



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 324 OF 2008

JULIUS MUSILI KYUNGA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES.....2ND DEFENDANT

JAMES MURIUKI KARAYA.....INTERESTED PARTY

RULING

1. By Notice of Motion dated 2nd August, 2017 expressed to be brought pursuant to Order 40 Rules 1, 2 and 3, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, the Interested Party seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to restrain the plaintiff, and/or the defendants, their agents, assigns, proxies, employees, servants and/or any other person acting under their instructions or otherwise from selling, transferring, leasing, advertising, leasing, advertising for sale, fencing and/or from any other way or manner, interfering with all that parcel known as SUBDIVISION NO. 2812/1/MN, pending the hearing and final determination of this suit.

3. That this Honourable Court be pleased to condemn the Respondent pay costs of this Application.

2. The application is supported by the Interested Party's affidavit sworn on 2nd August, 2017 and is premised on the following grounds:

a. That the applicant purchased the suit property from the 1st Respondent on 11th November, 2008 while the latter was exercising his rights as a chargee at a public Auction.

b. That the Plaintiff's right of redemption thus ended upon the fall of the hammer at the Auction Sale.

c. That the Plaintiff and the 1st defendant have since caused to be registered a discharge of a charge, the subject of the sale by public auction, against the suit parcel.

d. That unless the orders sought herein issue, the Plaintiff is likely to dispose off this suit (sic).

e. That this will destroy the substratum of this suit.

f. That the interests of justice will properly be met if the orders sought herein issue.

3. The Interested Party in the affidavit sworn on 2nd August 2017 averred that he entered into an Agreement of Sale with the 2nd Defendant herein to purchase the suit property at a Public Auction. That before proceeding with the registration of the suit land in the Interested Party's favour, on 14th November, 2008, the Applicant (sic) moved this court for injunctive orders which were issued on 30th October, 2015. The Interested Party avers that the effect of the discharge of charge on the Suit Property is that the Plaintiff, having obtained the original documents of the suit property may deal with it to defeat the Interested Party's interests. The Interested Party has attached a Court of Appeal judgment in **Mombasa Civil Appeal No.3 of 2013** between the same parties herein in which he avers that the Plaintiff herein was found to

have lost his right of redemption of the Suit Property upon purchase by the Interested Party. The Interested Party argues that any purported discharge registered on the Suit Property is therefore unlawful and that unless the orders sought herein issue, the Plaintiff will continue with its illegalities irrespective of the existence of this suit. The Interested Party stated that it was by the Plaintiff's institution of this suit that he was unable to complete the purchase price of the Suit Property due to the injunctive orders which has been issued.

4. In his submissions dated 3rd April, 2018, the Interested Party has submitted that the registration of the discharge of charge on the Suit Parcel after the hammer had fallen way back at a public auction is alien in conveyancing or in the law of contract and cited the case of **Bomet Beer Distributors Ltd & Another –v- Kenya Commercial Bank Limited and 4 Others (2005)eKLR**. It is the Interested Party's submission that he is a bona fide purchaser for value, and that upon the registration of the discharge, the title has unlawfully reverted to the plaintiff. The Interested Party submits that he has established a *prima facie* case with a probability of success in line with the principles governing the granting of an Interlocutory Injunction as laid down in the case of **Giella –v- Cassman Brown & Co. Ltd (1973)EA 358**. The Interested Party also relied on the case of **Nationwide Finance Co. Ltd –v- Meck Industries Ltd (2005)eKLR; Mary Njeri Ngowi –v- Housing Finance Company of Kenya Ltd & 2 Others HCCC No.1864/2000; Kitur & Another –v-Standard Chartered Bank & Another (No.2)(2002)IKLR 640** as well as Section 69B of the Transfer of Property Act (repealed) and Section 99 of the Land Act.

5. On whether the Applicant stands to suffer irreparable injury, it was submitted that unless the orders sought issue, the Plaintiff and the 1st Defendant will perpetrate an illegality and the loss suffered may not be compensated in damages.

6. The Application is opposed by the Plaintiff through a Replying Affidavit sworn by himself on 15th January, 2018 in which he deposes that for all intended purposes he has always been the registered proprietor of the Suit Property and that the statutory sale conducted was done without sufficient time being accorded to him. That they obtained a Temporary Injunction on 4/11/2008 stopping the sale of the Suit Property pending hearing and determination of this suit.

7. The plaintiff avers that the orders sought by the Interested Party have to satisfy laid down conditions. That the Applicant has not established a *prima facie* case with a probability of success as he has not demonstrated to the court that he is indeed the registered owner of the Suit Property and has not demonstrated that he will suffer irreparable damage. The Plaintiff avers that the Applicant only paid 25% of the Auction amount which can easily be refunded back to him. The Plaintiff states that he proposed in writing through the 1st Defendant's Advocates on record his willingness to offset the outstanding debt with the 1st Defendant to which he has offset and that the 2nd Defendant accepted the offer and a consent was signed and filed in court. It is the Plaintiff's contention that the Applicant does not have a binding contract between him and the 2nd Defendant as he has not paid the balance of the purchase price within the stipulated time or at all. The Plaintiff avers that even after the court in 2008 issued the injunctive order, that order did not stop the Applicant from clearing the balance of the purchase price and that the order was ultimately discharged and as such the Applicant would have proceeded to settle the balance of the purchase price.

8. The Plaintiff avers that he deposited the sum of Kshs.3,875,000/= with the 2nd Defendant which sum the 2nd Defendant assured the plaintiff that it was to refund to the Applicant if at all the Court were to order a refund. The plaintiff contends that he settled all his liabilities with the 2nd Defendant and his property was discharged. That it will be best to dispose off the suit as the charge no longer exists.

9. In his submission dated 12th February, 2018 the Plaintiff's counsel submitted that the applicant has no right against the Plaintiff and the latter is therefore incapable of infringing on non-existent rights. That the two parties have no legal or equitable contractual relationship between them therefore no rights or responsibilities can accrue against each other. That the Applicant only has a claim against the 1st Defendant bank. It is the Plaintiff's submission that no *prima facie* case with a probability of success against the respondent has been established. The Plaintiff's Counsel relied on the case of **Giella –v- Cassman Brown and Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003)eKLR**.

10. The Plaintiff further submitted that the Applicant will not suffer any substantial loss as he has only paid a sum equivalent to 25% of the auction price which has already been deposited into the 1st Defendant's account. That the Applicant can also claim for costs in this suit which will be sufficient to indemnify him for all the minimal losses that he may have incurred and that in any case, award of damages will sufficiently indemnify the applicant. They relied on the case of **Twin Travel & Tours Limited –v- National Industrial Credit Bank Ltd & Another (2007) eKLR. Relying on the case of Paul Gitonga Wanjua –v- Gathuti Tea Factory Company Ltd & 2 Others (2016)eKLR**, the Plaintiff submitted that the balance of convenience is in his favour.

11. On their part, the defendants adopted the submissions filed by the Plaintiff.

12. I have considered the Application. From the entire proceedings, the pleadings and submissions of the parties, some critical things are abundantly clear and are not disputed. The first one is that the Plaintiff is the registered proprietor of the Suit Property known as **PLOT SUBDIVISION N.2812/I/MN**. The Plaintiff charged the Suit Property to the 1st Defendant to secure the repayment of the money advanced to the Plaintiff by the 1st defendant. The other issue is that the Plaintiff defaulted in payment, prompting the 1st Defendant to exercise its statutory power of sale. Subsequently, the Suit Property was advertised for sale by public auction. The Suit Property was sold to the Interested Party by public auction on 11th November, 2008 and he paid 25% of the purchase price.

13. On 13th November, 2008, the Plaintiff filed this suit against the Defendants herein seeking orders that the charge document in respect of the Suit Property be declared a nullity for want of consideration and an order restraining the Defendants from selling or otherwise alienating mortgaging or otherwise dealing with or disposing off the Suit Property. The Plaintiff also sought an order that the debt outstanding on his account with the 1st defendant be declared as fully settled and/or recovered through a civil suit. At the time of filing suit, the Plaintiff simultaneously filed an Application for injunction.

14. The record shows that on 1st April 2009, the Interested Party herein was joined in the proceedings as an affected party pursuant to an

Application dated 2nd January 2009. On 30th October 2015 pursuant to an Application dated 16th March, 2015 by the plaintiff the court granted the Plaintiff leave to file and serve amended Plaintiff. The Court further ordered that Defendants and the Interested Party were at liberty to file and serve amended defences. In addition, the court granted conservatory order for status quo to ensure that pending the hearing and determination of the suit, the 1st Defendant and the Interested Party are restrained from registering a transfer over the Suit Property, among other orders.

15. The order of 30th October 2015 was registered by the registrar as entry No.8 in the title to the Suit Property. The Plaintiff has made an Application dated 20th June, 2017 seeking an order for removal of the said entry.

16. In the Application herein, the Interested Party seeks injunctive relief restraining the Plaintiff and the Defendants from selling, transferring, advertising for sale, and fencing and/or from any other way or manner interfering with the Suit Property pending hearing and determination of the suit. The Application is premised on the grounds that the Interested Party purchased the property from the 1st Defendant while exercising its rights as a chargee at a public auction. It is the Interested Party's case that the plaintiff's right of redemption ended upon the fall of the hammer at the auction sale. The Plaintiff and the 1st Defendant have since caused to be registered a discharge of charge on the title of the suit property and the Original title documents returned to the Plaintiff.

17. The point to be decided here is whether the Interested Party has satisfied the requirements for a temporary injunction. The principles governing the granting of an interlocutory injunction were laid down in the case of **Giella –V- Cassman Brown & Co Ltd (1973) EA. 358** as follows:

“First an application 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 would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience”

18. On the facts of the present case, the Interested Party has shown a prima facie case with a probability of success. First, the Interested Party has shown that he purchased the suit property from the 1st defendant in a lawfully constituted public auction bona fide and legitimately. There was no allegation of fraud against him in the amended Plaintiff, neither is there any allegation of conspiracy between him and the defendants. Besides, the Interested Party has filed a counter-claim claiming the suit property. Already, it is admitted that the Interested Party made a down payment of 25% of the selling price during the public auction.

19. On the second principle set out in the **Giella –v- Cassman Brown & Co. Ltd (supra)** the Interested Party has convinced this court that should the property be disposed off, this will destroy the substratum of this suit and will occasion irreparable harm to the Interested Party. The Suit Property has already been discharged and the Original Title documents are in the hands of the Plaintiff.

20. In the circumstances, this court exercises its discretion in favour of the Interested Party and his Application for Interlocutory Injunction succeeds. The Application dated 2nd August, 2017 is allowed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Wafula holding brief for Munyithya for Plaintiff

Gathu holding brief for Waweru for Defendants

Maundu for Interested Parties

Yumna Court Assistant

C.K. YANO

JUDGE