



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 133 OF 2017

KENFREY GITONGA MUNYUA.....PLAINTIFF

VERSUS

JAM AUTO SPARES.....1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR.....3RD DEFENDANT

RULING

BACKGROUND

The applications before me are dated 5th September 2017 and 16th October 2017 respectively. The first application is brought by the plaintiff seeking an injunction against the defendants in regard to L.R. No. MWEA/TEBERE/2264 and 2265. The second application is brought by the 1st respondent/defendant seeking to review and set aside interim orders of injunction ex-parte in favour of the plaintiff on 13th September 2017. The interim orders granted on 13th September 2017 were not extended. The cumulative effect of the two applications is that if one application succeeds, the second application must therefore fail.

PLAINTIFF'S CASE

The plaintiff in the Notice of Motion application dated 5th September 2017 sought a temporary injunction restraining the defendants/respondents by themselves, their directors, agents, legal representatives, officers or any other person claiming interest through them from accessing the suit properties, collecting rent, selling, leasing, transferring or dealing with suit properties in any manner whatsoever pending the hearing and determination of this application. In his affidavit in support, the plaintiff stated that he is the legal owner of suit properties known as MWEA/TEBERE/2264 and 2265. The plaintiff further stated that he entered into a sale agreement with the 1st defendant and later secured a loan of Ksh. 20,000,000/= with the 2nd defendant using the suit properties as securities. The plaintiff also contends that the contract for the sale of the suit properties was frustrated after the 1st defendant failed to perform his part of the bargain. The 1st defendant vide a letter dated 21st December 2016 was informed of the frustrated contract but in blatant disregard of that communication, he went ahead to fraudulently transfer the suit

properties to himself. The plaintiff also stated that in addition, the 1st defendant secured a loan of Ksh. 10,000,000/= from the 2nd defendant with the suit properties as security for the loan. The plaintiff contends that he was not informed of the fraudulent transaction until 13th July 2017 when he conducted a search at the Lands office and he realized that the suit properties were no longer in his name but were in the names of the 1st defendant. The plaintiff further stated that the 2nd defendant discharged the suit properties without informing him and even went ahead to secure the 1st defendant's loan with the suit properties. He stated that the 2nd defendant had also been informed of the frustrated contract vide a letter dated 9th January 2016 which it responded via a letter dated 16th January 2017. He stated that the 2nd defendant went against his own word by allowing the suit properties to act as security for a loan secured by the 1st defendant without consulting him yet the same properties had been used to secure the plaintiff's loan. The plaintiff contends that the 2nd respondent still maintains that the plaintiff is liable for settlement of Ksh. 8,810,695 plus arrears and interest despite discharging the suit property. He states that he stands irreparable loss in the event he loses the suit properties because the loan advanced to him was secured by the suit properties.

1ST DEFENDANT'S CASE

In her response, the deponent of the replying affidavit stated that he is one of the directors of the 1st defendant and that the plaintiff is his

nephew being the son of his sister-in-law. He stated that the plaintiff approached him after he was unable to service a loan with the National Bank of Kenya to which the suit land L.R. No. MWEA/TEBERE/2264 & 2265 was charged. The plaintiff requested him to purchase the suit properties so as to bail him out. The plaintiff wrote to the Branch Manager of the National Bank of Kenya Embu Branch on 30th June 2016 indicating that he intended to transfer his loan and title deeds to the 1st defendant. On 12th July 2016, the plaintiff and the 1st defendant entered into a sale agreement for the two properties namely MWEA/TEBERE/2264 and 2265 at a consideration of Ksh. 18,500,000/=. The plaintiff and the 1st defendant entered into an agreement for the sale of goodwill. The 1st defendant paid the purchase price in full and the wife of the plaintiff gave consent to transfer the property to the 1st defendant. The 1st defendant subsequently obtained consent from the Land Control Board and the plaintiff executed the transfer documents whereby the suit properties were effectively transferred to the 1st defendant.

With the consent of the plaintiff, the 1st defendant took possession of the suit properties and started collecting rent. It is alleged that the plaintiff through concealment was able to obtain temporary injunction orders pending hearing and determination of the application and started wasting the suit properties. The plaintiff also filed a case with the Business Premises Tribunal being Case No. 112 of 2017.

2ND DEFENDANT'S CASE

The 2nd defendant in response confirmed that the plaintiff was their customer and was granted loan facility of Ksh. 20,000,000/= which was secured by a charge over the suit properties. They stated that the loan facility was in arrears and they sent him a demand letter to clear the same. He approached their Embu Branch and introduced the 1st defendant as a willing buyer of the charged properties. The plaintiff and the 1st defendant entered into a sale agreement without involvement of the 2nd defendant bank and that the 1st defendant paid for the plaintiff's loan facility. Thereafter, the 1st defendant approached them for a loan facility of Ksh. 10,000,000/= and it was secured by legal charge over the suit properties. The loan was credited to the plaintiff's account to fully clear his loan. After full repayment, a discharge of charge in favour of the plaintiff was prepared. The 2nd plaintiff contends that they conducted due diligence in registration of legal charge and ensured the property was registered in the name of the 1st defendant. It denies any wrong doing or allegation of fraud levelled against her.

ANALYSIS AND DETERMINATION

I have considered the affidavit evidence and the annexures thereto. I have also considered the submissions by counsels for the parties and the applicable law. The orders being sought by the plaintiff/applicant is an equitable relief whose principles was settled in the celebrated case of **Giella Vs Cassman Brown Co. Ltd (1973) E.A. 358**. In that case, the Court set out the conditions for the grant of an interlocutory injunction as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 an application on the balance of convenience”.

The plaintiff in the application has given a set of facts in his supporting affidavit and attached numerous documents. According to the plaintiff, the sale agreement between him and the 1st defendant was frustrated as per his lawyer's letter dated 21st February 2016 due to failure by him to make certain payments to his account and that of his bank within specified timelines stipulated in the sale agreement. However, the plaintiff did not indicate the specific paragraph of the sale agreement where the 1st defendant has breached. The plaintiff's letter is a complaint of frustration of the sale agreement without being specific of the term and condition which the 1st defendant has failed to comply. The plaintiff has also stated that he has always dealt with one Peter Kiura as the purchaser of the suit properties and not the 1st defendant. Other than a sale agreement attached to the plaintiff's supporting affidavit, there is no evidence of any dealings between the plaintiff and the alleged Peter Kiura. The 1st defendant in her affidavit in support of the application dated 16th October 2017 and the replying affidavit to the plaintiff's application sworn the same date has explained in detail how the plaintiff approached her with a view to bailing him out of a loan he had borrowed from National Bank of Kenya using the suit properties as securities. The director of the 1st defendant Ciliaka Karimi also stated that the plaintiff is his nephew. He also stated that the plaintiff even wrote a letter to the Branch Manager, National Bank of Kenya, Embu Branch indicating that he was willing to transfer the loan together with the title deed to her. The letter is dated 30th June 2016. The plaintiff did not controvert those dispositions on oath. The director of the first defendant also deponed how she paid the plaintiff the agreed purchase price including the payment of good will agreed at Ksh. 6,000,000/=. After paying the full purchase price, the plaintiff executed all the transfer documents in favour of the 1st defendant. The plaintiff even gave her exclusive possession of the suit properties.

The 2nd defendant through her Manager, Redectual Collections, one Michael M. Mwitaa stated that the plaintiff herein who trades in the name and style of Makuti Remera Restaurant is a customer of the 2nd defendant bank and that he was granted a loan facility of Ksh. 20,000,000/= vide a letter of offer dated 25th February 2014. The portion of the loan to refurbish the hotel was Ksh. 2,620,776 and the balance of Ksh. 17,379,224 was to be utilized to take over an existing loan facility from Equity Bank Ltd. The facility was for a term of Eighty four (84) months payable at the rate of Ksh, 238,096 per month at an interest of 18.5 P.A. The loan was disbursed to the plaintiff's loan account No. 01156065305500 on 10th April 2014. However, the loan facility went in arrears and the bank issued the plaintiff with a demand letter dated 25th January 2016 requesting him to clear the arrears. The plaintiff failed to clear the arrears and the 2nd defendant issued a statutory Notice dated 13th April 2016.

The plaintiff thereafter approached the 2nd defendant through its Embu Branch with a proposal to sell the securities to a willing buyer. On 12th July 2016, the plaintiff and the 1st defendant entered into a sale agreement but without the bank's consent and/or involvement where the parties agreed that the purchase price of Ksh. 18,500,000/= would be utilized to pay off the plaintiff's loan facility with the 2nd defendant to enable the transfer of the suit properties in favour of the purchaser. A deposit of Ksh. 1,700,000/= was paid to the plaintiff as a down payment on 6th July 2016 which was duly acknowledged. Thereafter, the 1st defendant paid for the plaintiff's loan facility. It was further

agreed that the 1st defendant was to apply for a loan facility of Ksh. 10,000,000/= to finance part of the purchase price and the same to be fully applied to pay part of the plaintiff's loan facility. The 2nd defendant further stated that the 1st defendant thereafter approached the 2nd defendant for a loan facility to finance the above mentioned purchase and by a letter of offer dated 21st October 2016, the bank granted the loan facility to the 1st defendant. The said loan facility was secured by the legal charge over the suit properties, joint and several guarantees by the directors of the 1st defendant, simple deposit of title documents of other properties and a deed of assignment of rental income over the said properties. The loan was disbursed to the 1st defendant's account number 01167118371100 on 25th July 2017 and the same was immediately credited to the plaintiff's loan account number 01156065305500 to fully clear the plaintiff's loan. The 2nd defendant stated that upon full repayment of the banking facilities granted to the plaintiff as demonstrated above, the 2nd defendant instructed the firm of Humphrey & Company LLP who prepared a discharge of charge in favour of the plaintiff, transfer and charge in favour of the 1st defendant and the bank respectively over properties L.R. No. MWEA/TEBERE/B/2264 and 2265. The 2nd defendant stated that the transfer instruments were duly and voluntarily executed by the plaintiff and the 1st defendant who was at liberty to deal with the properties as they deemed fit. The 2nd defendant contends that the sale was at arm's length and that the bank was not a party to the alleged fraud. The 2nd defendant further contends that she conducted all due diligence in registration of the legal charge and ensured that the property in dispute was registered in the name of the 1st defendant.

These dispositions on oath by the 1st and 2nd defendants have not been controverted by the plaintiff. Having carefully analyzed the affidavit evidence and rival submissions, my view is that the plaintiff has not satisfied this Court the principles for the grant of the injunction orders sought. The plaintiff has not demonstrated the existence of a prima facie case with a probability of success. He has not also shown that he will otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The order that comments for this Court is to apply the third principle and considering all the circumstances of this case, the balance of convenience tilts in disallowing the application dated 5th September 2017.

In the final result, I issue the following orders:

(1) The plaintiff's Notice of Motion dated 5th September 2017 is hereby dismissed with costs.

(2) The 1st defendant's Notice of Motion dated 16th October 2017 is hereby allowed in terms of prayers 2 and 3 with costs to be borne by the plaintiff.

(3) The parties to file and exchange their compliance documents within 30 days from today and thereafter fix this matter for hearing and determination within the current term.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th day of November, 2019.

E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019

In the presence of:

1. Mr. Asimwe holding brief for Achach for Plaintiff/Applicant
2. Defendant/Advocate – absent
3. Kabuta – Court clerk – present

MR. ASIIMWE

I pray for a mention date to comply.

COURT

Mention on 23rd January 2020. Mention notice to issue.

E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019