



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 5 OF 2020

JONES JOHN KITILI WAMBUA.....1ST PLAINTIFF/APPLICANT

JOYCE SYOKAU KITILI WAMBUA.....2ND PLAINTIFF/APPLICANT

LUCY WANAGARI KAMAU.....3RD PLAINTIFF/APPLICANT

JOSPEH KIARIE KAMAU.....4TH PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT/RESPONDENT

NANCY NJERI NDUNGU.....2ND DEFENDANT/RESPONDENT

ROMAN KITHINJI MUTUAMWARI.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated 23rd January 2020, by the Plaintiffs/ Applicants seeking for orders that;

1. A temporary injunction be and is hereby issued restraining the Defendants, their agents, servants, employees and or anyone claiming under them from selling, offering for sale, advertising for sale, taking possession of, transferring, further charging, encumbering, subdividing, trespassing and or interfering in any manner whatsoever with Land parcel No. 13537/247 Title No. I.R No. 62328 pending the hearing and determination of the suit and or further order of this Court.

2. Any other order as the Court may deem fit and first to grant.

3. Costs of Application be provided for.

The Application is premised on the grounds that the Plaintiffs/ Applicants bought the suit property from **Francis Ndung'u Kiania(Deceased)** between 1995-1998 and that the Plaintiffs/ Applicants have constructed their matrimonial homes and residential houses thereon. That pursuant to a Certificate of Confirmation of Grant issued in **Succession Cause No. 147 of 2011**, the suit property was distributed to the Plaintiffs/ Applicants. Further that the Administrator of the Estate of **Francis Ndung'u Kiania** known as **Josephine Wanjiru Ndungu**, obtained registration of the said parcel of land in her name by transmission, pending transfer to the lawful beneficiaries, the Plaintiffs/ Applicants herein but she passed away before effecting the sad transfer.

That the 2nd Defendant/Respondent being a daughter to **Josephine Wanjiru Ndung'u**, took advantage of the situation and without the Plaintiffs/ Applicants knowledge petitioned for grant in **Josephine Wanjiru Ndungu's** Estate and illegally applied for distribution of the said parcel of land to herself. It was contended that **Josephine Wanjiru Ndungu** did not have proprietary right over the suit property and was only registered as the owner pending transmission to the Plaintiffs/ Applicants. That the 2nd Defendant/Respondent illegally obtained registration of the suit property in her name and in collusion with the other Defendants/Respondents unlawfully and fraudulently used the suit property as collateral for a loan facility of **Kshs. 5 million**. That by design and to further defraud the Plaintiffs/ Applicants, the 2nd and 3rd Defendants/Respondents failed to pay the loan and the 1st Defendant/Respondent issued **illegal Statutory Notices** in purported exercise of its **Statutory Power of Sale**. That the Public Auction was scheduled for **4th March 2020**, and the Defendant/Respondent intend to sell the suit property for a reserved selling price of **Kshs.45 million** to recover **Kshs.4 million** and share proceeds thereof to the Plaintiffs/ Applicants detriment. That unless restrained, the Plaintiffs/ Applicants will suffer irreparable loss and damage since the 2nd and 3rd Defendants/Respondents are not capable of paying over **Kshs. 45 million** to the Plaintiffs/ Applicants.

In his Supporting Affidavit, **Jones John Kitili Wambua**, the 2nd Plaintiff/ Applicant herein averred that he had authority of the rest of the Plaintiffs/ Applicants to swear the Affidavit. He further averred that **Francis Ndungu Kiania**, subdivided the Land into four blocks and named them A, B, C and D. That on **24th August 1998**, he sold L.R No. 13537/247A to **Jones Kitili Wambua** and **Joyce Syokau Kitili Wambua**. On **24th October 1998** he sold L.R 13537/247B to the 1st Plaintiff/Applicant, In the year **1995**, he sold L.R 13537/247C to the 4th Plaintiff/ Applicant, that further in **1995** he sold L.R 13537 /247D to **Zakayo Gitau Kamau** the late husband to **Lucy Wangari Kamau** the 3rd Plaintiff/ Applicant. Subsequently **Francis Ndungu Kiania** obtained Land Control Boards Consent to transfer the subplots to the Plaintiffs/ Applicants. He further averred that Plaintiffs/ Applicants took possession of their respective subplots and extensively developed the same. That before the transfer, the said **Francis Ndungu** passed away on **16th January 2007**. That the deceased's widow petitioned for letters of Administration intestate and she obtained all the necessary consents from the beneficiaries and the grant was confirmed with **IR 62328(L.R 13537/247)** share as follows; **0.1310Ha** going to **Jones Kitili Wambua** and **Joyce Syokau Kitili Wambua**, further another **0.1012 Ha** going to **Jones Kitili Wambua** and **Joyce Syokau Kitili Wambua**, **0.1012 Ha** going to **Lucy Wangari Kamau** and **0.1012 Ha** going to **Joseph Kiarie Kamau**.

He contended that the 2nd Defendant/Respondent is **Francis Ndung'u's** daughter and that all the surviving beneficiaries of the Estate of the deceased are aware of the Plaintiffs/ Applicants rights and interest in the suit property. That they voluntarily included their names in the list of creditors and or interested parties in the Chief' letter dated **17th August 2009**. Further that on **14th January 2014**, **Nancy Njeri Ndung'u** filed Summons for Revocation of Grant issued in respect of the Estate of **Francis Ndungu Kiania** and on **25th November 2019**, she withdrew the Summons. That on **30th December 2019**, the Plaintiffs/ Applicants were surprised when an Auctioneer served them with a **45 days** Redemption Notice, which described the 3rd Defendant/ Respondent as the chargor while the 2nd Defendant/Respondent was named as the owner of the suit property. He contended that the 2nd Defendant/ Respondent did not have a good title over the suit property to warrant her charge or guarantee any person or entity a loan and or use the suit property as collateral. That Defendants/Respondents committed fraud. He particularised fraud as obtaining registration of the suit property by the 2nd Defendant/ Respondent unlawfully,, purporting to redistribute the suit property to the 2nd Defendant/ Respondent vide the Estate of **Josephine Wanjiru Ndungu** who was merely a trustee, colluding to use the land as collateral, accepting the certificate of title as collateral while the entries indicate that **Josephine Wanjiru Ndungu**, was registered by way of transmission and the 1st Defendant/Respondent did not bother to call for certificate of grant, colluding to unlawfully sell the suit property, intermeddling with the suit property, purporting to issue unlawful statutory notices and to have a good statutory power of sale.

The Application is opposed and the 1st Defendant through **Peter Maina Mwirigi** its branch Manager swore a Replying Affidavit on **30TH April 2020** and averred that pursuant to an Application made by **Roman Kithinji M'Tuamwari** t/a **Kasajah Agencies** vide letter dated **13th October 2016** and a corrigendum to the letter of offer dated **23rd November 2016**, the 1st Defendant/ Respondent offered to advance the 3rd Defendant/ Respondent **Kshs.5,000,000/=** subject to the terms and conditions set out in the offer letter. That the 3rd Defendant/ Respondent duly executed the offer letter and the 2nd Defendant/ Respondent availed the title document for the suit property being the personal representative of the Estate of **Francis Ndungu Kiania**. That on the strength of the Grant and Certificate of Confirmation of Grant, a legal charge duly secured by the 2ND and 3rd Defendants/ Respondents was registered on **31st January 2017** in favour of the 1st Defendant/ Respondent to secure **Kshs. 5,000,000/=**.

That the 2nd and 3rd Defendants/Respondents defaulted in repaying the loan and on **22nd May 2019**, the 1st Defendant/Respondent notified the chargor and the borrower of the continued state of default and issued them with a **90 days Notification of Sale**, advising them to regularize the account to avoid exercise of Statutory Power of Sale. That upon lapse of the **90 days** and the account being in arrears, the 1st Defendant/ Respondent issued the **40 days Statutory Redemption Notice** on **8th October 2019**. Further that the 1st Defendant's/Respondent's firm of Auctioneers also issued to the 2nd and 3rd Defendants/Respondents a **45 days Redemption Notice** and the auction was scheduled for **4th March 2020**.

It was his contention that all the **Statutory Notices** were separately addressed to the 2nd and 3rd Defendants/Respondents and further served upon the available tenants on the suit property. That at **10th December 2019**, the total debt outstanding was **Kshs 4,257,638.85** which sums remain outstanding and continues to accrue interest. He averred that the 1st Defendant/ Respondent is neither privy to any alleged unlawful registration of the suit property, collusion to use the suit property as collateral nor that the 2nd Defendant/ Respondent was only a trustee. That the 1st Defendant/Respondent did not have any notice of any defect in the title as it carried out **due diligence** and therefore the **bank** cannot be faulted for accepting the suit property as a security for loan advanced. That a pre-registration search conducted by the bank revealed there was no other parties registered against the title of the suit property.

That his Advocate has advised him that the Plaintiffs/ Applicants are not forthright with the Court and in the absence of a **title** superior than the title in the 1st Defendant's/Respondent's possession, then they remain strangers concerning the suit properties thus they lack **locus standi** to institute these proceedings. Further that without any proof of participation in the alleged fraud, the **Charge** registered against the title is valid. It was his contention that the Plaintiffs/Applicants have failed to meet the basic threshold that would entitle them to the order sought. He urged the Court to dismiss the Application.

The application was canvassed by way of written submissions and the Plaintiff's/Applicants and the 1st Defendant/Respondent filed written submissions which the Court has carefully read and considered. It is the Court's considered view that the issue for determination is **whether the Plaintiff/ Applicants are entitled to the Injunctive orders sought**.

The Plaintiffs/ Applicants in their Application have averred that they bought the suit property from one **Francis Ndung'u Kiania**. That though he had subdivided the suit property and given them possession, he died before he could transfer to them their respective shares. However, his wife was granted **Letters of Administration** to his Estate and the Plaintiffs/ Applicants were listed as beneficiaries. Further, before she could also transfer to them, she unfortunately passed on. That the 2nd Defendant/ Respondent took advantage and used the suit property to secure a loan which she has defaulted to pay and the 1st Defendant/ Respondent is seeking to exercise its Statutory Power of Sale.

The Plaintiffs/ Applicants have sought the Court's intervention to restrain the sale of the suit property as the same is valued at **Kshs. 45 million** and the 2nd and 3rd Defendants/ Respondents would not be in a position to refund them the said amount of money .

The Plaintiff's/ Applicants having sought for injunctive orders, they should satisfy the principles as set out in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358**, where the court held:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also EA Industries ..Vs..Trufoods (1972) EA 420.”

The said principles are sequential and the Plaintiffs/ Applicants ought to satisfy all of them before injunctive orders can be issued. Have the Plaintiffs/Applicants herein established a prima facie case?.

A prima-facie case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Did the Plaintiffs/ Applicants have a right to the suit property that is likely to be infringed? The Court has gone through the documents provided by the Plaintiffs/ Applicants in their supporting Affidavit. The Court notes that in Succession Cause No. **147 of 2011**, in the ‘Estate of **Francis Ndung’u Kiania**’, one **Josephine Wanjiru Ndung’u** who was the wife to the deceased, petitioned for the said Letters of Administration. Further from the Chief’s letter in support of the said Succession Cause, the Plaintiffs/ Applicants were listed as beneficiaries. Further the Court has also seen the Supporting Affidavit in support of the Summons for Confirmation of the Grant sworn by the said **Josephine Wanjiru Ndungu** on **12th September 2012**, in which the mode of distribution of the suit property indicated that the Plaintiffs/ Applicants would share the suit property as per the distribution listed by the Plaintiffs/ Applicants in their Supporting Affidavit.

Therefore, it is the Court’s considered view that the Plaintiffs/ applicants have an interest and or rights over the suit property. Further it is evident that the 2nd and 3rd Defendants/ Respondents used the suit property to secure a loan from the 1st Defendant/ Respondent . They have failed to repay the said loan the 1st Defendant/ Respondent has sought to exercise its Statutory Power of Sale. A public auction date had been given.

Therefore, it is clear that the Plaintiffs/ Applicants rights have been infringed and the same calls for a rebuttal. The Court finds and holds that the Plaintiff/ Applicants have established that they have a prima facie case, with probability of success at the trial.

The Court notes that the 1st Defendant/ Applicant, the bank has stated it is not privy to any alleged fraud and without any proof of its participation, the charge is valid. Further that the transfer of the suit property was not affected. However, these are disputed facts that the Court cannot deal with at this interlocutory stage.

Having found that the Plaintiffs/ Applicants has established a prima facie case, the Court must go further and establish whether the Plaintiffs/Applicants will suffer irreparable loss. **Irreparable loss**’ was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as **simply injury or harm that cannot be compensated by damages and would be continuous.**

The Plaintiffs/ Applicants have alleged that there are structures on the suit property. They have further averred that the said structures are their residential houses and matrimonial homes. If the suit property is sold, and in the end the Plaintiffs/ Applicant are found to legally own the said property, they would have suffered substantial loss as they would have been displaced. Further the 2nd and 3rd Defendants/Respondents would not be in a position to refund them the monies given that they have defaulted in the loan repayment of **Kshs. 5 million**, which is way less than the value of the suit property

Further an owner of a suit property cannot be expected to take damages in lieu of his rights over the suit property. See the case of **Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR**, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Therefore, the Court finds and holds that the Plaintiffs/ Applicants will suffer irreparable loss which cannot be compensated by an award of Damages.

The third Principle is that if the Court is in doubt, then it is required to decide the case on a balance of convenience. The balance of convenience always **tilts** in favour of **maintaining the status quo**. However, the Court is not in doubt herein. Further, even if the Court was to decide on the said balance of convenience, it would tilt in favour of the Plaintiffs/ Applicants herein, who are in possession of the suit property.

Having considered the available evidence, the Court finds and holds that the Plaintiffs/ Applicants have met the threshold for grant of the **Injunctive orders** and are therefore entitled to the orders sought in the instant Notice of Motion, Hence the **Notice of Motion Application**

dated 23rd January 2020, is found **merited** and the same is **allowed** entirely with costs to the Plaintiffs/ Applicants.

It is so ordered.

Dated, signed and Delivered at Thika this 10th day of December, 2020.

L. GACHERU

JUDGE

10/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Ms Muritu Holding Brief for Mr. Muthomi for the Plaintiffs/Applicants

Ms. Cheruiyot for the 1st Defendant/ Respondent

No Appearance for the 2nd Defendant/ Respondent

No Appearance for the 3rd Defendant/Respondent

L. GACHERU

JUDGE

10/12/2020