



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 2776 OF 1987

ORAWO & ANOTHER.....APPLICANT

VERSUS

MISTRI & OTHERS.....DEFENDANT

RULING

There are before this court two applications dated 9th July, 1987 and 17th July, 1987 respectively that now stand consolidated. The application dated 9th July 1987, is brought by the plaintiffs under order XXXIX rules 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The plaintiff seeks for orders that an order for injunction be granted restraining the registration of the transfer of parcel number LR 209/407/ 10 Kirichwa Lane Nairobi to the third defendant or any other person until the final disposal of this suit that the sale of the said property by the first defendant to the third defendant by public auction on 12th March 1987 is null and void for all purposes and that the costs of this application be provided for. This application is based on the affidavit sworn by the first plaintiff on the same day and annexed to the said application. By a plaint filed on 9th July, 1987 the plaintiffs pray for the reliefs set out afore and add a prayer for damages for unlawful sale and purported disposal of the plaintiffs' property. Those prayers are the basis for the application under order XXXIX rule 1 and 2 aforesaid.

The 2nd defendant on the other hand has filed an application under order VI rule 13 of the Civil Procedure Rules for the plaintiffs suit to be struck out on the grounds that it discloses no reasonable cause of action against the 2nd defendant, it is scandalous, frivolous or vexatious, it may prejudice embarrass or delay the fair trial of the action or it is otherwise and abuse of the process of the court.

It is contended on behalf of the 2nd defendant as a preliminary issue that the claim between the plaintiffs and the 2nd defendant in this suit is *resjudicata* having been determined or adjudicated upon in High Court Case Nos 1777 of 1986 and 1087 of 1987; that the plaint does not show a *prima facie* case with a probability of success in the light of the defence filed by the second defendant, that the plaintiffs will not suffer irreparable injury if the injunction is not granted and that on a balance of convenience the temporary injunction should not be granted.

From the material before this court in HCCC No 1777 of 1986 the plaintiffs sued the 2nd defendant alone and prayed for orders *inter alia*

“(a) An injunction restraining the defendant from selling the plaintiffs property LR 209/407/10 together with all the developments thereon by public auction.

(b) An order that the plaintiff dispose their property by private treaty to enable them to redeem their mortgages.

By an order given by the court on 30th July, 1986 it was ordered by consent that the plaintiffs be allowed to redeem the mortgaged property by selling the same by private treaty to a person of their choice within 3 months from that day – that is 30th July, 1986 and in default the defendant be at liberty to sell the property in terms of the mortgage and that there be liberty to each party to apply.

In HCCC No 1086 of 1987 the plaintiffs again sued the 2nd defendant alone praying for an injunction against the defendant restraining it from disposing of the same property. The prayer to sell by private treaty had been omitted and it is apparent from the pleadings that negotiations were underway to sell the property by private treaty but the defendant refused to release photostat copies of the title documents to enable the plaintiffs to prepare the transfers. That suit was filed on 11th March 1987 and when the 2nd defendant filed its defence on 7th April, 1987 it stated that the 2nd defendant in the exercise of its power of sale under the mortgage on 12th March, 1987 caused the same to be sold hence an injunction could not be granted. That suit was struck out and dismissed with costs on 10th June, 1987.

The question that now arises for consideration by the court and which constitutes the preliminary point raised by the counsel for the 2nd defendant is whether the present suit is *res judicata*. I bear in mind the affidavits of the parties on record and the submissions by both counsel.

My reading of the pleadings in the present suit is that despite the fact that the plaintiffs obtained an injunction restraining the 2nd defendant from selling the property, it nevertheless went ahead and allowed the 1st defendant to sell the same to the 3rd defendant. That having taken place it is the contention of the plaintiffs that the sale was null and void and a declaration to that effect is sought. Further, before that issue is settled an injunction restraining registration of the transfer should be granted. Further still, if the sale was unlawful the plaintiffs pray for damages arising thereunder.

Unlike in HCCC No 1777 of 1986 and HCCC No 1086 of 1987 in the present suit the 1st and 3rd defendants are joined and the circumstances of this case would suggest that the case against that of the 2nd defendant cannot be decided in isolation from that against the 1st and the 3rd defendants.

I bear in mind also the provisions of section 7 of the Civil Procedure Act. In my ruling I am unable to agree that the suit is *res-judicata* as the prayers in my view are different although the subject matter is the same but the parties are more than in the original two suits.

I do not consider it appropriate to address myself to the issue of whether or not the sale was null and void or that the plaintiffs are entitled to damages for unlawful sale. These two issues form the main body of the present suit most of the allegations against the 1st and the 2nd defendant call for oral evidence.

The question that follows is whether this court should grant the injunction asked for. The conditions for the grant of an interlocutory injunction are set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358. The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

If it is true that the 1st defendant had notice of the court order restraining him from selling the property on 12th March 1987 and if it is also true that the 2nd defendant was aware of advanced negotiations to sell the said property by private treaty then the plaintiffs have shown a *prima facie* case with a probability of success. Any orders thereunder will no doubt affect the position of the 3rd defendant. From the pleading and disclosures made in several affidavits on record the subject matter of this suit is no doubt valuable. The main suit may take some time to be disposed of. By then the property prices may have rocketed and an award for damages may not adequately compensate the plaintiffs adequately. In the circumstances I am inclined to give an order for an injunction as prayed such that the status quo prior the sale of 12th March, 1987 is hereby restored. The effect of this order being that if there have been any steps taken under the title known as LR 209/407/10 Kirichwa Lane, Nairobi subsequent to 12th March, 1987 the

same shall be set aside until the determination of this suit. Costs in the cause.

Orders accordingly.

Dated and Delivered at Nairobi this 5th Day of April, 1988,

A. MBOGHOLI - MSAGHA

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J U D G E