily deprive a citizen of his property. Under Article 260 the term property is defined to include '*any vested or contingent right to or interest in or a rising from land, or permanent fixtures on or improvements to land*'. With that definition, it cannot be gainsaid that

the plaintiffs have no interest in the suit land.

The foregoing findings and conclusions lead the court to conclude that *prima facie*, the plaintiff have demonstrated that they have a case that on the face of it is neither frivolous nor ingenuine but a real dispute. I therefore find and hold that the first threshold for grant of a temporary injunction being the establishment of a *prima facie* case has been met.

The next consideration is whether damages would be an adequate remedy to the plaintiff claim. It is in the pleadings that the plaintiff have erected and developed on the land residential dwelling houses. I have equally found as above that the plaintiffs right to be served with a notice under sections 96 of the Land Registration Act has been infringed as much as the fact that demonstratively the plaintiffs have contingent interests on the land which are in the nature of property to be protected from arbitrary deprivation under Article 40 of the constitution.

In opposing the application Mr Mugambi forcefully submitted that the property has been valued at a known value and that should the plaintiff succeed at trial there would be no difficulty in assessing the quantum of damages payable. On my part, I say woe unto the day when a court of law will say ' *you may as well step on everybody's toes and deconsecrate their titles and rights provided you will pay damages*'. On that day we shall encounter the end of what we pride ourselves with as the rule of law. We, shall, in that event, then call it anything, but the rule of law. My finding is that one cannot take a violation before hand for damages in return. That would be the day this society would turn into one in which it is not the law nor the fundamental rights and freedom that matter but the financial muscle of an individual or institution. The less financially strong would then be delegated to the realm of being down trodden.

This path less been taken by many judges in judicial pronouncements and I only need to reinstate the words of Warsame, J, in **Olympic Sports House Limited =Vs= School Equipment Centered Limited[2012] eKLR** when the Judge said:

“On my part let me restate that damages is not automatic remedy when deciding whether or not to grant an injunction. Damages is not and cannot be substituted for loss which is occasioned by clear breach of the law, in any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be compelled to take damages in lieu of his crystalised right which can be protected by an order of injunction”.

More recently Gikonyo J while following the above decision and that by Ringera J in **Waithaka =Vs= ICDC [2001] eKLR 381** held in his decision in **Hassan Zubedi =Vs= Patrick Mwangangi Kibaiya & Another [2014eKLR]**.

“The court should take judicial notice of the fact that land itself is a unique commodity and there is no land like any other. The Respondent seems to argue that the applicants claim is quantifiable and therefore he is not entitled to an injunction; it is our humble submission that the Respondents position is hollow and without merit. Even where the court finds that damages are adequate, that in itself does not disentitle the applicant to the interim relief sought in the nature of a temporary injunction”

I have said enough to underscore the fact that as designed in equity and coded in our statute, the remedy of a temporary injunction is intended to preserve a right pending the determination of a litigants dispute presented before court. That to me is the only meaning of order 40 Rules 1a & 2 which provide:

" 1. 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

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. the court may by order grant a temporary injunction to restrain such act,....."

In the instant case the 1st defendant sought to know from the valuer who else other than the 2nd defendant, as its chargor, had any interest in the land and the value indeed identified the interests of the plaintiffs as owners without title. That was enough for the 1st defendant to find out more even if that only involved bringing to the plaintiff attention the 1st Defendant's interests as chargee over the land by service of notice. The 1st defendant did not seek to follow that path. In doing so, I find that the intention was to overreach or steal a march on to plaintiffs. Such is not to be encouraged but must be stopped.

I therefore invite the remedy of a temporary injunction which I hereby grant to the Applicant pending the hearing and determination of the suit.

In order to move the case forward and noting that parties have filed, their witness statements and documents, I direct that this matter shall come back to court on the 29.7.2016 for case conference.

I award to the plaintiffs /applicants the costs of the application

Dated and delivered this 15th day of July, 2016.

In the presence of

N/A for the Plaintiff/Applicant

N/A for the 1st Defendant/Respondent

N/A for the 2nd Defendant/Respondent

P.J.O. OTIENO

JUDGE