



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 511 OF 2017

SOKONO ENE YONKO.....PLAINTIFF

VERSUS

MOSES SHONKO.....1ST DEFENDANT

SPEED CAPITAL LTD.....2ND DEFENDANT

JOHN M. MURAGURI.....3RD DEFENDANT

KIMERIA OLE SILANTOI.....4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion dated the 30th April, 2020 brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 1(a), 2, 4 & 8 of the Civil Procedure Rules. The Plaintiff seeks orders of temporary injunction restraining the Defendants from selling or disposing by public auction or private treaty land parcel number KJD/ OLCORO ONYORE/ 19863, hereinafter referred to as the 'suit land' pending the outcome of the suit. The application is premised on the summarized grounds that the Plaintiff is the registered proprietor of the suit land and in occupation thereon. The Defendant have taken advantage of the current COVID 19 pandemic to advertise the suit land for sale which is scheduled on 5th May, 2020. The Defendants' power of sale has not crystallized bearing in mind that the Plaintiff is not indebted to them. The Plaintiff is in real danger of losing the suit land and this suit might be rendered nugatory if the Defendants proceed. The Defendants actions are against the doctrine of *Lis pendens*.

The application is supported by the affidavit of SOKONO ENE YONKO where she reiterates her claim above.

The 2nd Defendant in opposition to the Application filed Grounds of Opposition dated the 15th June, 2020 where it contends that the application is res judicata and the Plaintiff is subverting judicial process in not scheduling the main suit for hearing. Further, that the application is scandalous, frivolous as well as vexatious and not maintainable. It insists the application is mala fide, blatant abuse of the court process, made in bad faith to prevent it from exercising its statutory power of sale. Further, that it is tainted with illegality and the equitable remedies sought cannot be granted.

The Plaintiff and the 2nd Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 30th April, 2020 including the rivaling affidavits and submissions, the only issue for determination is whether the Plaintiff is entitled to the orders of temporary injunction pending the outcome of the suit.

The Plaintiff in her submissions explain that the Defendants are prepared to steal a match against her as this matter was set for pretrial directions on 26th May, 2020. Further, that the doctrine of *lis pendens* is applicable herein. She contends that she has met the threshold set for granting injunctive reliefs. To buttress her averments, she has relied on the following decisions: **Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358; Robinson V Pickering (1881) 16 Ch. D. 660; Mawji Vs US International University & Another (1976) KLR 185 and Grace Chemutai Koech Vs Francis Kiplangay Chebiror & 2 Others (2018) eKLR.**

The 2nd Defendant submitted that the instant application is *res judicata*. Further that the Plaintiff has not established a *prima facie* case to warrant the orders sought and the doctrine of *lis pendens* does not apply in this instance. In its submissions it relied on the decisions of **Margaret Njoki Migwi Vs Barclays Bank of Kenya Ltd (2016) eKLR; Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358; Mrao Vs First American Bank of Kenya & 2 Others (2003) eKLR; Palmy Company Limited Vs Consolidated Bank of Kenya Limited (2014) eKLR; Showind Industries Vs Guardian Bank Limited & Another (2002) 1EA 284 and Joseph M Mbuva V Pioneer Building Society Limited (In Receivership) & Peter Karanja Ngure (2016) eKLR** to support its arguments.

The principles of granting interlocutory injunction are well established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358.**

As to whether the Plaintiff has established a *prima facie* case with a probability of success, I will proceed to analyse the facts before me. In the instant case, the Plaintiff had initially filed an application dated the 1st October, 2019 seeking injunctive reliefs against the Defendants from selling the suit land claiming she never guaranteed the loan given to the 1st Defendant. This application was dismissed on 17th December, 2019. The 2nd Defendant proceeded to advertise the suit land for sale by public auction culminating in the Plaintiff filing this instant application seeking similar orders and arguing that the Defendants intend to steal a match against her since the matter is pending for pre trial directions. Further, the Defendants were violating the doctrine of *lis pendens*. The 2nd Defendant insists the application is *res judicata* as it had already been dealt with.

The principle of *res judicata* is provided for under section 7 of the Civil Procedure Act which stipulates thus: ‘ **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**’

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** the Court relied on the decision in **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that: -

‘ **in order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have**

been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.'

Further, in the case of **Margaret Njoki Migwi Vs Barclays Bank of Kenya Ltd (2016) eKLR**; the Court of Appeal while dealing with the issue of res judicata favourably cited the decision in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** and stated that: '.....The Court further posed the question whether a matter of interlocutory nature decided in one suit may be subject of another similar application in the same suit and answered it in the negative. It further posed the question whether the principle of res judicata applied to an application heard and determined in the same suit and answered it in the positive. It concluded thus: 'there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for.'

Based on the facts before me and in relying on the above cited legal provisions as well as associating myself with the quoted decisions, I find that the instant application is res judicata as the court had already heard and determined the Plaintiff's application dated the 1st October 2019 which sought to restrain the Defendants from selling the suit land, vide it Ruling dated the 17th December, 2019. It is my considered view that the instant application hence amounts to an abuse of the court process. The Plaintiff further contends that the Defendants intend to steal a march as the matter had been set down for pre trial directions and this contravenes the doctrine of lis pendens. In associating myself with the decision of **Joseph M Mbuva V Pioneer Building Society Limited (In Receivership) & Peter Karanja Ngure (2016) eKLR** where the Court held that the doctrine of lis pendens was unavailable where there were no injunctive orders barring the sale of suit land and applying it to the circumstances at hand, I find that the said doctrine of *lis pendens* is inapplicable to the Plaintiff at this juncture, since there were no orders whatsoever barring the 2nd Defendant from selling the suit land.

In the circumstances, and in line with the principles enshrined in the case of **Giella Vs Cassman Brown (1973) EA 358**; I find that the Plaintiff has not established a prima facie case to warrant the orders of injunction. Further, in associating myself with the decision of **Nguruman Ltd v Jan Bonde Nelson & 2 others**, Civil Appeal No.21 of 2014(UR) where the Court held that:

"It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol.I EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without hurdles in between."

I will not consider the other two conditions as the Plaintiff failed to meet the first condition for the grant an injunction.

It is against the foregoing, that I find the Plaintiff's Notice of Motion dated the 30th April, 2020 unmerited and will proceed to dismiss it with

COSTS.

Dated signed and delivered via email this 9th Day of July, 2020

CHRISTINE OCHIENG

JUDGE