



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUG OYA

ELC CASE NO. 541 OF 2013

ARCHIBALD WAMBURU KAHORA PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD1ST DEFENDANT/RESPONDENT

MAJALIWA LIMITED2ND DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant herein filed a suit in this Court on 7th May 2013 seeking various remedies against the defendants/respondents arising out of a claim that the 1st defendant/respondent unlawfully and fraudulently sold his property being a parcel of land known as NGANDORI/KIRIGI/2861 (hereinafter referred to as the suit property) to the 2nd defendant/respondent.

Simultaneously with that plaint, the plaintiff/applicant filed a Notice of Motion under **Order 40 Rule 1, (a) 2 (1) (2), Order 22, Order 51 Rule 1 and 2 Civil Procedure Rules, Section 1A, 1B, 3A 63 (e) Civil Procedure Act, Section 90, 96 and 97 of the Land Act No. 6 of 2012, Land Control Act, Auctioneers Act and Rules made thereunder, Article 40 (1) of the Constitutional of Kenya 2010** and all other enabling provisions of the law seeking the following orders:-

1. *Spent*
2. *Spent*
3. *Spent*
4. *That pending the hearing and determination of this suit, a temporary injunction do issue restraining the 2nd defendant, it's director, employee, servants and/or agents from entering, occupying wasting, offering for sale, selling, transferring or otherwise dealing with all that parcel of land known as NGANDORI/KIRIGI/2861*
5. *That the costs of this motion be borne by the defendants in any event*

The application was premised on the grounds, inter alia, that the plaintiff/applicant is the registered owner of the suit property which he had charged to the 1st defendant/respondent to secure a loan of Ksh. 1.5 million which loan he has re-paid to a tune of Ksh. 1.2 million yet unknown to him, the 1st defendant in purported exercise of Chargee's Statutory Power of Sale auctioned and transferred the suit property to the 2nd defendant. That he was not served with the Statutory 90 days notice for sale or 45 days notification of sale and that further, the **Auctioneer's Act and Rules** were flouted with impunity. The application is supported by his 26 paragraphs affidavit basically reiterating the above and adding that the suit property was sold at a gross undervalue of Ksh. 3.5 million yet it has a market value of Ksh. 5 million and there were restrictions placed on the same.

He adds further that he never attended the Land Control Board and the 2nd defendant has moved via Embu CMCC No. 63 of 2013 seeking to evict him from the suit property which is his matrimonial home and therefore he has established a prima facie case of illegality and fraud against both defendants.

The application is opposed by the two defendants/respondents.

The 1st defendant/respondent has filed grounds of opposition and a replying affidavit by PAUL CHELANGA an officer in their Remedial Department. What comes out of that affidavit and the grounds of opposition are:-

- ***That the plaintiff/applicant has deliberately withheld from this Court that he is an undischarged bankrupt who has no locus standi to file this suit in light of the receiving orders made against his Estate on 3rd April 2008.***
- ***That the plaintiff/applicant had deliberately concealed from this Court the existence of other suits that he has filed against the 1st defendant/respondent in unsuccessful attempts to restrain and fetter the Bank's Statutory Power of Sale.***
- ***That plaintiff/applicant defaulted in loan repayment which constrained the 1st defendant/respondent to issue formal demands and statutory notices for sale before disposing of the charged property by public auction wherein the 2nd defendant/respondent was the bonafide purchaser.***
- ***That the plaintiff/applicant previously filed MILIMANI HCC No. 1233 of 2011 against the 1st defendant/respondent and Garam Investment Auctioneers seeking injunctive orders to restrain the 1st defendant/respondent from selling the suit property and interim orders were granted and the suit was transferred to the subordinate Court being NAIROBI CMCC No. 12060 of 2003 where the 1st defendant/respondent filed a counter-claim for Ksh. 1.642.095.90***
- ***That by letter dated 2nd May 2008, the Official Receiver informed the 1st defendant that the plaintiff had obtained a Receiving Order on 3rd April 2008 in Bankruptcy Cause No. 17 of 2008 having the 1st defendant as his only creditor.***
- ***That the 1st defendant filed the proof of debt form and attended the First Creditor's meeting on 24th June 2008 in which the Official Receiver gave the 1st defendant being a secured creditor the go ahead to sell the charged property***
- ***That on 29th November 2008 the plaintiff/applicant wrote to the 1st defendant admitting the debt and offered Ksh. 1.2 million to redeem the property indicating that he was a person of means and had only filed for Bankruptcy to unlawfully defeat the 1st defendant's claim***
- ***That on 5th December 2008 the plaintiff/applicant procured yet another***

Ex-parte interim injunction in MILIMANI HCCC No. 719 of 2008 restraining the Bank from selling the property

- ***That the filing of multiple suits including Bankruptcy proceedings to fetter the 1st defendant's statutory power of sale is a hallmark of abuse of Court process***

EDWIN NYAGA NJAMURA a director of 2nd defendant/respondent swore an affidavit that the suit property is now registered in the names of the 2nd defendant/respondent and annexed a copy of the Title Deed adding that the same was sold by public auction on 8th March 2012 following an advertisement in the newspaper and that following that sale the plaintiff/applicant made all efforts to stop the registration of the property into the names of the 2nd defendant/respondent including making a false report to the Chief Land Registrar that there were some criminal elements intent on defrauding him of his property. That the plaintiff/applicant has not come to Court with clean hands as there are orders in CMCC No. 63 of 2013 restraining him from entering the suit land.

The plaintiff/applicant in his supplementary affidavit reiterated that he was never served

with any Statutory Notice or Notification of sale and that the property was never advertised in the papers and the whose process was illegal, null and void.

Counsels for all parties have filed their submissions.

I have considered the application, the rival affidavits, the depositions and the submissions by counsels.

This being an application for injunction, it has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN LTD 1973 E.A 358** which are:-

1. ***That the applicant must satisfy the Court that he has a prima facie case with a probability of success***
2. ***That the applicant will otherwise suffer irreparable injury which is uncompensable in damages and;***
3. ***If in doubt, the Court will determine the application on a balance of convenience.***

It must also be remembered that being an equitable remedy, the applicant must seek it with clean hands. Therefore, even if the necessary conditions are satisfied, an injunction may not issue if it is proved to the satisfaction of the Court that the applicant is undeserving of such equitable relief – see Ringera J (as he then was) in **ALBERT MARIO CORDETRO VS CYPERR ENTERPRISES LTD & OTHERS HCCC No. 2340 of 1996.**

I will therefore consider this application within the principles set out in the **GIELLA** case (supra) and also bearing in mind that an applicant seeking the remedy of an injunction must come to Court with clean hands since that remedy is an equitable remedy.

In considering an application such as this one, the Court only confines itself to the affidavit and other annexures and cannot make any determination on other pleaded issues such as fraud etc. Those have to await the trial. On the basis of the material placed before me, both the plaintiff/applicant and the 2nd defendant/respondent claim that they are the registered owners of the suit property. The plaintiff/applicant has annexed to his supporting affidavit a copy of the Title Deed to the suit property issued at the Embu Land Registry on 6th May 1991 (annexture

AWK-1) bearing his names. On the other hand, the 2nd defendant/respondent has also annexed to the affidavit of its director EDWIN NYAGA NJAMURA a copy of Title Deed to the same suit property registered in the names of the 2nd defendant/respondent and issued by the Embu Land Registry on 19th March 2013. I therefore have before me evidence of ownership of the suit property by two parties. The plaintiff/applicant alleges that the property was fraudulently sold to the 2nd defendant/respondent. The 2nd defendant/respondent on its part alleges that the property was lawfully bought in a public auction and the plaintiff/applicant frustrated the registration of the land in it's names until the 2nd defendant/respondent had to seek the intervention of the Chief Land Registrar. Whether the suit property was fraudulently sold to the 2nd defendant/respondent is an issue that will be determined at the trial and before then, this Court cannot determine who between the plaintiff/applicant and 2nd defendant/respondent has a better title. In such circumstances where there is a conflict of evidence with regard to the suit property, the Court will genuinely decline to interfere by issuing injunctions and leave the matter for trial. – **ROYAL MEDIA SERVICES LTD VS TELECOMS LTD & ANOTHER HCCC No. 13 of 2000 NAIROBI (MILIMANI)**. Clearly therefore, the plaintiff/applicant has failed to establish a prima facie case with a probability of success given the fact that a prima facie case is a case which, on the material presented to the Court, it can be concluded that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the opposite party. In this case, the claim of ownership by the plaintiff/applicant has been rebutted by other cogent evidence. As the plaintiff/applicant has failed to surmount the first hurdle in the GIELLA case (supra), his application filed herein on 7th May 2013

must be dismissed and I need not visit the other two principles in the ***GIELLA*** case (supra).

There is, however, the other issue raised by the defendants/respondents that the applicant has not come to Court with clean hands and is therefore undeserving of the remedy of injunction. There is

un-rebutted evidence that apart from this suit, there also exists the following cases involving the plaintiff/applicant and 1st defendant/respondent i.e.

1. ***MILIMANI HCCC No. 1233 of 2011 (later transferred to the subordinate Court)***
2. ***MILIMANI HCC No. 719 of 2008***

In both these cases, the plaintiff/applicant was seeking similar orders as those in this case. This was never disclosed by the plaintiff/applicant in his verifying affidavit nor was it rebutted yet it was material within his knowledge. The plaintiff/applicant only conceded that there was EMBU CMCC No. 63 of 2013 MAJALIWA LTD VS ARCHBALD WAMBUGU KAHORA but failed to disclose that there were orders issued in that case on 3rd April 2013 restraining him from entering or remaining on the suit property. All the above is a clear demonstration that the plaintiff/applicant is guilty of material non-disclosure and is therefore not deserving of the equitable remedy of injunction. Other issues have raised regarding the plaintiff/applicant's capacity to file the suit and also the issue of res-judicata. However, I need not visit those issues as I am satisfied that what I have discussed above is sufficient to dispose of the application now before me. In any case, the pleadings in MILIMANI HCCC No. 1233 of 2011 and MILIMANI HCCC No. 719 of 2008 were not placed before me and without them, I cannot adequately determine the issue of res-judicata.

Ultimately therefore, upon considering all the material before me, I am not satisfied that the plaintiff/applicant has established a prima facie case with a probability of success. Secondly, he has not come to Court with clean hands. His application for a temporary injunction is accordingly dismissed with costs and the orders issued on 7th May 2013 are, for avoidance of any doubt, hereby vacated.

Orders accordingly.

B.N. OLAO

JUDGE

6TH NOVEMBER, 2013

6/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Ndana for Njenga for Plaintiff/applicant – present

Also holding brief for Ms Ndorongo for 2nd defendant/respondent

COURT: Ruling delivered this 6th day of November 2013 in open Court.

Mr. Ndana holding brief for Mr. Njenga for plaintiff/applicant and also for Ms Ndorongo for 2nd defendant/respondent

No appearance for 1st defendant/respondent.

B.N. OLAO

JUDGE

6TH NOVEMBER, 2013