



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 505 of 2009

NANAK HOSPITAL MANAGEMENT

SERVICES LIMITED..... PLAINTIFF

VERSUS

KENNETH K. MWANGI.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

KANG'ERI WANJOHI T/A

KINDEST AUCTIONEERS.....5TH DEFENDANT

FIDELITY COMMERCIAL BANK LIMITED.....6TH DEFENDANT

RULING

The 1st Defendant herein moved this court on 4th August 2011 seeking orders that pending the hearing and determination of the main case herein, the orders of Injunction issued on the 8th day of July, 2010 be extended to apply to the 6th Defendant. In the alternative the 1st Defendant sought orders that pending the hearing and determination of the main case herein, an order of injunction do issue against the 6th Defendant restraining them from advertising for sale, selling or in any manner whatsoever from encumbering and/or interfering with the status of property L.R No. 209/3011/19 (hereinafter referred to as the suit property), to the detriment of the 1st Defendant. The other prayers in the 1st Defendant's said Notice of Motion have since been spent.

The 1st Defendant who claims to be registered proprietor of the suit property had prior to the present application been granted a similar injunction against the Plaintiff in an earlier ruling delivered by Okwengu J. (as she then was) on 8th July 2010. The 6th Defendant was subsequently joined to the proceedings, after it transpired that the Plaintiff had on the strength of a title it holds to the suit property, used the said property to secure a loan facility from the 6th Defendant, who in turn advertised the property for sale to realize its security.

The Plaintiff relied on a replying affidavit sworn on 24th June 2011 by its Managing Director, Janardan

Dahyabhai Patel, as its response to the 1st Defendant's application. The deponent stated that the Plaintiff held a valid title to the suit property which he attached. Further, that the said title clearly showed that the suit property had been charged to the 6th Defendant to secure a loan of Kshs.25,000,000/= on 27th November, 2008, almost two (2) years before the High Court orders of 8th July 2010 were issued and even before the filing of this suit. He further stated that following default in servicing the said loan facility by the Plaintiff, the 6th Defendant issued the requisite Statutory Notice in preparation for the exercise of its statutory power of sale over the charged property.

The Deponent also averred that the title document which the 1st Defendant is holding was fraudulently obtained, and that a Government Caveat under section 65 (1) (f) of the Registration of Titles Act (since repealed) was registered against the said title on 9th January 2007 to prevent fraud or improper dealing on the suit land.

The 6th Defendant opposed the application and filed a replying affidavit and further affidavit sworn by Philip Muoka, its Legal Officer, on 24th January 2012 and 3rd February 2012 respectively. The Deponent confirmed that that the Plaintiff's property being LR No. 209/3011/19 was charged to the 6th Defendant pursuant to acceptance of a duly signed letter of offer dated 19th August 2008, and a debenture dated 29th October 2008 which he annexed. Further, that in registering the said security, the 6th Defendant complied with all the laid down procedure relating to legal charges which included conducting due diligence over the particulars of the title to the property, which showed that the suit property was free from any encumbrances.

The Deponent further confirmed that the Plaintiff failed to service the loan resulting in an accrued aggregate debt that stands at Kshs.20,937,415.84/=, and attached a copy of the Plaintiff's Statement of Account. Further, that following the said default by the Plaintiff, the 6th Defendant issued the requisite Statutory Notice in preparation for the exercise of its statutory power of sale over the charged property. A copy of the Statutory Notice was attached as well as copies of an application for official search, and the certified extract of title to the suit property.

The 6th Defendant at the hearing of the application on 23rd March 2012 requested for summons to issue against the Commissioner of Lands to give evidence and be cross-examined on the titles to the suit property. Summons were duly issued by the Court and Mr. Mburugu from the office of the Commissioner of Lands attended court on 3rd May 2012 and presented a report on the suit property.

Mr. Mburugu stated that the original title to the suit property was 1R 7286 which was a lease for 50 years from 1st January 1949 to 1st January 2001. Further, that the 1st Defendant purchased the said land from the previous owners on 10th June 1974, and that on 28th January, 1975 he purchased the shares of his partners and remained the sole proprietor. The report further states that the 1st Defendant applied for a lease extension on 6th March 1987, and was accorded 50 more years with effect from 1st January 2001. The new grant was processed and registered in Nairobi land registry as I.R. No. 98403/1 on 19th July 2005.

The report by Mr. Mburugu further states that the Plaintiff was registered as the owner of parcel No. 209/3011/19 Nairobi, through a vesting order registered against the original title on 17th June, 1996. Further, that on 13th December 2007, P.J Kakad & Co. Advocate on behalf of the Plaintiff applied for renewal of lease which was approved on 10th March 2008 for 50 years more, with effect from 1st January 2001. The Grant for the renewed lease was processed and registered in Nairobi land registry as I.R. No. 111182/1 on 9th June 2008.

Upon cross-examination by Mr. Kanjama, counsel for the 6th Defendant and Mr. Wambugu, counsel for the Plaintiff, Mr. Mburugu stated that he had not seen a copy of the vesting order and that it was not in their records. He further stated that it was irregular for the lease to be issued in favour of the 1st

Defendant, after the vesting order in favour of the Plaintiff had been registered and had not been reversed. Further, that when this irregularity came to the attention of the Commissioner of Lands he registered a caveat on the 1st Defendant's title under section 65 (1)(f) of the Registration of Titles Act (since repealed). Mr. Mburugu also stated that his copy of the Plaintiff's title to the suit property had no charge registered in favour of the 6th Defendant, and that he had been shown a copy of title and official search with the said charge.

Upon cross-examination by Mr. Namada, counsel for the 1st Defendant, Mr. Mburugu stated that the 1st Defendant applied for a renewal of his lease on 6th March 1987 before its expiry, and that the Plaintiff applied for renewal of the lease on 13th December 2007. Further, that the renewed lease was issued to the 1st Defendant on 19th July 2005, and that at the time the Plaintiff applied for renewal of the lease, there was a lease existing in the name of the 1st Defendant with respect to the suit property. Mr. Mburugu confirmed that the lease issued to the 1st Defendant still existed in their records and could only be cancelled through a court process, and that it was the first in time as it was approved earlier.

The parties in addition filed written submissions which were highlighted during the hearing of the Notice of Motion on 12th March 2013. The 1st Defendant's counsel argued in written submissions dated 25th January 2012 and in his oral submissions made in court that the Plaintiff's lease was fraudulent, having been obtained three years after that issued to the 1st Defendant. Further, that the Plaintiff therefore had no valid title, interest or right to pass and the 6th Defendant's purported security was void.

The counsel also argued that the facts show that the 1st Defendant has a valid case with triable issues, and that an injunction had already previously been granted against the Plaintiff pending the hearing of the suit herein. He submitted that the intent of the Plaintiff and 6th Defendant is to put the suit property beyond the reach of the court, and render the suit nugatory.

Counsel for the Plaintiff argued in submissions dated 8th February 2012 that the Plaintiff is the true and legal owner of the suit property, has valid title documents and that the charge to the 6th Defendant is therefore also valid. Further, that it is the 1st Defendant who is holding a fraudulent grant as shown by the Government caveat registered on the grant on 9th January 2007. The counsel denied that there conspiracy or fraud in failing to pay the loan amount advanced by the 6th Defendant, which default was occasioned by the hard economic times the Plaintiff was experiencing.

The Counsel for the 6th Defendant filed written submissions dated 3rd February 2012 and made oral submissions in court. The counsel argued that

an official search at the Lands Registry had shown that the suit property is registered in the name of the Plaintiff, and is encumbered by a charge duly registered by the 6th Defendant. Further, that under section 23 of the Registration of Titles Act (since repealed), the Plaintiff's title was conclusive proof of proprietorship.

The counsel submitted that the 6th Defendant had the right to exercise its statutory power of sale and relied on the decisions in **Samuel Mwangi Kanubi vs Bank of India (2006) eKLR**, **Nairobi Mamba Village vs National Bank of Kenya(2002) 1 EA 197** and **Solomon Kiragu Thande vs Simon Gatunyi Chabi, Nairobi High Court Civil Suit No. 396 of 2004** for the position that once a power of sale has arisen it remains to be exercised, and an interest in the charged property does not suffice to give a party *locus standi* to obtain an injunction against the charge as the debtor's proprietary interest ceases to exist.

Lastly, counsel for the 6th Defendant submitted that the 1st Defendant had failed to establish a *prima facie* case with the probability of success to stop the 6th Defendant from exercising its statutory power of sale. This is for the reasons that the 6th Defendant had relied on a title guaranteed by the state, and statute allowed it to advertise the suit property for sale. Further, that the evidence by Mr. Mburugu had also

shown that the title issued to the 1st Defendant was irregular, having been issued during the pendency of a vesting order with respect to the suit property in favour of the Plaintiff. Counsel submitted that the 6th Defendant had a right with priority over that of the 1st Defendant, and the counsel relied on the decision in **Andrew Peter Ngirichi vs Cooperative Bank of Kenya Limited & Another, High Court Civil Case No. 405 of 2004.**

Counsel in conclusion submitted that the 1st Defendant had failed to lay sufficient basis for fraud against the Plaintiff and 6th Defendant, and can be adequately compensated in damages. Further, that the balance of convenience tilted in favour of the 6th Defendant who seeks to exercise a legitimate statutory power.

After considering the pleadings, evidence and submissions by the parties, the main issue for determination herein is whether the 1st Defendant has met the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction with respect to the 6th Defendants exercise of its statutory power of sale. The 1st Defendant in its Further Amended Defence and Counterclaim amended on 10th August 2011 is seeking among other prayers declarations that the vesting orders made in Nairobi Civil Suit No. 54 of 1994 and sale of the suit property in favour of the Plaintiff was null and void *ab initio*. The 1st Defendant also prays for a permanent injunction restraining the 6th Defendant from selling and /or transferring the suit property.

It is not disputed that the 6th Defendant's statutory power of sale is being sought to be exercised pursuant to a charge over the Plaintiff's title to the suit property. The 1st Defendant has brought evidence of its title to the said property, which does not show any charge registered in favour of the 6th Defendant. The issue as to which of the two titles is the valid title is one to be decided after full trial and not at this stage, as was also held in the ruling delivered by Okwengu J. (as she then was) on 8th July 2010. The arguments made by the parties as to the regularity or otherwise of the renewal of the Defendant's lease with respect to the suit property can therefore only be decided upon after full trial as they turn on the validity of the titles produced herein. Likewise, the validity or otherwise of the vesting orders giving rise to the Plaintiff's title and of the renewal of the Plaintiff's lease cannot be decided upon at this interlocutory stage.

My findings are therefore twofold. The first is that the 1st Defendant has not established a *prima facie* case to the extent that there are two conflicting titles over the suit property in existence, one which has a charge registered in favour of the 6th Defendant. As stated in the foregoing this court cannot in the circumstances make a finding at this stage as to which of the two titles is the valid title, and it cannot therefore confirm that the 1st Defendant has superior proprietary interests over the suit property.

Secondly, as the validity of the Plaintiff's title is also yet to be determined, this court cannot make a definitive finding at this stage as to the validity of the charge secured by the said title in favour of the 6th Defendant, and its realisation. I must at this juncture comment on some of the arguments made and authorities cited by the 6th Defendant's counsel in this respect. It is my view that it needs to be further argued whether the proprietary interest that becomes non-existent once the power of statutory sale arises is that of a charge or as against the chargee, and also that of third party without notice of the charge. In addition there need to be further examination on the concept of priority ranking particularly on whether it only applies to comparable proprietary interests or otherwise.

The 1st Defendant's Notice of Motion dated 4th August 2011 will therefore be decided on the basis of balance of convenience. The 6th Defendant has argued that he has a statutory right to effect the sale of the suit property, and therefore the balance tilts in his favour. However as indicated in the foregoing the substratum of the said statutory power is still being interrogated, and the extent to which the said statutory power may be exercised to the detriment of a third party's proprietary interests is also arguable. In addition any loss that the 6th Defendant may incur arising from an injunction being granted herein can be recovered in the form of damages, as its right of statutory sale will be satisfied in monetary terms.

I therefore find that the balance of convenience tilts in favour of the 1st Defendant for the reason that he will suffer irreparable damage were the suit property to be sold before the determination of the suit herein and of his counterclaim. This is particularly so given the considerable value of the suit property. I accordingly hereby order that the 6th Defendant be and is hereby restrained while acting either by themselves or through their directors, agents and servants or through any third parties or auctioneers from advertising for sale, selling or in any manner whatsoever transferring the property known as L.R No. 209/3011/19 pending the hearing and determination of the suit and counterclaim filed herein, or until further orders.

The costs of the 1st Defendant's Notice of Motion dated 4th August 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____7th ____ day of ____May____, 2013.

P. NYAMWEYA

JUDGE