



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 1022 OF 2013**

**INTEX SECRETARIAL BUREAU LTD.....PLAINTIFF**

**VERSUS**

**ASHA ALI MANSUR.....1<sup>ST</sup> DEFENDANT**

**KIMAIGA ENTERPRISES.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 23<sup>rd</sup> August 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from levying distress for rent against the Plaintiff/Applicant pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Symon Wachira Mwaniki, a director of the Plaintiff/Applicant, sworn on 23<sup>rd</sup> August 2013 in which he averred that the Plaintiff is the registered proprietor of the parcel of land known as L.R. No. 209/1296/44 (hereinafter referred to as the “suit property”) where he resides with his family. He disclosed that he has been having a legal dispute with Equity Bank Limited with respect to the suit property which dispute is the subject matter in **HCCC No. 752 of 2009** which is pending before this honorable court awaiting final determination. He further disclosed that sometime in August 2009, the said Bank threatened to sell the suit property by way of public auction allegedly to recover a loan in arrears of Kshs. 3,113,344.40. He further disclosed that injunctive orders given in that suit were discharged by Justice Njagi on 8<sup>th</sup> April 2011 and the security realized at a price of Kshs. 8 million from an undisclosed purchaser. He averred further that it is only on 15<sup>th</sup> August 2013 that he received a letter from the 1<sup>st</sup> Defendant’s advocates when he came to learn of the existence of the 1<sup>st</sup> Defendant as the purchaser of the suit property. He averred further that his advocates wrote to the 1<sup>st</sup> Defendant’s advocates seeking further information and clarification on the 1<sup>st</sup> Defendant upon which they received a letter written to the 2<sup>nd</sup> Defendant instructing them to levy distress for rent arrears of Kshs. 1,470,000/-. He concluded by stating that he was apprehensive that this is a ploy to throw them into panic to vacate the suit property to the 1<sup>st</sup> Defendant when it is not yet clear whether she is the alleged purchaser of the same and/or the registered owner of the suit property.

The Application is contested. The 1<sup>st</sup> Defendant/Respondent, Asha Ali Mansur, filed her Replying Affidavit sworn on 20<sup>th</sup> September 2013 in which she averred that she purchased the suit property from

the Bank upon its exercise of its statutory power of sale. She annexed copies of the sale agreement and transfer by chargee documents in support of her assertion. She averred further that she obtained all necessary approvals to have the suit property transferred in her favour and annexed copies of the stamp duty declaration form, payment of stamp duty and clearance certificate from the Nairobi County Government. She added that upon full compliance, the Land Registrar transferred the suit property to her and she is now the registered proprietor thereof. She further stated that she has since carried out a search at the Lands Office, a copy of which she annexed, which indicated that she is the registered owner of the suit property. She stated further that the Plaintiff/Applicant's rights over the suit property were extinguished pursuant to the sale and transfer thereof to herself on 12<sup>th</sup> November 2011. She further averred that the Plaintiff/Applicant does not deny the fact that he executed a legal charge over the suit property in favour of the bank or that the bank lent him money. She further stated that the Plaintiff/Applicant failed to establish whether he serviced his loan and he cannot enjoy equitable benefits as the debt is not disputed. She concluded that stating that the Plaintiff/Applicant does not have any proprietary rights over the suit property capable of being protected by an equitable remedy of injunction and further that his claim lies in damages against the bank.

Both the Plaintiff and the 1<sup>st</sup> Defendant filed their respective written submissions.

The issue that I am called upon to determine is whether or not to grant the Plaintiff/Applicant the order of temporary injunction which he seeks. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”**

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

**“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”**

This seems to me to be a pretty straightforward matter for determination. The Plaintiff/Applicant concedes to having received loan facilities from Equity Bank Limited and offered a legal charge over the suit property in favour of the said bank. The Plaintiff disclosed that the said bank was successful in exercising its statutory power of sale in respect thereof whereupon the suit property was sold to an unknown person. The Plaintiff disclosed that he remained in possession of the suit property until he recently received communication from the 1<sup>st</sup> Defendant's advocates requesting him to pay up rent arrears amounting to Kshs. 1,470,000/-. On the other hand, the 1<sup>st</sup> Defendant has come out clearly to claim ownership of the suit property. She asserted that she purchased the suit property from Equity Bank Limited way back on 12<sup>th</sup> November 2011. She annexed documents in relation to the transfer of the suit property to herself, including a copy of her Certificate of Title. The title document was issued under the provisions of the **Registration of Titles Act Cap 281 Laws of Kenya** (now repealed). **Section 23(1)** of the **Registration of Titles Act** (repealed) provides as follows:

**“The certificate of title issued by the registrar to a purchaser of land upon a transfer ... shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof ... and the title of that proprietor**

**shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”**

**The Land Registration Act No. 3 of 2012 under section 26(1)** more or less reproduces the provisions of **section 23(1)** of the **Registration of Titles Act** (supra) save that it extends the grounds on which a registered title could be challenged to include where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

**Section 26(1)** of the **Land Registration Act** provides as follows:

**“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-**

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The Plaintiff/Applicant has not impugned the 1<sup>st</sup> Defendant’s title deed on any grounds whatsoever. It would appear clear to me, even at this interlocutory stage, that the Plaintiff/Applicant concedes that the suit property previously belonged to it but has since been sold by Equity Bank Ltd to an unknown person in exercise of its statutory power of sale. On that ground, therefore, the Plaintiff/Applicant admits that it is no longer the registered proprietor of the suit property. Upon his own confession, Mr. Symon Mwaniki admits that he only came to know the identity of the purchaser of the suit property recently when he received a letter from the 1<sup>st</sup> Defendant’s advocates. As matters stand, the Plaintiff/Applicant appears, on good authority, not to have any proprietary rights over the suit property capable of being protected by way of a temporary injunction. My finding is that the Plaintiff/Applicant has failed to establish that it has a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

**DELIVERED AND SIGNED IN NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER 2015.**

**MARY M. GITUMBI**

**JUDGE**