



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 248 OF 2019

**KENYA COMMERCIAL BANK AND ELIZABETH OGAJA Suing as the Executors
of the Estate of SIMEON HONGO OMINDE PLAINTIFFS**

VERSUS

GEORGE MUIRURI T/A LEAKEY AUCTIONEERS.....1 ST DEFENDANT

EQUITY BANK KENYA LIMITED..... 2 ND DEFENDANT

RULING

1. The plaintiffs are executors of the will of the late Simeon Hongo Ominde (**the deceased**) pursuant to a Grant of Probate of Written Will issued in **Nairobi High Court Succession Cause No 1757 of 1996**. They initiated this suit through a plaint dated 23/7/2019 seeking, among other reliefs, injunctive orders against George Muiruri t/a Leakey Auctioneers (**the 1st defendant**).

2. Their case is that the deceased is the registered proprietor of **Land Reference Number 13400** comprised in **Grant Number IR 39371**. The parcel of land measures 0.3768 hectares, is developed, and is located in Karen Brooks, Nairobi. The said parcel of land is the subject matter of litigation in: (i) **Nairobi ELC No 2099 of 2007: Kenya Commercial Bank v Godfrey Ngatia Njoroge t/a Karen Auto Bazaar**; and (ii) **Milimani CMCC No 8704 of 2006; Godfrey Ngatia Njoroge t/a Karen Bazaar v Kenya Commercial Bank**. [The two suits relate to tenancy disputes and were pending in the High Court and in the Chief Magistrate Court at the time the present suit was initiated].

3. They contend that on 15/7/2019, the 1st defendant, through an advertisement in the **Daily Nation Newspaper** at page 37, advertised for sale of the property described as **Land Reference Number 13681** comprised in **Grant No IR 88036, Karen Brooks Estate, Langata Road, Karen, Nairobi County**. Accompanying the said newspaper advertisement for sale were two photographs allegedly of the said property. However, the said photographs, were in fact those of the deceased's land and developments thereon, namely, Land Reference Number 13400 comprised in Grant Number IR 39372.

4. The plaintiffs further contend that by carrying in the newspaper advertisement photographs relating to the deceased's land and developments thereon, the 1st defendant was deliberately misrepresenting to the general public that the deceased's property was up for sale.

5. Together with the plaint, the plaintiffs brought a notice of motion dated 23/7/2019, seeking the following interlocutory reliefs:

1. Spent.

2. Spent.

3. THAT a temporary injunction do issue restraining the defendant, its servants, agents and /or employees or whomsoever, acting under its authority or on its behalf from, conducting the sale by public auction scheduled for 25/7/2019 of the property known as LR Number 13681 (IR NO 88036) KAREN BROOKS ESTATE, LANGATA ROAD – KAREN, NAIROBI COUNTY bearing the photographs of Land Reference Number 13400 (IR NO 39372) contained in the Daily Nation Newspapers of 15/7/2019, and any other print media pending the hearing of this suit.

4. Spent.

5. A temporary injunction do issue restraining the defendant, its servants, agents and/ or employees or whomsoever acting under its instruction or on its behalf from misrepresenting to the public that the property known as Land Reference Number 13400 (IR

NO 39372) is for sale pending the hearing and determination of this suit.

6. Spent.

7. A temporary injunction do issue restraining the defendant, it's servants, agents and/or employees or whomsoever acting under its instruction or on its behalf from using photographs of the property known as Land Reference Number 13400 (IR NO 39372) in any advertisement for sale of any other property whatsoever pending the hearing and determination of this suit.

6. The said application is the subject of this ruling. It was supported by an affidavit sworn on 22/7/2019 by Elizabeth Ogaja. She outlined the plaintiff's case as summarized above and urged the court to grant the interlocutory reliefs.

7. Pursuant to an application dated 25/10/2019, Equity Bank Kenya Limited was, on 29/10/2019, admitted as a 2nd defendant in the suit.

8. The 1st defendant opposed the application through a replying affidavit dated 20/11/2019. He deposed that the photographs alluded to did not prove ownership of property. He faulted the plaintiff for not exhibiting photographs of the deceased's property. He added that he would not rule out collusion between the plaintiffs and the true owners of Land Reference Number 13681. Lastly, he deposed that the two properties were completely different.

9. The 2nd defendant opposed the application through a replying affidavit sworn on 24/1/2020 by Roy Akubu. He deposed that in 2011, Equity Bank Kenya Limited advanced Kshs 10,000,000 to **Samson Jimmy Manyasi t/a Spectrum Network** a loan facility in the sum of Kshs 10,000,000 secured by a legal charge over **Land Reference Number 13681** comprised in **Grant No 88036**, registered in the name of **Gharu Limited**. In 2015, the Bank made further advances totaling Kshs 10,000,000 to the same borrower, secured by a further charge against the same title. Upon default by the borrower, the Bank decided to exercise its statutory power of sale.

10. Mr Akubu further deposed that the charged property was previously identified as **Land Reference Number 13400** but the Map containing the property identified as **Land Reference Number 13400** was cancelled; the cancellation was followed by a change in the structure of the land; and Survey Plan F/R No 191/7 was issued containing a new Reference Number, LR No 13681, issued and registered in the name of **Gharu Limited**. He added that prior to the issuance of the new title, the title in which LR No 13400 was comprised ought to have been surrendered to the Land Registry.

11. Mr Akubu added that the photographs accompanying the advertisement of Land Reference No 13681 were those of the property known as LR No 13681 on the ground, as represented in Survey Map F/R No 191/7, and the said property was previously surveyed and registered as LR No 13400. He urged the court to dismiss the application.

12. The application was canvassed through written submissions dated 16/6/202 which I have duly considered. I have also considered the 1st defendant's written submissions dated 5/3/2020 and the 2nd defendant's written submissions dated 28/7/2020.

13. The single question falling for determination in this application is whether the plaintiff was satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctions. That criteria was spelt out in **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that, if the injunctive relief is denied, he would stand to suffer irreparable damage for which he may not be adequately indemnified through an award of damages. Third, should the court have doubt on both or either of the above two limbs, the application is to be decided on a balance of convenience.

14. At the stage of interlocutory proceedings in search of injunctive reliefs, the court does not make conclusive or definitive findings on any of the substantive issues or questions in the dispute. Conclusive and definitive pronouncements on substantive issues are reserved to await trial or earlier determination of the substantive suit.

15. The suit together with the application under consideration were triggered by an advertisement placed in the Daily Nation edition of 15/7/2019 by the 1st defendant. It has turned out that the 1st defendant placed the advertisement on behalf of his principal, the 2nd defendant. The 2nd defendant is a bank and sought to exercise the chargee's power of sale over the suit property. The plaintiffs brought the suit and the application because they were aggrieved by the fact that the photographs used to project the charged property related to property which belongs to the estate of the late Simeon Hongo Ominde, namely, **Land Reference Number 13400** comprised in **Grant No IR 39372** registered on 25/3/1985. The plaintiffs exhibited a copy of the Grant bearing entries relating to: (i) Memo of Charge registered on 10/2/1986 in favour of Trans-national Finance Company Limited to secure a facility of Kshs 70,000; (ii) Charge to Transnational Finance Company Limited registered on 21/7/1988 to secure a facility of Kshs 1,600,000; (iii) Discharge of Charge; and (v) Caveat by the Registrar of Titles registered on 24/4/2018 claiming an interest under Section 65 of the repealed Registration of Titles Act.

16. The case of the 2nd defendant on whose behalf the 1st defendant acted is that the photographs depicted in the impugned advertisement indeed relate to the charged property. They contend that the charged property was previously surveyed and registered as LR No 13400 and that the Map on which the charged property was surveyed and registered as LR No 13400 was cancelled. According to the 2nd defendant, a new Survey Plan, F/R No 191/7 was issued in which the structure of the charged property changed and the Land Reference Number changed from **LR No 13400** to **LR No 13681**.

17. What emerges from the foregoing is that, the dispute in this suit relates to a common property on the ground. Further, the photographs projected by the 1st defendant on behalf of the 2nd defendant relate to that common property on the ground. It does also emerge from the interlocutory evidential materials before court that the late Simeon Hongo Ominde and his estate have held the property since 1985 through Grant No 39371 comprising LR No 13400. The property is developed. The 2nd defendant on whose behalf the 1st defendant advertised the suit property has, through its Senior Legal Manager, asserted that the charged property was previously surveyed as Land Reference Number 13400 but this Reference Number was cancelled, followed by a change in the structure of the property and issuance of new Survey Plan F/R

No 191/7, containing a new Land Reference Number, being LR No 13681. He has also asserted that upon change of the Land Reference Number, the land was registered in the name of **Gharu Limited**, the chargor. He has further asserted that prior to the issuance of the new title comprising LR No 13681, the previous title comprising LR No 13400 ought to have been surrendered to the Lands Registry.

18. My perusal of the Grant exhibited by the 2nd defendant reveals that the title document held by the 2nd defendant as chargee is indicated to have been issued on 15/2/2002 to **Golden Sequins Limited**, who on 30/7/2008 transferred it to **Gharu Limited**.

19. It is not clear at this point who initiated the process of resurveying the land to change the Reference Number of the land which was already registered and why the subsequent title was issued in a name different from that of the registered proprietor.

20. Taking the above interlocutory evidence into account, it is the view of the court that the appropriate order to issue in the circumstances of this application is one which preserves the suit property within the context of **Order 40 rule 1 of the Civil Procedure Rules** and further preserves the prevailing *status quo*. This position is informed by the fact that on the ground, the charged property, which the 2nd defendant claims is registered in the name of Gharu Limited as Grant No 88036 is the same property occupied by the estate of the late Simeon Hongo Ominde and is registered as Grant No 39372, registered on 25/3/1985.

21. Further, for complete and effectual adjudication of this dispute, Golden Sequins Limited; Gharu Limited; the Chief Land Registrar; the Director of Surveys; and the Attorney General shall be joined as defendants in this suit.

22. Lastly, hearing and determination of this dispute shall be fast-tracked to mitigate against any likely prejudice.

Disposal Orders

23. In light of the foregoing, I make the following disposal orders in relation to the plaintiff's notice of motion dated 23/7/2019:

a) The property comprised in Grant Number 39372, surveyed as Land Reference Number 13400, and held by the estate of the late Simeon Hongo Ominde; which property is contended to be the same as the property comprised in Grant Number 88036 surveyed as Land Reference Number 13681, indicated as charged to the 2nd defendant, shall be preserved and shall not be disposed, auctioned or further charged, pending the hearing and final determination of this suit.

b) The plaintiff shall join the following as defendants in this suit: (i) Golden Sequins Limited; (ii) Gharu Limited; (iii) Chief Land Registrar; (iv) Director of Surveys; and (v) the Attorney General

c) The prevailing status-quo shall continue to obtain in terms of possession; meaning that the estate of the late Simeon Hongo Ominde shall continue to have possession of the property pending the hearing and determination of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Mara for the Plaintiff/Applicant

Mr Kahuthu for the 1st Defendant/Respondent

Ms Mungai for the 2nd Defendant/Respondent

Court Clerk - June Nafula