



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 4 OF 2020**

**BENJAMIN TEMUT KEREMA.....PLAINTIFF**

**VERSUS**

**MICHAEL KIHAMBILU LUGWILI.....1<sup>ST</sup> DEFENDANT**

**JEMI GROUPS OF COMPANIES LTD.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR KAJIADO.....3<sup>RD</sup> DEFENDANT**

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED (NIC)....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion dated 7th February, 2020 and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Notice of Motion dated the 9<sup>th</sup> July, 2020. In the Plaintiff's Notice of Motion application which is brought pursuant to Order 40 Rules 1& 2 of the Civil Procedure Rules including Sections 1A, 3A & 63 (e) of the Civil Procedure Act, he seeks orders of injunction restraining the Defendants including their servants or agents from selling, alienating and offering for sale all that property known as Kajiado/ Kitengela/ 95834 hereinafter referred to as the 'suit land', pending the outcome of the suit. The application is premised on the grounds on the face of it as well as the supporting affidavit of BENJAMIN TEMUT KEREMA where he deposes that he was the registered owner of land parcel number Kajiado/ Kitengela/ 94235 which he subdivided into several parcels including Kajiado/ Kitengela/ 95322. He contends that around 2016, he decided to sell some four (4) acres of land to the 1<sup>st</sup> Defendant out of the nine (9) acres from Kajiado/ Kitengela/ 95322. Further, that he gave the 1<sup>st</sup> Defendant the Title as he was meant to excise his portion. He claims he was unwell over a period of time and when he followed up in 2019, the 1<sup>st</sup> Defendant was elusive. Further, he reported the matter to the Police and in December, 2019 some people from NIC Bank came to his property, showed him a copy of title for the suit land where it indicated that the 2<sup>nd</sup> Defendant had taken a loan but defaulted in repaying the same. He denies transacting with the 2<sup>nd</sup> Defendant and explains that upon a search, he discovered the 1<sup>st</sup> Defendant was the sole director to the 2<sup>nd</sup> Defendant. Further, that the 1<sup>st</sup> Defendant did not even fully pay for the four acres and took advantage of his sickness. He contends that on 5<sup>th</sup> February, 2020 some people visited his property and informed him the same had been advertised in the Standard Newspaper of 4<sup>th</sup> February, 2020 indicating that the suit land was due to be auctioned on 21<sup>st</sup> February, 2020. He reiterates that the 1<sup>st</sup> Defendant committed fraud against him and that his grandparents including parents are buried on the suit land.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the application by filing a replying affidavit sworn by MICHAEL KIHAMBILI LUGWILI where he deposes that he purchased land parcel number Kajiado/ Kitengela/ 92043 from the Plaintiff and paid the full purchase price of Kshs. 800,000. Further, that in 2017 he bought Kajiado/ Kitengela/ 95325 and 95835 from the Plaintiff for Kshs. 3,000,000 and paid the full purchase price. He claims in 2017 the Plaintiff sought to hive off and sell to him an additional two acres from Kajiado/ Kitengela/ 95834 for cash or in the alternative he constructs for him a 4 bedroomed bungalow with detached servant quarter, connect electricity, erect modern gate as well as fence off five acres using 10 feet concrete posts. Further, in 2018 the Plaintiff requested him to charge the suit land and they executed a Sale Agreement, after which he lawfully charged the land to the 4<sup>th</sup> Defendant. He contends that he made several payments to the Plaintiff but the Plaintiff still delayed in hiving off the two acres of land. Further, that Kajiado/ Kitengela/ 95322 was registered in 2017 and not 2016 as claimed by the Plaintiff. He explains that on 18<sup>th</sup> January, 2020 a meeting was convened by the Area Chief at the Plaintiff's residence after he closed the road leading to Jemi Estate. He insists the Plaintiff has been dealing with the 2<sup>nd</sup> Defendant herein since 2016 contrary to his averments. Further, that he is seized of valid sale of the suit land to his company, valid ownership, transfer and entitlements as well as lawful charge to the 4<sup>th</sup> Defendant.

The 4<sup>th</sup> Defendant opposed the Application and filed a replying affidavit sworn by STEPHEN ATENYA who confirmed that the suit land which is owned by the 2<sup>nd</sup> Defendant was charged to it vide a Legal Charge. He explains that the 2<sup>nd</sup> Defendant defaulted in repaying the

loan and the total outstanding amount due as at 24<sup>th</sup> February, 2020 is Kshs. 15, 882, 902. 15. Further, that they issued requisite statutory notices with an intention to exercise its statutory power of sale. He confirms that the 4<sup>th</sup> Defendant issued instructions to Lloyd Masika Limited an Independent Valuer to value suit land. He insists the 4<sup>th</sup> Defendant is a stranger and not privy to the allegations of fraud and illegal transaction between the Plaintiff and 1<sup>st</sup> Defendant. He contends that the 2<sup>nd</sup> Defendant presented to the 4<sup>th</sup> Defendant a valid title which did not disclose any defect. Further, the 4<sup>th</sup> Defendant conducted a search to confirm authenticity of title. He reiterates that the Plaintiff has not established a prima facie case and the 4<sup>th</sup> Defendant should not be restrained from realizing its security.

The Plaintiff filed a further affidavit and Grounds of Opposition where he reiterated his claim above.

In the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' application dated the 9<sup>th</sup> July, 2020, brought pursuant to Order 40 Rule 1, Order 51 Rule 1 & 3 of the Civil Procedure Rules as well as sections 1A, 1B and 3A of the Civil Procedure Act, they seek that the Plaintiff, his agents, servants and or employees be restrained from trespassing, demolishing and or causing damage to land parcel numbers Kajiado/ Kitengela/ 99014; 99016; 99034; 99037; 99038; 99039; 95941 pending the outcome of the suit. The application is premised on the summarized grounds that the aforementioned parcels of land are owned by different parties as follows: Monica Wanjiru - Kajiado/ Kitengela/ 99014; Loise Wangu Thuo - Kajiado/ Kitengela/ 99016 ; Emma Wangeci Kanyi - Kajiado/ Kitengela/ 99034; Meshack Otieno Genga - Kajiado/ Kitengela/ 99037; Paul Kamuthu Wachiuru - Kajiado/ Kitengela/ 99038; Francisca Nduku - Kajiado/ Kitengela/ 99039; and Teresia Wanjiku Kinuthia - Kajiado/ Kitengela/ 95941. Further, the said properties do not constitute the dispute over the suit land but the Plaintiff including his family have been issuing threats to the aforementioned owners. He claims the Plaintiff is dumping black cotton soil and tampering with beacons to the aforementioned parcels of land. The application is supported by the affidavit of the 1<sup>st</sup> Defendant MICHAEL KIHAMBULI LUGWILI who reiterates his claim above and explains that he bought certain parcels of land from Samuel Katita Kerema, Nixon Meteor Kerema and John Kipila Kerema who are the Plaintiff's brothers. Further, he sold part of the said land to the aforementioned persons. He reiterates the contents of his affidavit opposing the Plaintiff's application dated the 7<sup>th</sup> February, 2020 to support this instant application.

The Applications were canvassed by way of written submissions.

### **Analysis and Determination**

Upon perusal of the two applications together with the rivalling affidavits, Grounds of Opposition and the parties' submissions, at this juncture the following are the issues for determination:

- Whether the Plaintiff is entitled to orders of interim injunction as against the Defendants pending the outcome of the suit.
- Whether the 1<sup>st</sup> Defendant is entitled to orders of interim injunction against the Plaintiff in respect to land parcel numbers Kajiado/ Kitengela/ 99014; 99016; 99034; 99037; 99038; 99039; and 95941 pending the hearing and determination of the main suit.

The Plaintiff in his submissions reiterated his claim above and insisted the 1<sup>st</sup> Defendant has not denied the allegations of fraud. Further, that the Title to the suit land ought to be preserved pending the outcome of the suit. The 1<sup>st</sup> Defendant in their submissions relied on their averments in the supporting affidavit and insists the Plaintiff has not established a prima facie case to warrant the orders sought. Further, that the Plaintiff and his agents should be restrained from interfering with the suit lands. He relied on the decisions of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** and **Mrao Vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** to buttress his arguments.

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 line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiff has demonstrated a prima facie case with probability of success. It is the Plaintiff's contention that he is the proprietor of the suit land and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently proceeded to obtain a loan with the 4<sup>th</sup> Defendant which they failed to repay, culminating in the said property being scheduled for sale through public auction. The 1<sup>st</sup> Defendant who is a director to the 2<sup>nd</sup> Defendant insists he purchased the suit land from the Plaintiff who allowed him to Charge it to the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant insists the suit land was charged to it by the 2<sup>nd</sup> Defendant to secure a loan. Further, it should not be restrained from realizing the security as the 2<sup>nd</sup> Defendant has since defaulted in repaying the loan. Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. I note there was indeed a Sale Agreement dated the 3<sup>rd</sup> November, 2017 between the Plaintiff and the 2<sup>nd</sup> Defendant in respect to the suit land. Further, in the said Sale Agreement, the 2<sup>nd</sup> Defendant paid Kshs. 10 million as part of the purchase price and was to obtain a loan of Kshs. 17, 400,000 from a financier to finish paying the Plaintiff. The 1<sup>st</sup> Defendant has not informed Court whether they adhered to the said terms and the process he adhered to, to obtain the said title before he Charged it to the 4<sup>th</sup> Defendant. From the averments by the parties herein, several issues are not clear as to how the 1<sup>st</sup> Defendant obtained the transfer of the suit land to his name without the Plaintiff's knowledge. Further, except for the Sale Agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not presented any documentation to prove whether the Plaintiff participated in the transfer of the suit land to the 2<sup>nd</sup> Defendant. Insofar as the suit land was charged to the 4<sup>th</sup> Defendant, I opine that the issues raised by the Plaintiff in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' mode of acquisition of the land cannot be ignored. In the circumstance, I find that the Plaintiff has indeed established a prima facie case as against the Defendants.

On the second principle as to whether the Plaintiff stands to suffer irreparable loss which cannot be compensated by way of damages. The Plaintiff claims the 1<sup>st</sup> Defendant fraudulently obtained title to the suit land, charged it to the 4<sup>th</sup> Defendant and there is an imminent sale.

Further, that his home including his parents and grandparents graves are situated within the suit land. The 1<sup>st</sup> Defendant insists the 2<sup>nd</sup> Defendant owns the land and confirms it was charged to the 4<sup>th</sup> Defendant. Further, that he indeed defaulted in repaying the loan to the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant contends that it should not be stopped from exercising its statutory power of sale. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that ‘...the applicant 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 applicant 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 applicant. 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. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. ‘

Based on the facts as presented and from the Plaintiff’s averments while noting he resides on the suit land which was charged to the 4<sup>th</sup> Defendant without his knowledge, I find that his injuries are not speculative. Further, it would be pertinent if all the parties were granted an opportunity of being heard to enable the court make a determination on the ownership of the suit land.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away. Further, at this juncture, I find that the balance of convenience indeed tilts in favour of the Plaintiff.

On the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ application seeking to restrain the Plaintiff from interfering with the aforementioned parcels, I note the listed owners including the said properties, are not part of the dispute herein. Based on the established principles in the case of **Giella Vs Cassman Brown (supra)**, I find that there is no prima facie case established against the Plaintiff in respect to the said parcels of land. I indeed concur with the Plaintiff’s Grounds of Opposition and is unable to make any orders of injunction as against the Plaintiff. I advise the said parties that if indeed their rights have been infringed upon by the Plaintiff, they should proceed and file a separate suit. In the circumstances, I will disallow the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Notice of Motion dated the 9<sup>th</sup> July, 2020.

It is against the foregoing that I find the Plaintiff’s Notice of Motion dated 7th February, 2020 merited and will allow it. I will proceed to make the following final orders in respect to the two applications:

1. An order of injunction be and is hereby issued against the Defendants/ Respondents and or their servants, agents from alienating, selling, offering for sale of all that property known as LR No. Kajiado/ Kitengela/ 95834 pending the outcome of the suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Notice of Motion dated the 9<sup>th</sup> July, 2020 be and is hereby disallowed.
3. The costs of the two applications will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 14th day of October, 2020**

**CHRISTINE OCHIENG**

**JUDGE**