



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 277 of 2012

(fast track)

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

- VERSUS -

JOSEPH KITTONY.....1ST DEFENDANT

KIPRUTO KANDIE.....2ND DEFENDANT

KIPTUI KANDIE.....3RD DEFENDANT

KIGEN KANDIE.....4TH DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** dated 26th April 2012. the application seeks the following orders namely:-

- 1) This application be certified urgent and be admitted for hearing forthwith.
- 2) This Honourable Court be pleased to issue a temporary injunction restraining the Defendant, his agents, servants or anyone claiming to act under instructions or authority from the Defendant from encroaching, trespassing, building, alienating, disposing and/or in any way interfering with **Land Reference No. 209/8336/128** pending the hearing and determination of this application.
- 3) This Honourable Court be pleased to issue a temporary injunction restraining the Defendant, his agents, servants or anyone claiming to act under instructions or authority from the Defendant from encroaching, trespassing, building, alienating, disposing and/or in any way interfering with the **Land Reference No. 209/8336/128** pending the hearing and determination of this suit.
- 4) This Honourable Court be pleased to issue a temporary mandatory injunction compelling the Defendant, his servants, agents and/or anyone claiming to act under the Defendant's instructions or authority to forthwith vacate from **Land Reference No. 209/8336/128** pending the hearing and determination of this application..
- 5) This Honourable Court be pleased to issue a temporary mandatory injunction compelling the

Defendant, his servants, agents and/or anyone claiming to act under the Defendant's instructions or authority to forthwith vacate from **Land Reference No. 209/8336/128** pending the hearing and determination of this suit.

6) Upon grant of **prayer (4)** and/or **(5)** above, this Honourable Court be pleased to fix a time frame within which the Defendant, his servants, agents and/or anyone claiming to act under the Defendant's instructions or authority ought to vacate from **Land Reference No.2 09/8336/128** and in the event of non-compliance, the Plaintiff be at liberty to evict the Defendant, his servants, agents and/or anyone claiming to act under the Defendant's instructions or authority and the Defendant be ordered to pay the Plaintiff all costs attendant thereto.

7) This Honuorable Court be pleased to issue a temporary mandatory injunction compelling the Defendant to, within **two (2) days** of the order, withdraw the caveat lodged against **Land Reference No. 209/8336/128** and in default thereof, the Registrar of Titles do remove the same pending the hearing and determination of this application and thereafter, pending the hearing and determination of this suit.

8) The Officer Commanding Station (OCS), Spring Valley Police Station, do supervise the implementation and enforcement of court orders herein.

9) The Defendant do pay the Plaintiff the costs of this application.

2. The application is supported by the many grounds set out therein, and by an affidavit sworn by **Z.K. MOGAKA** dated **26th April 2012**.

3. The application is opposed vide a Replying Affidavit by the 1st Defendant **JOSEPH KIMUTAI KITTONY** dated **25th May 2012** with its annexures. It is also opposed by the 2nd and 3rd Defendants' affidavit filed in court on **25th September 2012**.

4. Briefly the history of the application is that the Plaintiff, a bank, is registered as chargee over the suit property L.R. No. 209/8336/128 pursuant to a charges dated 30th December 1977, 10th May 1984, 9th June 1993 and 23rd March 1994 following financial advances granted by the Plaintiff to the registered owner, one Aaron Kimosop Kandie, now deceased. Due to several defaults in loan repayment terms the suit property, was in 1999, sold to the Defendant at a public auction. The Defendant paid the requisite 25% deposit but failed to pay the balance leading to further negotiations with the Defendant where the Plaintiff agreed to sell the suit property to the Defendant at a total sum of Kshs.6,000,000/=, but again the Defendant failed to comply with the terms of the sale, pursuit to which the Plaintiff revived the sale of the suit premises by way of public auction which sale was scheduled on 3rd June 2004 but was halted by the court after the chargor's wife filed suit on behalf of the chargor's estate against the bank being **MILIMANI HCCC NO. 283 OF 2004 – RHODA CHELANGAT KANDIE – VS – NATIONAL BANK OF KENYA LIMITED** which case is still pending. The Plaintiff alleges that on or about 26th February 2009, one Kigen Kandie, a son of the chargor and a beneficiary of the estate of the chargor to whom the suit premises devolves pursuant to a Certificate of Confirmation of Grant dated 30th January 2008 issued in **HIGH COURT SUCCESSION CASUE NO. 991 OF 2003**, approached the Plaintiff and offered to redeem the suit property on behalf of the estate whereupon pursuant to an agreement between the parties the Plaintiff agreed to discharge the suit premises upon *inter-a-alia* payment of Kshs.6.3 million. It is alleged that the Commercial Bank of Africa Limited has agreed to extend a loan to the said Kigen Kandie of Kshs.6.3 million to purchase the said property subject to the registration of a charge against the suit premises in favour of the Plaintiff bank. The Defendant in this suit **JOSEPH KITONNY** currently occupies the suit premises. In order for the Plaintiff to proceed as agreed with Kigen Kandie, the Defendant is required to vacate the suit premises. This is the purpose to be achieved by this suit and the Plaintiffs' application dated 26th April 2012 is in part intended to secure interim preservatory orders in respect of the suit premises.

5. Originally the parties to this suit were the Plaintiff and the 1st Defendant. However, pursuant to a

Notice of Motion application dated 25th May 2012 and a Ruling of this court dated 19th July 2012, 2nd, 3rd and 4th Defendants were joined to the suit, and the Plaintiff was later allowed to amend the pleadings referring to the Defendant to mean the 1st Defendant. The parties by leave of the court filed written submissions. The Plaintiff and the 1st Defendant did so while the 2nd, 3rd and 4th Defendants left the matter to the court.

6. Mr. Ngugi for the Plaintiff in his submissions provided the detailed history of the matter and how the 1st Defendant has continued to breach the various agreements under which the Plaintiff bank agreed to buy the suit property. In his submissions, the suit revolves around Land Reference No. 209/8336/128 to which the Plaintiff was and is registered as Chargee pursuant to duly registered charges dated 30th December 1977, 10th May 1984, 9th June 1993 and 23rd March 1994 following financial advances granted by the Plaintiff to the registered owner, one Aaron Kimosop Kandie, now deceased (hereinafter referred to as "*the Chargor*").

On 23rd June 1999 the suit premises were sold to the 1st Defendant at an auction in exercise of the Plaintiff's statutory power of sale at a total purchase price of Kshs.7,758,000. Pursuant to the applicable conditions of sale, the 1st Defendant was bound to pay a 25% deposit immediately after the sale while the balance was payable within a period of 30 days from the date of sale and in default of payment of the balance within the said period, the deposit paid would be forfeited to the Plaintiff absolutely and the Plaintiff would be at liberty to, without notice to the 1st Defendant, resell the suit property at such time, in such manner and subject to such conditions as it would think fit. While the 1st Defendant paid a sum of Kshs.2,000,000 being the 25% deposit he failed, refused and/or neglected to pay the balance of the purchase price being Kshs.5,758,000 within 30 days as agreed with the consequence that the deposit paid was forfeited to the bank absolutely. The Plaintiff was now at liberty to resell the suit premises. However, between years 1999 and 2004, the Plaintiff accorded the 1st Defendant unmatched indulgence to enable him purchase the suit premises to no avail. On several occasions, the 1st Defendant pleaded for more time and entered into agreements which he breached with unbelievable impunity. Such occasions included the following:-

§ Following proposals made by the 1st Defendant contained in the said letter of 15th June 2000 and a meeting held on 7th June 2000, the Plaintiff indulged the Defendant and vide its letter dated 23rd June 2000, it prescribed fresh conditions to the Defendant towards completion of the sale but the 1st Defendant still failed, refused and/or neglected to abide by the same.

§ Following re-advertisement of the suit premises for sale, the 1st Defendant wrote to the Plaintiff on 10th January 2001 indicating that he intended to sell two parcels of land to enable him purchase the suit premises.

§ The bank offered to sell the suit premises afresh to him at Kshs.8,110,145 vide its letter of 19th January 2001 on condition that he paid 3 million on or before 15th February 2001. He failed to do so and instead went to the bank pleading for more time. Vide his letter of 17th February, 2001 he requested for more time up to 28th February but he never paid the sum of 3 million.

§ An auction sale scheduled on 21st June 2001 was shelved after he pleaded with the bank to postpone the same. He also entered into a financing agreement dated 21st June 2001. He never paid the 3 million as promised thereby breaching the financial agreement.

§ Another auction sale scheduled on 19th February 2001 was shelved after the 1st Defendant gave another proposal which was declined.

§ Another auction sale scheduled on 3rd October 2002 was halted after the 1st Defendant went to the Plaintiff and made a further proposal.

§ Vide his letter dated 8th October 2003 he made several promises and upon consideration of the same, an agreement was entered vide a letter dated 10th November 2003. The 1st Defendant never paid as agreed thus breaching the agreement.

7. Following the above allegations of breaches, the bank cancelled the last offer for sale and offered the premises for sale afresh which sale was only halted after the estate of the Chargor filed HCCC No. 283 of 2004. Mr. Ngugi submitted that in those circumstances the Defendant had absolutely no proprietary rights over the suit premises.

8. A Mr. Kigen Kandie, the 4th Defendant, a son to the Chargor and one of the administrators of the Chargor's estate approached the bank to redeem the suit premises at Kshs.6.3 million, which the bank accepted. It is submitted that the 1st Defendant has however refused to vacate the suit premises and had further lodged the caveat against the title to the suit premises claiming a purchaser's interest. He has further refused to allow a government valuer access to the suit premises to carry out valuation. This, it is submitted, is illegal occupation and possession as the 1st Defendant has no mandate from the administrators of the Chargor's estate or the bank to occupy the premises, hence the orders sought herein to evict him.

9. In response to these submissions Mr. Anzala for the 1st Defendant submitted that the suit premises were sold to the 1st Defendant and that over the years the 1st Defendant acquired a beneficial interest in the suit premises. The 1st Defendant is ready to pay the balance of the purchase price, and is simply waiting for the aforesaid succession cause to be completed so that he can conclude the transaction.

10. The 2nd and 3rd Defendants in response to the application have challenged the redemption transaction between the bank and the 4th Defendant stating that the same has been done without their knowledge, consent or authority. They allege it to be a secret conspiracy between the bank and the 4th Defendant to deprive the estate of its property. They also impugn the certificate of confirmation of grant issued to the 4th Defendant and state that the same was fraudulently procured vide a Ruling delivered by Justice Nambuye on 14th October 2011.

11. I have carefully considered the application before the court and the opposing submissions. In my view, two issues at this stage will, if determined, settle the matter:-

(i) Whether or not the Plaintiff is entitled to mandatory and prohibitive injunction at this stage.

(ii) The place of all the executors of the deceased estate, in this matter.

12. To answer the first issue, the Plaintiff prays for mandatory injunctions in terms of prayers 5 and 7 of the application. The test for the grant of mandatory injunctions was restated in the case of **RIFT VALLEY AGRICULTURAL CONTRACTORS LTD – VS – GITHAE & CO. ACCOUNTANTS & ANOTHER (HCCC NO. 334 OF 2004)** where the Judge cited the Court of Appeal in the case of **KENYA BREWERIES LTD. – VS – WASHINGTON OKEYO (CIVIL APPEAL NO. 332 OF 2000)** where the court said:-

“The test to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England, 4th Edition, para. 948 which reads:-

‘A mandatory injunction can be granted on an interlocutory application as well as the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempts to steal a march on the Plaintiff . . . a mandatory injunction will be granted on an interlocutory application.’”

Applying these principles to this case, it is clear now that the 1st Defendant has not demonstrated any

legal or equitable basis for his continued occupation on the suit premises having failed to complete the sale. The 2nd and 3rd Defendants are challenging the redemption transaction between the bank and the 4th Defendant. That is different. They are not claiming that they have authorized the 1st Defendant's being in occupation of the suit premises. The continued illegal occupation complained of is a simple and summary act which can be remedied through an order to vacate. The Defendant failed to complete the sale despite extensive indulgence. He has been on the suit premises since 1999 without paying rent or any outgoings.

Besides, there are special circumstances in favour of the grant of mandatory injunction.

Firstly, the Chargor who is the registered owner of the suit premises is deceased. The 1st Defendant occupies the suit premises but has neglected to pay the City Council of Nairobi land rates, but has instead lodged a caveat against the property thereby showing no good will at all. Lastly the dispute between the Chargor's estate and the bank cannot be resolved when the Defendant is still in occupation.

In the case of **SHIVA MOMBASA LIMITED – VS – KENYA REVENUE AUTHORITY (2005) Eklr**, the court said:-

“Having heard both sides this court is satisfied that the Plaintiff has made out a *prima facie* case with probabilities of success. It is the 3rd owner of the subject land which was first given to Francis Wanjohi by the Commissioner of Lands who is represented by the Hon. Attorney General here . . . The Plaintiff bought the land in 2003. It has a title which has been charged. The 1st Defendant (Kenya Revenue Authority) only holds a letter of reservation/allotment from the very Commissioner of Lands but as we all know, such letters do not signify having registrative interest in land. It is no matter that the Defendant has been in occupation for a long time by utilizing a section of the fenced larger property. The Plaintiff's portion though enclosed in that wall is not built up.

In sum the Plaintiff Company has made out a case to warrant not only a temporary injunction but in the circumstances of the case, also a limited mandatory injunction. It is no good just to restrain the Defendant from preventing the Plaintiff from accessing its land. The Defendant having built a wall around that land can only give meaningful access by demolishing that part of the wall directly barring the Plaintiff from its land. This appears a special circumstance requiring a mandatory order. Accordingly, the Defendant should not interfere with the Plaintiff's access to its land No. 9594 and it must demolish that part of its wall directly enclosing the said land. The rest of the wall may await the outcome of the suit. In case the Defendant does not demolish the said part of the wall in the next 30 days, the Plaintiff may itself do so for there is no reason why the Defendant authority should exclude it from its property.”

In my view this is as well an appropriate case for the grant of a mandatory injunction compelling the 1st Defendant, his agent, or servants to vacate from suit premises as prayed. Further, there is no basis for the caveat entered against the suit premises. It would serve little purpose to merely order the Defendant to vacate. This is an appropriate case where the order that further commends itself is an order compelling the Defendant to withdraw the caveat.

The Plaintiff has also prayed for a prohibitive injunction at prayer 3 of the application. The principles applicable in this kind of injunctions were well laid out in the case of **GIELLA – VS – CASSMAN BROWN** where the Plaintiff is required to prove a *prima facie* case, likelihood to suffer irreparable damage and balance of convenience.

In the absence of a proper legally acceptable explanation from the 1st Defendant regarding his continued occupation of the suit premises, the Plaintiff has established a *prima facie* case with a probability of success at the trial to the effect that the 1st Defendant is in illegal occupation and that the Plaintiff is entitled to possession pursuant to Section 100 1 (A) of the Indian Transfer of Property Act, 1882.

The Defendant has been claiming some undefined rights over the suit premises. There is real likelihood

that the suit premises is in danger of being wasted, damaged and/or illegally alienated by the Defendant to the irreparable detriment of the Plaintiff. Further, the Defendant does not pay any outgoings on the suit premises and on 13 August 2010, the City Council of Nairobi demanded a sum of Kshs.334,271 as outstanding rates arrears. As at 24th August 2011, the outstanding rates were Kshs.516,507 and unless the orders sought are issued, the Defendant will continue in occupation without paying the rates and the City Council of Nairobi may move to enforce payment which is likely to cause the Plaintiff irreparable damage. Besides, the Plaintiff and the estate of the Chargor shall have been denied an opportunity of settling any dispute arising from the facilities granted to the Chargor.

13. In finding as I have done above, I must draw the attention of the parties to **Section 100 A (1) of the Indian Transfer of Property Act, 1882** which provides:-

“A Chargee under a charge executed in accordance with the provisions of Section 46 of the Registration of Titles Ordinance and duly registered under that Ordinance shall have the same rights, powers and remedies including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rent and profits, or any of them as if the charge were an English Mortgage to which Section 69 of this Act applies.”

14. In response to the second issue, that is the place of the executors that is, 2nd, 3rd and 4th Defendant in this matter, it is clear that the 2nd and 3rd Defendants have stated at paragraph 24 of their replying affidavit that they believe there is no valid sale between the Plaintiff and the 1st Defendant after the failure of the 1st auction sale since the property devolved to the estate of the late Aaron Kimosop Kandie on his demise. This means that the two administrators support the bank’s position that there can be no legally enforceable sale capable of conferring any interest in the suit premises on to the 1st Defendant. However, the 2nd and 3rd Defendants are obviously unhappy with the redemption transaction between the bank and the 4th Defendant. If that is so, they still need not challenge the transaction as evidently the Defendant is in the premises not with their mandate or that of the bank. The 1st Defendant has no right to remain in the suit premises, and as administrators, it is in the interest of the 2nd and 3rd Defendants to ensure that the suit property does not go to waste. It is also clear that the Plaintiff has not sought any orders, negative or adverse against the estate of Aaron Kimosop Kandie where the 2nd and 3rd Defendants are said to be administrators. Even if the redemption transaction between the bank and the 4th Defendant is to be rejected for some reasons, the same does not justify the continued illegal occupation of the suit premises by the 1st Defendant. It is in their interest that the suit property is secured for the benefit of the deceased’s estate.

15. For the forgoing reasons, I allow the Notice of Motion application dated 26th April 2012 as prayed with costs against the 1st Defendant only.

16. I also order and direct that if the bank intends to proceed with the redemptive transaction of the suit property as intimated, the interest of the deceased’s estate must come first. This means that any transaction involving the suit property must be discussed and finalized with the full agreement and consent of the 2nd, 3rd and 4th Defendants, or as per the legitimate confirmed certificate of grant in the said estate.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 4TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Chege H/B for Ngugi for the Plaintiff

Anzala for the 1st Defendant

Ongegu for the 4th Defendant

Teresia – Court Clerk