REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 4321 OF 1991

SITEYIA ……..…….. APPLICANT

VERSUS

GITOME & 3 OTHERS…….. RESPONDENTS

RULING

This is an application for a temporary injunction to restrain the defendants from further charging, leasing disposing of, selling or interfering with the suit premises until the hearing and determination of the suit.

The circumstances leading to this application are well set out in the ruling of my brother Githinji, J, on January 16th, 1992, in this very case, and it will be a superfluity to attempt to recapitulate them in this ruling.

The suit itself is brought to cancel a sale and purchase of the suit land on grounds of alleged illegality and fraud, a sale which was in execution of a decree, and was at a public auction.

It is the applicant's expressed fear that unless the Court grants a temporary injunction until the suit is heard and determined, the defendants are likely to interfere with the property in a manner "which would make the proceedings in this suit nugatory" (paragraph 9 of the affidavit of Nakeel Ole Lolkipury Siteyia sworn on September 9, 1991).

It is also feared that without the injunction issuing, "the plaintiff is likely to suffer great and irreparable loss which cannot be adequately compensated with damages" (*ibid*, paragraph 12).

Mr Machira, of Messrs Machira & Co advocates for the applicant ably argued the application before me. Mr Gathenji for the second respondent and holding brief of Mr Gatonye for the first and third respondents, and Miss Kittony for the fourth respondent, stoutly opposed this application.

A temporary injunction is a pre-emptive remedy. It is preventive in its nature. By its very nature it is interim or interlocutory. In terms of duration it is tentative, provisional, impermanent, mutable, not fixed or final, or conclusive. It is characterized by its for-the-time-beingness. It emanates from one of the most valuable features of equity jurisdiction to anticipate and prevent injury. It is a jurisdiction exercised for the benefit of both parties. For the benefit of the defendant because the injunction discloses to him that he is probably proceeding without warrant of the law; for the benefit of the complainant by protecting him from injuries which if inflicted would be wholly destructive of his rights before they are judicially considered.

The goal of a temporary injunction is to maintain the status quo pending the outcome of the litigation. But the question may be: whose status quo is to be preserved? The answer is, that status quo which will be preserved by a temporary injunction is the last actual, pre-dispute, peaceable, noncontested status which preceded the pending or forthcoming controversy to be resolved in a suit. This means that the injunction shall preserve or restore such relationship to a desirable state. Equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status even if he succeeded in making the change before the judge's hand actually reached him. Restoration of the right status quo is an effort to meet the efforts of those who endeavour to be swifter than justice and the law. Accordingly, the object of a temporary injunction is to put and keep matters in the position in which they stood before the disorder commenced, and to prevent any party from gaining any unfair, underserved forensic advantage by his own wrongful act.

The idea is to preserve or restore the subject in controversy in a safe condition without determining the contested question of right or infringement of right. It is to prevent the indulging in that whereby the right in controversy may be materially endangered, until a full investigation and determination of the dispute, or until a named day or until a further order. The injunction goes no further than is necessary to protect, as far as practicable, the rights of both parties pending the final determination and subject to the final decision or until further orders.

The injunction decides no contested fact finally, fixes no disputed right. On the application for the injunction, the Court must avoid to act as though it were in a position to determine the main issues at this stage. It must, with a clinical detachment, abstain from expressing an opinion as to the merits of the case while the main issues are still at large on untested materials. With due regard to the fact that the legal position has not been finally decided and that the defendant's affairs and interest may be seriously affected by the grant of an injunction, the Court at this stage attempts to put and hold matters between the parties on such a footing as will ensure that neither the applicant's interests nor his legal position shall be prejudicially and irreversibly affected by the defendant's acts at any time prior to the trial or before a certain named date or further or other order.

The exercise of the jurisdiction is justified by the well-founded apprehension of damage which would alarm men of steady nerves and reasonable courage. Proceeding on practical views of human affairs, the law guards against risks which are so imminent that no prudent person would incur them lying down. Balancing the magnitude of the apprehended evil, against the chances of its occurrence, the law provides against mischief which, should it be let to be done, it would be vast and overwhelming.

Whether a temporary injunction should or should not issue will depend on the facts of the case. It is not possible to lay down one general rule on which the Court shall act in all cases. A variety of circumstances may have to be considered. According to the many cases decided on questions of temporary injunctions, in deciding whether to grant or deny an application for a temporary injunction, a Court considers the following factors:

(1) Has the applicant made a strong showing that he is likely to prevail on the merits at the trial of the suit itself?

(2) Has the applicant shown that without a temporary injunction he will be irreparably injured?

(3) Has the applicant shown that taking into consideration the comparative mischief or inconvenience to the parties, the balance of convenience is in his favour?

(4) Would the issuance of the injunction substantially harm other parties interested in the proceedings, but not brought before the Court?

(5) Where does the public interest lie?

(6) Would the withholding of the temporary injunction be in the interest of conserving judicial time?

(7) Is there a clear necessity for affording immediate protection to the applicant's alleged right or interest which would otherwise be seriously injured or impaired?

Some of these factors are expressly stated in orthodox formulations, but some of them may be gleaned from judicial practice and behaviour as unstated premises of the courts. In short, the applicant must show that he has a legal right. He must show a fair *prima facie* case in support of the right or interest claimed, which means that his case at this stage should not appear frivolous. He must show an actual or threatened violation of that right. The injury must be imminent and the risk a real one. The violation must be shown to be one productive of irreparable or at least grave damage. This means that in the event of withholding the relief the applicant will suffer in irremediable injury; ie that the case is one in which in the event of success in the suit the applicant will not have a proper remedy in being awarded adequate damages or some other remedy.

Moreover, the award of a temporary injunction by Courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the applicant. The award or withholding of the injunction is a matter of sound judicial discretion, in the exercise of which the Court balances the conveniences of the parties and possible injuries to them and third parties, according as they may be affected by the granting or withholding of the injunction. There must be greater convenience in granting than refusing the injunction and equally efficacious relief must not be obtainable by any other usual mode of proceeding.

In considering all these matters, the Court must act on the usual principles of equity. Accordingly the Court will ensure that the applicant's conduct is such as not to disentitle him to the Court's assistance; the applicant must be fair and honest, and, in particular, there must be no acquiescence or delay. Thus, the Court will act on the well-known principles of equity, that he who seeks equity must do equity, and that he who comes into equity must come with clean hands. The applicant must come with equitable conditions generally imposed upon parties asking equitable relief.

Where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an undertaking as to damages cannot compensate, the Court may in the public interest withhold the relief until a final determination of the rights of the parties, though the postponement may be burdensome to the applicant. This is but another application of the principle, that Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved; for example, to protect the national economy from the disruptive influence of inflation.

Other considerations include whether the injunction may be unworkable, onerous or impracticable. If the circumstances are such that it cannot be enforced by the Court, or its enforcement would be practically impossible, or requires continuous supervision on the part of the Court, or where it will be unnecessary, or complete relief can be obtained on the final decree, or the acts complained of have been discontinued and there is no showing that they are likely to be renewed, or if the injunction would bring about the very condition it is sought to prevent or it will not correct the mischief complained of, the Court shall not grant such an injunction. A Court should not make an order which will be infructuous for practical purposes.

So, the discretion must be exercised in accordance with principles generally recognized. The discretion is not unfettered. It is a rule-bound discretion. It is a discretion whose exercise must proceed on correct principles in a given factual setting. The Court must balance the question of damage in the interim. The damage to the applicant must preponderate to justify the injunction. If hardship to the defendant is much less strong than that of the applicant, relief will issue.

With these principles in mind, let me look at the factual position in the instant application. It is stated in the affidavit in support of the application, and in the plaint, by the applicant, that the first defendant in the suit obtained a judgment against the plaintiff in a 1988 suit, for Shs 346,000. In execution of the decree in that suit, the first defendant attached and sold the plaintiff's lad which the plaintiff estimates to be about one hundred acres. The land was bought at a public auction by the second defendant in the instant suit. She bought it for Shs 475,000. The public auction was conducted by the third defendant herein.

Subsequent to the buying of the land, the purchaser (2nd defendant) offered the land as a security for obtaining, and on it she obtained, a loan of two million shillings from the fourth defendant bank.

All these happenings aggrieved the applicant who accuses the four defendants of having done what they did, maliciously, fraudulently, illegally or unlawfully. He, therefore, sued the four persons seeking to undo everything they did. It is in that suit that he also filed this application seeking to be granted a temporary injunction restraining the defendants by themselves or by others, from further charging, leasing, disposing of, selling or in any manner interfering with the suit premises.

It is acknowledged by the applicant himself, as a fact, that the applicant was sued in the earlier case, but he did not file a defence and that in default of defence judgment was entered against him for the sum claimed.

The applicant does not say that the judgment and decree against him in that suit were irregular or wrongly obtained. He does not show that he successfully challenged the judgment and decree.

A decree validly obtained against the applicant was not satisfied by him; so, his land was sold in execution of that decree. According to the applicant's own plaint and affidavits, the Court gets the impression that the applicant's main worry seems to be founded on the fact that the first and second defendants are seen by him to be man and wife, or man and mistress, a relationship denied by the two defendants. With that perceived relationship between the two defendants weighing heavily on his mind, the applicant felt that the two defendants, with the intent to defraud or deceive the applicant, the second defendant at the request of the first defendant, "maliciously, fraudulently, illegally, or unlawfully purchased the suit premises".

What the applicant considers to be the particulars of malice, fraud, and illegality of all the defendants, are set out in the tenth paragraph of the plaint.

At this point in the litigation it is not for this Court to say whether the applicant's allegations on all these things will prevail. But I am able to say that as long as the judgment in default still stands against the applicant, and that as long as the actual value of the suit land remains unknown, and as long as the newspaper advertisement shown in the attached copy of the cutting carrying the publication of the notice of the intended auction sale at which auction the second defendant purchased property, has not yet been shown to have been inadequate or otherwise invalid, the applicant's right remains undemonstrated at this stage.

In particular, the claim against the third and fourth defendants, does not readily appear.

Conspiracy and fraud charges against all the defendants are not supported by *prima facie* particulars. They may be proved at the hearing; but as at the moment, they are not apparent, and the Court should not say anything now which may prejudice the trial. Suffice it to say that no *prima facie* case with a probability of success has been demonstrated on the materials so far available.

But if I am wrong in that finding, and supposing the applicant has any legal right and he has a *prima facie* case with a probability of success, I find that the applicant has not shown what injury he is likely to suffer before the determination of the suit, and whether such injury would be irreparable unless an injunction issues at once. You see, the land is intact. No injurious activity is said to be going on there. It has been charged to the bank as a security for a loan of two million shillings. It has not been shown that the borrower is in fefault of loan repayments, or that such default is expected or beyond being elimminated. After the repayment of the loan, the land will still be there. Probably, by the time the suit is over the loan will have been paid in full and the charge on the land lifted. If the suit will be determined before the loan is fully paid, the land will still be unalienated and available.

It has not been shown that the defendants are damaging the land. If the land is further alienated, and the applicant succeeds in the suit, he may probably be compensated in damages. Not every land is beyond any money-value. It has not been shown what land we are talking about – its unique features, its special

nature – and whether any damages cannot afford the applicant to get another land, or why the applicant cannot do without this particular suit land.

On the balance of convenience, greater convenience would be to let the position remain where it stands at present. The bank which advanced the loan on the strength of the security probably not knowing how the borrower acquired the land charged, would be inconvenienced greatly. The borrower may not be having the money to return to the bank at once. On the other hand, the applicant has not shown what inconvenience he will suffer more than the defendants would.

It is not in the public interest that an injunction should cause money lending institutions to be slow in accepting land as security for loans. This would stifle commerce, to the detriment of the nation. It is not for a bank to question the acquisition of land titles by those who seek loans on the security offered to guarantee repayment of the loan.

The applicant did not show what expeditious steps he took to prevent the 1988 suit against himself, from maturing into a decree against him. The auction was advertised before it took place. The applicant let things go as far as where they currently stand. He was not diligent. Such conduct disentitles him to any relief at equity. He has not shown that he came with clean hands. Moreover, he offers no undertaking as to damages in any of his affidavits. He does not say as to how he will pay the decretal sum which was claimed and obtained against him. He is not prepared to do equity.

For these reasons, the Court dismisses the application. The cost of the application shall be cost in the cause.

Dated and delivered at Nairobi this 1st day of December, 1993

R.C.N KULOBA

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JUDGE