



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 78 OF 2019

VIMIT CONVERTERS LIMITED.....PLAINTIFF

VERSUS

AIMA ENTERPRISES LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 15th August, 2019 brought pursuant to sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act; Order 40 Rule 1, Order 51 Rules 1& 3 of the Civil Procedure Rules. The Plaintiff seeks orders of temporary injunction against the Defendant in respect to land parcel number Kajiado/ Kaputiei North/ 14774 measuring 2.02 hectares hereinafter referred to as the 'suit land', pending the hearing and determination of this suit. Further, that the OCPD Kajiado/ OCS Isinya Police Station to provide security to the Plaintiff 's representative and or directors to access the property and exercise their legal right of enjoyment. The application is premised on the grounds on the face of it and the supporting affidavit of MAHENDRA HARIA where he deposes that he is a director of the Plaintiff which the register proprietor of the suit land. He confirms that initially the Defendant was the registered proprietor of the suit land but charged it to African Banking Corporation Limited ('ABC Bank') to secure certain amounts advanced to it but it failed to fulfil its obligations as per the Charge Document culminating in the bank exercising recovery options under the said agreement. He explains that the Plaintiff came into possession of the suit land through a private sale by ABC Bank in exercise of its statutory power of sale and a transfer was made in its favour. Further, that the suit land was registered in the Plaintiff's favour and title deed issued to that effect on 25th February, 2019. He insists the Plaintiff is the absolute proprietor of the suit land. He contends that on 9th August, 2019 the Defendant without justifiable reasons or any colour of right invaded the suit land gaining unlawful access through an auctioneer acting as its agent in exercise of illegal power to levy distress for rent. Further, the said agent attached assorted goods worth over twenty million, all belonging to the Plaintiff's tenant housed within the suit land which the Auctioneer intends to sell by 24th August, 2019 unless the said tenant pays the rent arrears of Kshs. 1,200,000 including interest, auctioneer's charges as well as legal fees. He avers that the Plaintiff's tenant has no subsisting lease agreement with the Defendant and has dutifully paid rent to the Plaintiff. Further, the Defendant misled the Court vide Misc Application No. 22 of 2019 into granting orders for attachment and illegally instructed his agents messrs Pyramid Auctioneers to unreasonably cause disturbance including mayhem on the Plaintiff's tenant whilst knowing that it did not have proprietary rights over the suit land. He reiterates that the Defendant's continuous trespass over the suit land will jeopardize the Plaintiff's legal and equitable interest in the land. Further, that the Plaintiff stands to suffer irreparable harm if the orders sought are not granted.

The Defendant/Respondent opposed the application and filed a replying affidavit sworn by MOHAMED ABUKAR its director where he deposes that the Defendant is still the registered proprietor of the suit land as per the title issued on 13th March, 2012. He confirms that the Defendant did execute a charge on 16th October, 2012 in favour of the African Banking Corporation for banking facilities and the advance of the sum of Kshs. 285,000,000/=. Further, that the said bank failed to honour the terms of their lending to the Defendant nor advanced the agreed sum and thereafter purported to exercise its statutory power of sale over the suit land to recover unspecified sums due. He insists that the Plaintiff has failed to disclose the process leading to its acquisition of the suit land. Further, there is a raging dispute as to the validity and legality of the process involved in the purported exercise of the statutory power of sale. He insists there are two competing titles in respect to the suit land. He contends that the African Banking Corporation did not comply with the proper legal process in its purported sale of the suit land to the Plaintiff, hence the intended sale was illegal, null as well as void and of no effect. He challenges the Transfer Document dated the 11th February, 2019 and contends that it is incurably defective as it indicates the Charge is dated 16th October, 2019. He claims the Plaintiff has not exhibited a Sale Agreement between itself and the African Banking Corporation and not demonstrated how payment for the suit property was effected. He avers that the purported lease to Surge Limited is also a clear fabrication as the documents purported to have been executed for the lease dated 1st June, 2019 are dated long after the said lease had been executed. Further, the Plaintiff has not exhibited any evidence of Surge Limited rent payments. He explains that Surge Limited has sued the Defendant in Kajiado Chief Magistrate's Court Civil Case No. 157 of 2019 where the Plaintiff has been allowed to join as an interested party. He reiterates that the Plaintiff has failed to acknowledge that the Defendant was at all material times the landlord of Surge Limited.

On 24th October, 2019, the Court directed the parties to file written submissions to canvass the instant application and it is only the Plaintiff that complied.

Analysis and Determination

Upon consideration of the instant Notice of Motion Application including the rivalling affidavits and Plaintiff's submissions, at this juncture the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The Plaintiff in its submissions reiterated its claim and contended that it has established a prima facie case as it is the registered proprietor of the suit land. Further, that the recourse of a Chargor rests with payment of damages by the Chargee. It insisted the Defendant's acts violate the Plaintiff's right to peaceful enjoyment of the suit land. It relied on the decisions of **Simon Njoroje Mburu V Consolidated Bank of Kenya Ltd (2014) eKLR; Mrao Limited Vs First American Bank Limited & 2 Others (2003) KLR 125; Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (2014) eKLR** to buttress its averments. It further submitted that it stands to suffer loss and damage which cannot be compensated by an award of damages. Further, that the Defendant has a recourse to resort to following up for damages if any, from the ABC Bank Ltd. It contended that the Defendant has never challenged the sale of the suit land. It reiterated that the balance of convenience tilted in its favour as they had demonstrated how they acquired the suit land and how the Defendant had trespassed thereon. It stated that they had satisfied the principles established in the case of **Giella Vs Cassman Brown and Co. Ltd.**

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

In the first instance as to whether the Plaintiff has demonstrated a prima facie case with probability of success, I wish to make reference to the case of **Mrao Ltd Vs First American Bank of Kenya Limited (2003) KLR 125** where the Court of Appeal had defined a prima facie. The fulcrum of this suit revolves around a claim over a parcel of land between the Plaintiff and the Defendant. As per the documents presented in the supporting affidavit, the Plaintiff is the current registered proprietor of the suit land having purchased the same from ABC Bank that exercised its statutory power of sale over it. The Defendant insists it is still the owner of the suit land and that the said sale was illegal, null and void. The Defendant further proceeded to distress the Plaintiff's tenant for rent, which dispute is pending at the Chief Magistrate's Court.

A cursory glance at the documents presented by the parties, I note the Defendant indeed charged the suit land with the ABC Bank which fact it does not deny. I note the suit land was registered in the name of the Plaintiff in February 2019. Further, the Plaintiff took occupation and entered into a lease agreement with a tenant. The Defendant proceeded to distress the Plaintiff's tenant for rent yet the suit land had ceased to belong to it. From the respective parties' averments, I opine that the Plaintiff indeed raises issues, which are triable that the court cannot disregard. In relying on the facts as presented and the above cited judicial authorities, I find that the Plaintiff has indeed established a prima facie case with a probability of success as there is apparently its right infringed upon by the Defendant.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the Plaintiff is the current registered proprietor of the suit land. The Defendant challenges the ownership and contends that the ABC Bank's exercising statutory power of sale was illegal. It is my considered view that if the Defendant was dissatisfied with the mode of the sale, it should have sued the bank. However, at this juncture, the Plaintiff took occupation and the Defendant has interfered with the suit land and proceeded to distress the Plaintiff's tenant for rent, knowing fully well it was not the registered proprietor of the said land. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that '**...the Plaintiff must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the Plaintiff to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Plaintiff. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'**

In relying on this case decision and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as it has demonstrated the harm it will suffer if the injunctive orders are denied.

As for balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the Plaintiff.

It is against the foregoing that I find the Plaintiff's Notice of Motion application dated the 15th August, 2019 merited and will allow it.

Costs of the application are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 24th day of September, 2020

CHRISTINE OCHIENG

JUDGE