



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 661 OF 2017

KRISHMA JITESH CHAVDA.....PLAINTIFF

VERSUS

JOSEPH MUNGAI GIKONYO

T/A GARAM INVESTMENTS AUCTIONEERS.....1ST DEFENDANT

COMMERCIAL BANK OF AFRICA LTD.....2ND DEFENDANT

GREEN FUTURE LIMITED.....3RD DEFENDANT

FREDRICK OKUMU SEWE.....4TH DEFENDANT

MICHAEL MUINDE KIMIYU.....5TH DEFENDANT

MICHAEL OKUMU KASERA.....6TH DEFENDANT

RULING

What is before the court is the plaintiff's amended Notice of Motion application dated 14th December, 2017 seeking the following prayers;

1. That the 2nd defendant be restrained whether by themselves or through their auctioneers, servants or agents or anybody claiming through them whatsoever from selling, transferring or dealing in any manner whatsoever with the plaintiff's parcel of land known as Title Number L.R 205/26 (I.R 124510) Villa No. 8 Olive Point Villas until this suit is heard and determined.
2. That a permanent injunction restraining the 1st and 2nd defendants whether by themselves or through their agents and servants from selling, dealing, interfering, alienating or disposing of all that parcel of land known as L.R No. 205/26 (I.R 124510) Villa No. 8 Olive Point Villas.
3. That a declaration does issue that the applicant herein is the rightful and lawful owner of parcel of land known as L.R No. 205/26 (I.R 124510) Villa No. 8 Olive Point Villas (hereinafter referred to as "the suit property").
4. That the costs of this application be provided for.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the plaintiff sworn on 14th December, 2017. The plaintiff averred that she was at all material times the registered owner of the suit property. The plaintiff averred that she purchased the suit property at a public auction that was conducted on 4th March, 2015 by S. K. Karuu T/A Kiriuyu Merchant Auctioneers. The plaintiff averred that the said auction was carried out in execution of a decree that was issued by the High Court of Kenya at Nairobi in Commercial and Admiralty Division Civil Case No. 502 of 2013 against Green Future Limited, the 3rd defendant herein. The plaintiff averred that prior to the sale of the suit property by public auction as foresaid, the property was registered in the name of Fredrick Okumu Sewe, the 4th defendant herein who was a director of the 3rd defendant.

The plaintiff averred that in the said Nairobi High Court Commercial and Admiralty Division Civil Case No. 502 of 2013(hereinafter referred to as "the commercial case"), the court had ordered that the 4th defendant was responsible for the debts of the 3rd defendant. The plaintiff averred that after meeting all the conditions of the auction sale, the court issued an order in the commercial case on 12th May, 2015 confirming and declaring the sale of the suit property to her absolute. The plaintiff averred further that on 18th March, 2016, the said court

ordered the Registrar of Titles to remove a caveat that had been registered by the 2nd defendant against the title of the suit property on 20th January, 2015 and to proceed to register the order vesting the suit property upon the plaintiff.

The plaintiff averred that on 14th December, 2016, the suit property was registered in her favour. The plaintiff averred that in an advertisement by the 1st defendant in the Daily Nation newspaper of 9th October, 2017, the 1st defendant informed the general public that he was going to sell the suit property by public auction on 24th October, 2017. The plaintiff averred that the said advertisement was unlawful, negligent and improper in that it indicated the owner of the suit property as the 4th defendant. The plaintiff averred that the 2nd defendant failed, neglected and ignored to carry out due diligence by conducting a search at the land registry to establish the rightful and lawful owner of the suit property which search would have indicated that the suit property was lawfully and rightfully owned by the plaintiff and not the 4th defendant.

The plaintiff contended that the 2nd defendant's alleged interest in the suit property arose out of the proceedings in High Court at Nairobi, Civil Suit No. 379 of 2015 (hereinafter referred as "the subsequent suit"). The plaintiff averred that in a bid to settle the subsequent suit that was brought by the 2nd defendant against the 3rd to 6th defendants herein, the 4th defendant fraudulently, illegally, irrationally, knowingly and willingly deceived the 2nd defendant that he was the registered owner of the suit property and entered into a consent with the 2nd defendant to sell the property by way of public auction to settle his debt with the 2nd defendant.

The plaintiff averred that the said consent order obtained by the 2nd defendant in the subsequent suit could not be enforced in that as at the time it was issued, the suit property had legally been registered in her name through a preceding court order and she was the rightful and legitimate owner thereof. The plaintiff averred that as the lawful and rightful owner of the suit property, she would suffer irreparable harm and damage if the application was not allowed and the auction scheduled by the 1st defendant allowed to proceed.

The plaintiff averred that it was in the interest justice that the prayers sought in the application be allowed. The plaintiff attached to her affidavit in support of the application among others; a copy of a lease dated 8th June, 2010 between AMS Properties Limited and the 4th defendant in respect of the suit property; a copy of a decree issued in the commercial case on 3rd February, 2014; a copy of an order issued in the commercial case on 16th June, 2014; a copy of an order issued in the commercial case on 11th May, 2015; a copy of a vesting order issued in the commercial case on 11th May, 2015, a copy of an order issued in the commercial case on 8th March, 2016; a copy of an instrument of transfer registered on 14th December, 2016 and a copy of the advertisement by the 1st defendant in the Daily Nation of 9th October, 2017.

The plaintiff's application was opposed by the 2nd defendant through a replying affidavit sworn by its head of Remedial Management Unit, Dr. Jacob O. Ogola on 13th February, 2018. In the affidavit, the 2nd defendant contended that the plaintiff's application was bad in law, without merit and an abuse of the court process. The 2nd defendant contended further that the application was intended to subvert the 2nd defendant's lawful exercise of its right to sell the suit property pursuant to a decree that was issued in its favour in the subsequent suit. The 2nd defendant averred that at the instance of the 3rd defendant, it advanced to the 3rd defendant an overdraft facility in the sum of Kshs. 3,000,000/= payable on or before 30th September, 2013. The 2nd defendant averred further that prior to the maturity of the said overdraft to the 3rd defendant, the 3rd defendant sought and was advanced a further sum of Kshs. 3,000,000/= which facility the 3rd defendant did not repay and was converted by the 2nd defendant to a term loan.

The 2nd defendant averred that the 4th to 6th defendants guaranteed to indemnify the 2nd defendant of any loss arising out of the 3rd defendant's breach of its obligations under the said banking facility. The 2nd defendant averred that it was a term of the said banking facility that was the same would be secured by personal guarantees of the 4th to 6th defendants and a first legal charge over the suit property that was registered in the name of the 4th defendant. The 2nd defendant averred that in furtherance of the foregoing, the 3rd and 4th defendants deposited the original title documents in respect of the suit property with the 2nd defendant in the year 2013 for the purposes of creation of the said charge.

The 2nd defendant averred that despite depositing the said title documents with the 2nd defendant, the 4th defendant failed to execute an instrument of charge. The 2nd defendant averred that as a precautionary measure, it proceeded to register a caution against the title of the suit property on 21st January, 2015 on the basis of its contractual rights to obtain a security over the property. The 2nd defendant averred that the said caution was registered without any objection by the Chief Land Registrar.

The 2nd defendant averred further that the said caution was registered to forbid any disposition and/or further dealing with the suit property by any third party without consent and/or service of notification upon the 2nd defendant. The 2nd defendant averred that it was a mandatory requirement of law that any intention to remove the said caution on the suit property be brought to its notice in accordance with the provisions of the Land Registration Act, 2012.

The 2nd defendant averred that neither a notice for the removal of the said caution nor the order that was issued on 8th March, 2016 that directed the Registrar of Titles to remove the said caution and to register the order that vested the suit property upon the plaintiff was served upon it. The 2nd defendant averred that the purported removal of the said caution was unprocedural, null and void. The 2nd defendant averred further that, since the vesting order in favour of the plaintiff was issued after the registration of the 2nd defendant's said caution, the same should not have been registered against the title of the suit property. The 2nd defendant averred further that after the prohibitory order that was issued in the commercial case and registered against the title of the suit property was lifted on 11th May, 2015 at the instance of the plaintiff, the caution that was registered by the 2nd defendant against the title of the suit property remained as the only prohibition over the suit property. The 2nd defendant averred further that no other disposition inconsistent with the said caution was capable of registration without the consent or notice to the 2nd defendant. The 2nd defendant averred further that the removal of the said caution should have

followed the procedure laid down under section 73 of the Land Registration Act, 2012.

The 2nd defendant averred further that in flagrant breach of the laid down procedure, the plaintiff proceeded to obtain a court order on 8th March, 2016 removing the said caution through an application that was not served upon the Chief Land Registrar and the 2nd defendant. The 2nd defendant averred that the irregular removal of the said caution was a violation of the 2nd defendant's right over the suit property and invalidated the subsequent registration of the vesting order in favour of the plaintiff. The 2nd defendant averred that it filed the subsequent suit against the 3rd to 6th defendants to recover the amount that was outstanding in respect of the banking facility that it had availed to the 3rd defendant.

The 2nd defendant averred that following mediation, the parties executed a settlement agreement that was adopted by the court in the subsequent suit on 31st May, 2017 and a decree issued in terms thereof on 19th July, 2017. The 2nd defendant averred further that by a consent dated 22nd September, 2017 the decree in the subsequent suit referred to hereinabove was amended to reflect that the 2nd defendant was authorised to sell the suit property by public auction or private treaty to recover the amount that was owed to the 2nd defendant. The 2nd defendant averred that pursuant to the said decree and consent, the 1st defendant was appointed by the 2nd defendant to proceed with the advertisement and sale of the suit property by public auction. The 2nd defendant averred that the original lease dated 8th June, 2010 in respect of the suit property was in its custody and that it had an interest in the suit property. The 2nd defendant averred that the removal of the caution that it had registered against the title of the suit property was unknown to it until the present suit was filed. The 2nd defendant averred that the purported registration of the plaintiff as the owner of the suit property took place long after the original title for the suit property had been deposited with the 2nd defendant and consequently, the registration of the suit property in the name of the plaintiff was unprocedural, null and void.

The 2nd defendant averred that in any event, it continued to hold an interest in the suit property having advanced monies to the 3rd defendant. The 2nd defendant averred further that in light of the competing interests between plaintiff and the 2nd defendant, it was not in the interest of justice to grant the orders sought by the plaintiff which would occasion undue hardship to the 2nd defendant. The 2nd defendant averred that the suit property was its only security for the monies it advanced to the 3rd defendant and should the orders sought by the plaintiff be granted, the 2nd defendant would suffer irreparable loss and damage as it was owed Kshs. 13,677,979/= as at 31st January, 2018. The 2nd defendant averred that the plaintiff had not established a prima facie case with a probability of success and had failed to give the requisite undertaking as to damages. The 2nd defendant urged the court to dismiss the plaintiff's application with costs.

The 2nd defendant annexed to its affidavit in opposition to the application among others; a copy of a letter of offer of credit facility to the 3rd defendant dated 17th December, 2013; a copy of a lease dated 8th June, 2010 between AMS Properties Limited and the 4th defendant; a copy of a letter dated 5th June, 2017 by the Deputy Registrar High Court of Kenya, Milimani Law Courts to Wainaina Ileri & Company Advocates and Kounah & Co. Advocates with respect to the commercial case and a copy of a decree given on 31st May, 2017 and issued on 19th July, 2017 in the commercial case. The plaintiff filed a further affidavit on 15th November, 2019 in response to some of the issues that were raised in the 2nd defendant's replying affidavit.

I have considered the plaintiff's application together with the two affidavits filed in support thereof. I have also considered the 2nd defendant's affidavit filed in opposition to the application. Finally, I have considered the written submissions filed by the parties' respective advocates. The principles upon which this court exercises its discretion in applications for temporary injunction are settled. In the case of Gielu v Cassman Brown & Company Ltd. [1973] E.A 358, it was held that, an applicant for an interlocutory injunction must show a prima facie case with a probability of success and that, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that, if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguman Ltd. v Jan Bonde Nievesen and 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Ltd. v First American Bank of Kenya Ltd. and 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

In the case of Ougo and Another v Otieno [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

From the material placed before this court, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants and that unless the orders sought are granted, the plaintiff is likely to suffer an irreparable injury which cannot be adequately compensated in damages. Even if I was not satisfied as to the foregoing and the matter had to be determined on a balance of convenience, in my view, the balance of convenience tilts in favour of the plaintiff. It is not disputed that the suit property is registered in the name of the plaintiff. It is also not disputed that the plaintiff acquired the suit property through a court sanctioned process and paid a total sum of Kshs.38,700,000/= for the same. It is also not in dispute that the plaintiff is in possession of the suit property and that the 2nd defendant through the 1st defendant intends to sell the suit property through public auction.

Whether or not the court process through which the plaintiff acquired the suit property was legal is an issue that can only be determined at the trial. On the material before the court, I have no reason to doubt that the process was lawful and proper. There is no evidence before the court that the orders pursuant to which the suit property was vested upon the plaintiff have been varied or set aside. I am of the view that even if the 1st and 2nd defendants were to proceed with the sale of the suit property, they would not be able to pass a good title to the auction purchaser since the suit property is not registered in the name of 4th defendant as claimed in the advertisement by the 1st defendant.

I have noted that the 2nd defendant's interest in the suit property was registered against the title of the suit property after the prohibitory order had been issued in the commercial case. Without deciding the matter with finality, the prohibitory order took precedence over the 2nd defendant's caution. I am not persuaded by the 2nd defendant's argument that when the court lifted the said prohibitory order so as to enable the registration of the vesting order in favour of the plaintiff, the caution registered by the 2nd defendant overtook the said prohibitory order and the vesting order in priority. As to whether the plaintiff can be compensated in damages, it has not been suggested that the 2nd defendant is not in a position to pay damages to the plaintiff in the event that the orders sought are not granted and the plaintiff succeeds at the trial. However, that alone would not persuade this court to allow the 2nd defendant to sell a property that is registered in the name of the plaintiff as if the property is owned by the 4th defendant who is alleged to have authorised the 2nd defendant to sell the same. Furthermore, it is settled that when it comes to land, monetary compensation in most cases would not be sufficient to compensate for the loss of the same. I am satisfied therefore that the plaintiff would suffer irreparable harm unless the orders sought are granted. Even, if I was to consider the matter on a balance of convenience, the same would tilt in favour of the plaintiff. As I have stated earlier, there is no dispute that the suit property is registered in the name of the plaintiff and that the plaintiff is in possession thereof. In the circumstances, the balance of convenience would favour the maintenance of that status quo. In her application, the plaintiff had sought in addition to the temporary injunction, a permanent injunction and a declaratory order that she is the rightful and lawful owner of the suit property. These orders cannot be granted by the court in an interlocutory application. The same are therefore not for granting.

In the final analysis and for the foregoing reasons, I find merit in the plaintiff's Notice of Motion application dated 14th December, 2017. The application is allowed in terms of prayer 3 thereof. The plaintiff shall also have the cost of the application.

Dated and Delivered at Nairobi this 14th Day of November 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

Mr. Kori for the plaintiff

Ms. Muyai h/b for Mr. Kariuki for the 1st and 2nd Defendants

N/A for the 3rd, 4th, 5th and 6th Defendants

Phylis-Court Assistant