



REPUBLIC OF KENYA
ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO. 352 OF 2014

MICHAEL H. K. LANG'AT.....PLAINTIFF

VERSUS

MUIGAI COMMERCIAL AGENCIES LTD.....1ST DEFENDANT

THE LAND REGISTRAR, NAIROBI.....2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....3RD DEFENDANT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT

RULING

The Plaintiff's Application

The application before this Court for determination is an Amended Notice of Motion dated 11th April 2014 filed by the Plaintiff in which he is seeking the following orders:

- a) A declaration that the Plaintiff herein is the bona-fide registered proprietor of the suit property.
- b) A temporary injunction restraining the Defendants from consenting to the transfer and/or transferring, alienating, disposing or in any other way howsoever dealing with the suit property pending the hearing and determination of the suit.
- c) A mandatory Injunction compelling the 2nd Defendant to revoke the transfer, alienation, disposal of, or any other interference with the suit property pending the hearing and determination of the suit.

The application is supported by an affidavit sworn by the Plaintiff on 21st March 2014, wherein he states that he is the registered owner of the suit property namely L.R No. 12610/33, and that the 4th Defendant intends to give consent to the transfer of the said suit property to the 2nd Defendant. Further, that the alleged transfer of the suit property is illegal as the consent of the Plaintiff has not been acquired by the purported transferee, and that despite several attempts by the Plaintiff the 2nd Defendant has failed, refused and/or neglected to gain the Plaintiff access to the original file of the suit property, claiming that the same is missing.

The Plaintiff explained that he purchased the suit property in 1992 from British American Tobacco after seeing an advertisement of the sale of three parcels of land in the newspapers. He further stated that he secured a loan facility of Kshs 38 million from the 3rd Defendant to finance the purchase. Further, that out of the said loan proceeds, the 3rd Defendant was to directly pay Kshs.20 Million to Posta Credit Limited which had initially lent the Plaintiff money to buy the suit property, but which subsequently collapsed, and that the balance of Kshs.18 million was to finance a project in the purchased land.

The Plaintiff averred that the 3rd Defendant duly paid the agreed Kshs.20 million to Posta Credit Limited and charged all the three parcels of land for the loan of Kshs.38 Million. However, that the 3rd Defendant never advanced him the balance of Kshs.18 Million despite several reminders and personal visits he made to it. The Plaintiff alleged that he managed to pay a total of Kshs.9 Million towards the loan facility despite the hardship that the 3rd Defendant put him through.

The Plaintiff further stated that he managed to find a willing buyer of the land and that when he approached the 3rd Defendant, he was informed that it had already auctioned off the suit property. The Plaintiff stated that he was never given any notice for the auction and that the only advertisement that was placed for the auction of the three parcels of land was in the *Daily Nation* newspaper on 28th April, 2003 which auction did not take place. The Plaintiff claimed that two of three parcels of land, that is LR. Nos 12610/34 and 12510/35 (200 acres) were transferred to a company known as Igainya Limited in 2008.

The Plaintiff pointed out further irregularities he found to exist in the said auction to be as follows:

- a) That upon undertaking a private investigation of the auction, only one of the three parcels of land fell under the hammer but nevertheless the auctioneers announced that all the three properties had been sold.
- b) That the properties were apparently auctioned for Kshs.9 million each, an amount that was less than 10% of the value of the land, and that ten years later, the properties would have been worth Kshs.27 Million.
- c) That the 3rd Defendant never set a reserve price which should have been what was being claimed from the Plaintiff.
- d) That no valuation was undertaken to establish the market value of the land before going to the auction.
- e) That the three parcels of land were worth Kshs.300 million at the time of the auction.
- f) That by selling and transferring the two parcels of land, the 3rd Defendant recovered the entire sum that the Plaintiff owed it under the loan facility.

It is the Plaintiff's claim that the third parcel which forms the basis of this suit, was not transferred at the said auction since the 3rd Defendant had already recovered the entire sum that was owed under the loan facility by the sale and the transfer of the other two parcels of land. Therefore, that the Plaintiff is the lawful owner of the suit property. The Plaintiff annexed a copy of his certificate of title to the suit property. The Plaintiff further claimed that the suit property can only be transferred by way of a valid public auction, and that the 3rd Defendant has not advertised any public auction for the sale of the said property. Therefore, that as no valid public auction has taken place, the purported transfer of the suit property to the 1st Defendant cannot be justified.

The Defendants' Responses

The 1st Defendant opposed the Plaintiff's application in a replying affidavit sworn by its Director, Elizabeth Wanjiku Muigai, on 30th April 2014. The deponent stated that he saw an advertisement in the

local dailies on the 10th April, 2006 and 24th April, 2006 by Ms Garam Investments, indicating that the suit property herein, namely L.R no. 12610/33, would be sold by public auction on 25th April, 2006. The deponent subsequently attended the public auction on 25th April 2006 and bid for the suit property with the authorisation of the Directors of the 1st Defendant. Further, that her bid of Kshs.9,005,000/= was the highest bid for the suit property and was accepted, and that she paid the sum of Kshs.2,250,000/= at the fall of the hammer as the 25% down payment. The deponent annexed copies of the said advertisements and of the payment receipt.

The deponent further stated that the 1st Defendant thereafter paid the balance of the purchase price in full, and that the 3rd Defendant which was selling the property as chargee in exercise of its statutory powers of sale executed the transfer in its favour. Further, that the 1st Defendant procured all clearances and the relevant consents, but was however unable to register the transfer in time for reason that the file for the suit property at the Lands Office could not be traced and/or found.

The deponent explained that as a result the 3rd Defendant executed a deed of indemnity in favour of the Government of Kenya and the process of transfer in favour of the 1st Defendant was finalised. The deponent averred that the suit property is now lawfully registered in favour of the 1st Defendant, which has not participated in any illegally and/or fraud either with the 3rd Defendant or any other person in relation to its purchase. The deponent also annexed copies of the relevant certificates, consents and of their title to the suit property.

The 3rd Defendant on its part opposed the Plaintiff's application in a replying affidavit sworn on 7th November 2014 by Damaris W. Gitonga, its Manager for Legal Services. The deponent stated that on or about 30th December 1993, the Plaintiff in his capacity as chairman of Berur Enterprises Ltd (hereinafter referred to as "the Borrower") applied for bank facilities from the 3rd Defendant, and after the necessary procedures were followed which were detailed out in the replying affidavit, he was given a letter of offer with a loan facility of Kshs 38 million which was to be disbursed in two instalments as follows:

- c) Loan 1 of Kshs.20,000,000/= was to be paid directly from the liquidator, Postbank Credit which was in liquidation, and
- d) Loan 2 of Kshs.18,000,000/= was to be sourced from the European Investments Bank (EIB) through the Kenya Global Private Loan Facility administered through the Central Bank of Kenya. The deponent stated that Loan 2 was however declined.

The deponent attached the executed letter of offer, and further stated the said letter of offer also required that a legal charge be created by the 3rd Defendant over the three properties that were being purchased by the loan facility, being Land Reference Numbers 12610/33, 12610/34 and 12610/35, which charge was registered on 18th June 1996. Further, that the said letter of offer required that a Debenture of Kshs.38,000,000/= be created by the Borrower and that the same was registered on 18th June 1996. The deponent annexed copies of the said Charge and Debenture both dated 4th June 2006

The deponent averred that the Borrower subsequently defaulted in repayment of the loan even after the 3rd Defendant had granted it additional time to repay which the Plaintiff had requested. Thus in exercise of its statutory power of sale for the recovery of the sums owed to it, the 3rd Defendant issued statutory notices which were served on the Plaintiff by registered post, and the deponent annexed copies of letters, advertisements run in the local dailies and notifications of sale issued by different auctioneers. Further, that there were several valuation reports conducted on the charged property which influenced the reserve price set by the 3rd Defendant, and copies of the said evaluation reports were annexed.

The deponent also stated that following the notifications in the paper, there were several unsuccessful auctions due to low bids, and that in one instance the Plaintiff and the Borrower were granted a temporary Injunction in **Milimani HCCC No. 238 of 2003- Edward Kings & Another t/a Berur Enterprises**

Limited vs National Bank of Kenya Limited, in which the issue of the ownership of the property was canvassed and determined.

Eventually, that following advertisement on 10th April, 2006 and 24th April 2006 in the *Daily Nation* newspaper and a notice issued to the Plaintiff and posted by registered mail on 6th April 2006, Garam Investments Auctioneers who were instructed by the 3rd Defendant held an auction of the charged properties on 25th April 2006, and that one Elizabeth Muigai was present at the said auction successfully bid on parcel number LR. 12610/33 on behalf of the 1st Defendant. The deponent annexed documents from the said firm of auctioneers relating to the said auction.

The 3rd Defendant contended that from the foregoing there was no fraud or illegal transfer of the suit property by it as alleged or at all, and that the Plaintiff had also not demonstrated to this Court any evidence of payment or attempted repayment of the longstanding debt owed to it. Further, that the cause of action in this matter arose in 2006, and there has been an undue delay in filing the present suit and the same is therefore time barred, and should be struck out on the grounds that it is an abuse of the Court process.

The 2nd and 4th Defendants filed Grounds of Opposition dated 1st July 2014 and opposed the Plaintiff's application on the grounds that it is frivolous and vexatious and an abuse of the court process; that the Plaintiff has not established a *prima facie* case with a possibility of success; that some of the prayers sought cannot issue at this stage; and that no damage will be suffered if the matter goes to full trial and final determination is made.

The Issues and Submissions

The Plaintiff's application was canvassed by way of written submissions. Achach & Company Advocates, the Advocates for the Plaintiff filed written submissions dated 17th July 2014. The Advocates for the 1st Defendant, Kibanya and Kamau Advocates filed submissions dated 30th July 2014, while Joyce C. Koech, a Litigation Counsel at the Attorney General's office filed submissions dated 31st July 2014 for the 2nd and 4th Defendants. Lastly, Sisule Munyi Kilonzo & Associates filed submissions dated 29th August 2014 for the 3rd Defendant.

I have carefully read and considered the pleadings and arguments made by the parties herein the pleadings and submissions filed. The preliminary issue to be decided first is whether the Plaintiff's suit and application are *res judicata*. If the Court's finding on this issue is in the negative, it will then proceed to consider the primary issue which is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory injunctions he seeks.

On the preliminary issue, the Plaintiff submitted that the doctrine of *res judicata* is not applicable as the issues in this suit have not been canvassed by the parties, and this suit is premised on a different subject matter and on new facts that were not available to the Plaintiff in **Milimani HCCC No. 238 of 2003- Edward Kings & Another t/a Berur Enterprises Limited vs National Bank of Kenya Limited**.

The 3rd Defendant on the other hand submitted that in view of the filing by the Plaintiff of **Milimani HCCC No. 238 of 2003- Edward Kings & Another t/a Berur Enterprises Limited vs National Bank of Kenya Limited** in a bid to halt the transfer of LR No. 12610/34 and 12610/35 which were auctioned together with the suit property, the Plaintiff rights in the suit property were also substantially in issue in the said case.

I find that as the 3rd Defendant did not provide any evidence of the pleadings filed in, and orders given in **Milimani HCCC No. 238 of 2003- Edward Kings & Another t/a Berur Enterprises Limited vs National Bank of Kenya Limited**, I am not able to determine if the requirements of section 7 of the Civil Procedure Act as to the doctrine of *res judicata* have been met, and particularly as to whether the said suit was between the same parties as those herein and whether it dealt with the same issues with

finality. I also note that the said suit was filed in 2003 whereas the auction that is the subject matter of this application took place later in 2006.

Coming to the issue whether the injunctions sought can issue, the requirements for the grant of a temporary injunction as stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

Furthermore, the required threshold for the grant of a mandatory injunction is that an applicant in addition to showing a *prima facie* case, has to show special circumstances that make it a clear case where the matter ought to be decided at once. These requirements were stated by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** 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.”

The Plaintiff argued that he had established a *prima facie* case with a probability of success for reasons that lack of a statutory notice made the sale of the suit property a nullity and unlawful, and also for reasons that the legality of the transfer of the suit property to the 1st Defendant is disputed. The Plaintiff relied on sections 90(1) and 90(2)(b) of the Land Act of 2012 to submit that the 3rd Defendant did not serve him with any statutory notice for the auction conducted on 25th April 2006, since the statutory notice was served by registered post on 6th April 2006, and the required 40 days' notice would therefore have expired on 16th May 2006. Therefore, that the 3rd Defendant's statutory power of sale had not accrued or crystallized when the auction was held on 25th April 2006. The Plaintiff relied on the decision in **Josiah Kamanja Njenga vs Housing Finance Corporation of Kenya & Another, (2014) e KLR** in this respect.

The Plaintiff further submitted that section 97(2) of the Land Act of 2012 required a valuation to be carried out before the auction, and that the valuation report relied on by the 3rd Defendant dated 22nd January 2005 was over a year out of date. He relied on the decision in **David Gitome Kuhiguka vs Equity Bank Ltd, (2013) e KLR** in this respect. The Plaintiff also argued that the transfer to the 1st Defendant was a nullity as it was effected during the currency of a caveat registered with respect to the suit property, and without the consent of the Mavoko Land Control Board. On the grant of the mandatory injunctions sought, the Plaintiff argued that the parties' positions in this matter are obvious from the documents that they have filed, and therefore that this matter should be decided at once.

The 1st Defendant on its part argued that the subject auction sale took place on 25th April 2006 and was governed by the Auctioneers Act of 1996, Auctioneers Rules of 1997, as well as the repealed Registered Land Act which were all strictly followed, and that the Land Act of 2012 does not apply retrospectively to the conduct of auctions. The 1st Defendant submitted that being the highest bidder for the suit property, it bought the said property legally.

Further, that consent to transfer the suit property to it was granted by the Mavoko Land Control Board on 14th December 2012 since the file could not be traced at the Lands office immediately after the auction. In addition, that as held in **Wilfred Agage Nyawanga & Another vs National Bank of Kenya Ltd & 2 Others, HCCC 138 of 2002** and in **Amos Wangeera Njoroge & 9 Others vs Serah Wamuyu Muriuki & Another, (2014) e KLR**, the only remedy available to the Plaintiff in the circumstances is to sue for

damages. Lastly the 1st Defendant submitted that the suit property has already been transferred, and issuing a temporary injunction restraining the transfer would be an academic exercise. Further, that the Plaintiff had been indolent as he has filed his application eight years after the auction sale of the suit property was concluded.

The 2nd and 4th Defendants submitted that the Plaintiff had not shown a *prima facie* case since the transfer of the suit property was registered on 20th December 2012, and he is no longer the registered owner of the same. Further, that he had not submitted any evidence to show that the 2nd Defendant had refused and/or neglected to give him access to the original file of the suit property. Lastly, that the issue of whether the statutory sale of the suit property was effected within the limits of the law is contested and can only be determined after full hearing, and the mandatory injunctions sought would determine this issue with finality at this stage.

The 3rd Defendant on its part submitted that Plaintiff had not established a *prima facie* case as he had no right in existence that had been infringed, as the suit property had been sold at an auction. Further that the dispute over the accounts of the loan payments was not relevant in injunction proceedings. The 3rd Defendant further submitted that even if the Plaintiff's rights were to be found to have been infringed, his only right would be in damages and he will therefore not suffer irreparable injury. Reliance was placed on the decision in **Mohammed Khaled Kashoggi vs Equity Bank, (2013) eKLR** in this respect.

The 3rd Defendant also argued that the mandatory injunctions sought are of a nature which if granted, would determine with finality the rights of the parties herein and cannot be granted at this stage. Lastly, relying on the decisions in **Abigael Barmoa vs Mwangi Theuri, (2013) eKLR** and **Kenya Products and Investments Ltd vs Kenya Post Office Savings Bank, HCCC No 2811 of 1995**, the 3rd Defendant submitted that the remedy of an injunction is founded on equity, and that the delay of 8 years in filing of the suit herein amounted to inordinate and unreasonable delay which defeats equity.

I agree with the Defendants' arguments for various reasons. Firstly, I find that the Plaintiff has not established a *prima facie* case for the reason that he is no longer registered as the owner of the suit property, which is now registered in the name of the 1st Defendant who produced evidence of its title to the same. The Plaintiff therefore has no current right or interest in the suit property capable of being protected or preserved.

Secondly, even if it were to be found that the sale of the suit property to the 1st Defendant was irregular, the only remedy that can be available to the Plaintiff in the circumstances is that of damages. The suit property was registered under the repealed Registration of Titles Act, and section 69B(2) of the Transfer of Property Act (since repealed) was the law applicable on the exercise of a statutory power of sale with respect to the said land at the time of the disputed sale of the 1st Defendant. Under the said section, the effect of an irregular sale and transfer by a mortgagee was provided as follows:

“Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised,

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

Similar provisions are now provided for the protection of a purchaser who has bought land sold in exercise of a statutory power of sale in section 99 of the Land Act of 2012 as follows:

“(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

As the only remedy available to the Plaintiff under the law is damages, he can therefore not only be adequately compensated by way of damages, but he is not likely to suffer any irreparable injury if the temporary injunction he seeks is not granted.

Thirdly, there are many contested facts in the Plaintiff’s suit, particularly as to the circumstances in which the public auction of the suit property took place, and the transfer of the same to the 1st Defendant, that will still require further evidence and legal argument. This suit and application is therefore not a clear case where the mandatory injunctions sought can issue. Lastly, I am also in agreement with the arguments put forward that the Plaintiff is guilty of laches, as the disputed public auction took place in 2006 and the transfer of the suit property in 2012, and the equitable principles that apply to the grant of injunctions is that they only aid the vigilant and not the indolent.

I accordingly decline to grant the prayers in the Plaintiff’s Notice of Motion dated 11th April 2014 for the foregoing reasons, and the Plaintiff shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____4th____ day of ____December____, 2014.

P. NYAMWEYA

JUDGE