REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO.25 OF 2019

ANTHONY MBUGUA NJIHIA.....1ST PLAINTIFF/APPLICANT

BERNARD MWANGI WAWERU.....2ND PLAINTIFF/APPLICANT

PURITY K. KABUBA .....3RD PLAINTIFF/APPLICANT

ONESMUS KAMAU KAGWANJA.....4TH PLAINTIFF/APPLICANT

MERCY WAITHERA KIMURA.....5TH PLAINTIFF/APPLICANT

VERSUS

URITHI HOUSING COOPERATIVE

SOCIETY LTD.....1ST DEFENDANT/RESPONDENT

FAMILY BANK LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs/Applicants' application dated 16/7/2019 and filed the following day seeks the following orders;

a. spent

b. spent

c. That conservatory orders by way of an interim injunction be issued restraining the 2nd Defendant/ Respondent whether by itself, servants and / or his agents or whomsoever is acting on its behalf from offering for sale, selling or dealing with land title L.R No. 11486/6 Panorama Estate in any manner whatsoever pending the hearing and determination of this suit.

d. That the costs of this application be borne by the 1st and 2nd Defendants/Respondents.

2. The application is premised on the following grounds that; the 1st Respondent is the registered lessee of the suit land; the 1st Respondent and the Plaintiffs entered into various agreements of sale to purchase plot Nos. 22, 128,129,373, 203 and 91(various plots) which were to be hived out of the main land - LR No 11486 Panaroma Estate (mother/main title); the Applicants have discovered that the 1st Respondent procured a loan facility and charged the main land to the 2nd Respondent for which default has occurred and for which the 2nd Respondent has issued statutory notices to exercise its power of sale over the main property; That unless restrained the Applicants stand to lose their plots and suffer irreparable loss and damage.

3. The Applicants have averred that they have fully paid the purchase price which has been fully acknowledged by the 1st Respondent. That the act of the 1st Respondent of giving them possession and share certificates of ownership of the plots pending registration of titles created an irrevocable constructive trust in the purchased plots in their favour.

4. They maintained that the 1st Respondent is in breach of its contractual obligations by charging land that is wholly sold to them.

5. The application is further supported by the affidavit sworn by Anthony Mbugua Njihia on his behalf and that of his co-Applicants. He

reiterated the grounds of the application and deponed that they entered into sale agreements with the 1st Respondent on various dates and paid the full purchase price, copies of the agreements of sale and receipt of payments are annexed to the application. That the 1st Respondent represented to them that the main title had no encumbrances and that they would be issued with titles of the plots upon completion.

6. They aver that though the 1st Respondent has given them vacant possession of the plots, it has refused and or failed to issue them with titles despite demands to do so. To their consternation they discovered that the main title has been charged to the 2nd Respondent without their knowledge. As a result of which the 2nd Respondent has sought to auction the main property because the 1st Respondent is in default of its loan obligations to the 2nd Respondent. That unless the 2nd Respondent is stopped from offering the property for sale, auctioning and or alienating the said property, they stand to lose their plots and investments therein.

7. The Applicants have annexed interalia the agreements for sale duly executed, the payment receipts for the purchase price and acknowledgements, the ownership certificates and the master plan for the developments christened Panaroma Estate- Comprehensive development on LR 11486/6 Muranga County.

8. The 1st Respondent did not file any response to the motion. The 1st Respondent therefore did not oppose the application.

9. The motion has been opposed by the 2nd Respondent through the Replying Affidavit sworn by Anthony Ouma on the 29/10/19 where he deponed that he is the Senior Legal Officer of the 2nd Respondent. He denied any knowledge of the subdivision and sale of the portions of the property. That the certificate of ownership does not denote ownership by the Applicants of the stated plots. Further that the 2nd Respondent is a stranger to the transaction between the Applicants and the 1st Respondent.

10. In addition, the deponent states that the Applicants cannot comment on a charge that they are strangers to as the same is between the 1st and 2nd Respondents. That the Applicants have not exhibited the notices to sale of the property by public auction and as such they are peddling unsupported allegations. That they have failed to ascertain ownership of the plots they purport to own and any threat to sale them. It denied any knowledge of any pending transaction between the Applicants and the 1st Defendant. It accused the Applicants of being on a fishing expedition with the aim of embroiling it in unnecessary litigation in respect to lands that are unknown.

11. It admitted that it has a duly executed charge over the main title and the Plaintiffs have no right against the 2nd Defendant in that their claims are unsubstantiated. That they have not established a primafacie case with a probability of success.

12. The Applicants filed a further affidavit dated 4/11/2019 in a rejoinder to the 2nd Respondent's reply. The Applicants stated that if the 2nd Respondent is allowed to auction the whole property they stand to lose their plots which they have fully paid for. They aver that damages are inadequate remedy in the circumstances.

13. The Applicants further averred that they are in occupation of the said plots and some of them have commenced development on the said plots.

14. They state that according to the terms of loan restructure dated the 21/6/19 (copy enclosed) between the 1st and 2nd Respondent, it was a term of the restructuring that the loan would be repaid through the proceeds of sale of the plots and therefore the 2nd Respondent cannot feign ignorance of their interest in the aforesaid plots. The Applicants have exhibited copies of the notification of sale dated the 29/4/19 issued by the auctioneer under the instructions of the 2nd Respondent. The amount due according to the said notice is Kshs 263,852,785.46 as at 26/4/19.

15. Have the Applicants established a prima facie case? The Applicants submitted and relied in the case of **Mbuthia Vs Jimba Credit Corporation Limited (1988) KLR** where the Court stated that he who alleges must prove. In defining what a prima facie case is they adopted the dicta in **Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) KLR** where the Court stated as follows;

> " a prima facie case in a civil application includes but not confirmed to a genuine and arguable case . It is a case which on the material presented to the Court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

16. That they are innocent purchasers for value without notice of the various plots and their entitlement to the said plots have not been rebutted by the Respondents. It is a term of the contract of the Respondents that the loan will be repaid through the sale proceeds of the various plots out of the main title charged to the 2nd Respondent.

17. On irreparable loss that cannot be compensated by an award of damages, the Applicants argued that no two parcels of land are the same and therefore damages will not be adequate remedy should the injunction be declined. That they are in possession and occupation of the various plots and have developed the same and therefore an emotional attachment has been created. They argued that the 2nd Respondent does not stand to suffer any prejudice because the loan account continues to accrue interest which remedies any prejudice and or loss that may be suffered if the injunction is granted.

18. They submit that the balance of convenience tilts in favour of granting the injunction pending the hearing and determination of the suit.

19. The 2nd Respondent submitted that the standard in proofing a primafacie case has shifted from having an arguable case to proving that a right has been infringed which calls for an explanation. It argued that the 2nd Respondent has not issued any statutory notices or begun to exercise its statutory power of sale and therefore the application is premature. That the notices have not been attached to the Applicants'

supporting affidavit. That the Plaintiffs have not established a prima facie case. That there is no documentary evidence that the suit land is at the verge of being sold. That the injunctive orders sought by the Applicants are anticipatory in nature and are sought in collusion with the 1st Respondent to protect them against future default and future exercise of statutory power of sale. That in any event the 2nd Respondent is not a party to the agreements of sale, if any, between the Applicants and the 1st Respondent. That it is the 1st time the transaction between the Applicants and the 1st Respondent is being brought to its attention. It termed the claims of the Applicants a figment of their imagination and in any event a case of unfinished business between them. For the Applicants to establish ownership, they should have furnished the Court with title documents in respect of the said plots.

20. Further that the Applicants have not showed where the plots are placed in the main property charged to the bank. That they have failed to supply the evidence of any subdivision.

21. In respect to irreparable harm, it submitted that the Plaintiffs do not stand to suffer any damage that cannot be compensated in damages by the 2nd Respondent. It relied on the case of **Charity Njeri Kanyua Vs Trevor Kent (2016) EKLR; Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018 EKLR** to buttress its point that the Applicants have not demonstrated irreparable harm that cannot be compensated with damages. That the Applicants have not proved any developments on the suit land and that apart from the purchase price which the 2nd Respondent is more than able to refund, there is no tangible harm that they are likely to suffer.

22. That the 2nd Respondent is not privy to the agreement between the Applicants and the 1st Respondent. That it stands to suffer prejudice if its statutory power of sale is curtailed arising from a transaction that it is a stranger to.

23. That the balance of convenience tilts in declining the orders. It argued that the Applicants' hands are tainted for colluding with the 1st Respondent with the sole intention of frustrating the 2nd Defendant from eventually exercising its remedies available in law.

24. I have read and considered the submissions and the case law as presented by the parties. The issue is whether the Applicants are deserving of the orders sought.

25. As a way of background to this matter, it is accepted that the suit land belongs to 1st Respondent although no documentary evidence was presented to the Court to evidence this. It is the case of the Applicants that they are purchasers of the various plots from the 1st Respondent and have exhibited *interalia* agreements for sale, payment receipts and acknowledgments, ownership certificates and the master plan for the whole development. The project is described in the agreements as a controlled development.

26. According to the various agreements the 1st Respondent was to hand over possession of the various plots to the Applicants upon purchase of the full purchase price. The Applicants have confirmed in their pleadings that they are in possession of the plots and some have started developments. They did not show any evidence of developments though. The fact of the possession has not been controverted. The fact of the sale and purchase has neither been controverted by the 1st Respondent except the 2nd Respondent who has stated that they are strangers to the said transaction.

27. In the agreement it was the responsibility of the 1st Respondent to obtain the Land Control Board consents and effect the transfer of the various plots to the purchasers so that they are issued with titles. It was a part of the agreement that upon full payment of the purchase price the Applicants would be issued with ownership certificates (which they have exhibited) as they await the issuance of titles of the various plots.

28. The various plots have been shown on the master plan attached to the affidavits of the Applicants. The suit land is LR No 11486/8 registered in the name of the 1st Respondent.

29. It is on record and presented by the Applicants that the 1st Respondent charged the suit property to the 2nd Respondent for a sum of Kshs 500 Million. Whether the suit land was charged after or before the agreements of sales aforementioned is a matter for the trial Court.

30. The loan restructuring agreement between the 1st and 2nd Respondent is dated the 21/6/19. The security is stated to be the suit property LR No 11486/6 in the name of the 1st Respondent. This agreement has not been denied by both Respondents.

31. Under para **K** of the special conditions of the said agreement, the parties agreed to a clause that is relevant to this application. It states as follows;

> "the customer/chargor Urithi Housing Cooperative Society Limited confirmed that the statutory notice and notification of sale had already been issued and expired and as such waive any perceived rights that might be inferred as a basis of their reissuance in the event of default of the terms herein."

32. The import of the above clause is that the 1st Respondent had been in default and in the event of further defaults the 2nd Respondent need not issue any other statutory notices. The 1st Respondent indeed has forgone the right to issuance of further statutory notices in respect to the sale of the suit land. It means that the suit land can be sold without issuing any notices or reference to the Applicants. By such conduct the Applicants will be prejudiced.

33. Para **P** and **Q** state as follows;

> "**P**). the borrower shall submit to the lender the status report of the project dubbed Urithi Panaroma Gardens' on LR No 11486/6 at

the end of every month and not later than the 15th of the succeeding month. The lender reserves the right to recall this facility if this condition is not complied with.

Q). the borrower shall market and advertise at its own costs the project dubbed Urithi Panaroma Gardens on its website, newsletters, print and broadcast until the facility is repaid in full. The lender reserves the right to recall the facility if this condition is not complied with."

34. This arrangement is further captured in one of the agreements of sale (see plot No 373) where it was disclosed that the property is charged to the 2nd Respondent and the 1st Respondent shall use the proceeds of sale to procure the discharge of charge from the 2nd Defendant in order to facilitate the sale upon completion of the purchase price. This clause is in agreement with the 1st and 2nd Respondents contemplated arrangement as captured in clause clause 9 of the loan restructuring agreement wherein the 2nd Respondent charged Kshs 1500/- being discharge documentation fee for every discharge of each title deed for the plots.

35. The notification of sale dated the 29/4/19 is exhibited to show that a statutory notice issued in respect to the suit land. This is collaborated with para **K** of the loan restructuring document. It is the view of the Court that the 2nd Respondent misled the Court when it feigned ignorance of the sales of the plots that comprise the Panaroma Gardens whose proceeds were to be deployed to repay the facility. The 2nd Respondent misled the Court when it stated in its sworn evidence that no statutory notices had been issued.

36. The Applicants have argued that they are purchasers for value of the various plots. That the 1st Respondent created an equitable charge over the land after selling the various plots to the Applicants. That having paid for the plots fully they have an interest in the suit lands, hence a primafacie case.

37. In the case of **National Gender and Equality Commission v Cabinet Secretary, Minister of Interior and Coordination of National Government & 2 others [2016] eKLR**, the Court noted that conservatory orders were not ordinary civil law remedies but were remedies provided for under the Constitution. They were not remedies between one individual as against another but were meant to keep the subject matter of the dispute *in situ*. Therefore, such remedies were remedies *in rem* as opposed to remedies *in personam*, meaning they were remedies in respect of a particular state of affairs as opposed to injunctive orders which could only attach to a particular person. It is the view of the Court that the orders being sought here relate to interim injunction as captured in prayer No **C** of the Notice of Motion.

38. The principles of granting injunction are well settled in the decision in **Giella Vs Cassman Brown & Co Ltd (1973) EA 358.** Firstly, that the Applicant must demonstrate that there is a *prima facie* case with a probability of success. Secondly, that if the injunction is not granted the Applicant will suffer irreparable injury that cannot be compensated by an award of damages. Thirdly, that if it is in doubt the Court shall decide the application on a balance of convenience.

39. As regards a prima facie case, it is clear from the above analysis that the Plaintiffs purchased the suit lands from the 1st Respondent and paid the purchase price in full. Whether they are bonafide purchasers for value without notice is a matter best left for the determination of the trial Court. There is a nexus between the plots and the loan facility in the way that the repayment of the loan was through the proceeds of sale of the plots. Having paid for the plots and taken possession, it is clear that an interest based on constructive trust has been created in favour of the Applicants. It is the view of the Court that the Applicants are not idle irritants in this case.

40. Going by the decision in **Mrao case**, it is the view of the Court that the Applicants have proved the existence of a right which has been infringed and or threatened to be infringed by the opposite party as to call for an explanation or a rebuttal. Unfortunately, the Respondents have not rebutted this evidence and instead the 2nd Respondent has not been very candid to the Court in the way it feigned ignorance of the arrangement between it and the 1st Respondent when it comes to the sale of the plots to finance the loan repayment and issuance of statutory notices of sale.

41. The Court takes the Applicants possession, payment of full purchase price and the issuance of ownership certificates awaiting the issuance of titles is a testament that they have firmly established a primafacie case.

42. As to the issue of irreparable damage if the injunction is declined, the Applicants have averred that they have invested their savings in the plots for their homes in a gated community and that the plots are unique and appealed to their lifestyle expected to be derived therein. The 2nd Respondent on the other hand has responded that the Applicants will not suffer any damages which cannot be compensated by the 2nd Respondent. What then constitutes irreparable loss? Irreparable loss in my view is not just about compensation for the land. It is more.

43. When confronted by the same issue the Court in the case of **Muiruri Vs Bank of Baroda (Kenya) Limited (2001) KLR 183 at page 188** it was pointed out that; -

"besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss".

44. In the case of **Shiva Carriers Limited v Imperial Bank Limited & another [2018] eKLR** the Court had this to say;

"To say that in such situation the Defendant should be allowed to employ the law of the jungle merely because it shall pay damages is not to this Court the way a civilized society should work. It would fly in the face of the law guaranteeing equal treatment before the law because every party able to pay damages would be free to infringe on others rights and proclaim the financial ability to pay. In the ***Victoria Pumps Ltd vs Kenya Ports Authority and 4 Others [2015] eKLR,*** the Court said:-

> **"In those circumstances I find that the Plaintiffs loss as far it touches on his right to be heard goes to the very root of administration of justice and that the Defendant or any them ought not to be allowed to disregard the law with abandon merely because they are capable of paying damages. To me that would create a situation and state where the financially strong would be above the rule of law merely by Courtesy of their ability to pay damages. That to me would ran affront the provisions of Article 27 of the Constitution. I therefore find and hold that the Plaintiff's injury in this regard would be incapable of adequate compensation by an award of damages".**

45. The provisions of Article 27 of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. This provision is further fortified by the provisions of Article 3 of the Constitution which obligate every person to respect, uphold and obey the law. In the circumstances of this case, this Court being a court of law and a court of Equity would frown on a situation where a party is allowed to transgress on the rights of another because that other party has the ability to pay the damages.

46. This Court is guided by Order 40 Rule 1(a) and (b) of the Civil Procedure Rules which provides as follows;

> "Where in any suit it is proved by affidavit or otherwise-
>
> a). that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> b). that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders".

47. The 1st Respondent's act of default and the 2nd Respondents acts of disposing the suit land in exercise of its statutory power of sale entitles it to alienate the land thus occasioning loss to the Applicants. This procedural rule then comes in to protect the suit properties in dispute where the property is likely to be wasted, damaged or alienated, sold, removed or disposed of before the suit is heard and determined.

48. The balance of convenience tilts in the Court issuing an injunction in favour of the Applicants.

49. In the upshot the application is allowed in the following terms;

> a. an interim injunction be issued restraining the 2nd Defendant/ Respondent whether by itself, servants and / or his agents or whomsoever is acting on its behalf from offering for sale, selling or dealing with land title L.R No. 11486/6 Panorama Estate in any manner whatsoever pending the hearing and determination of this suit.
>
> b. Costs of the application shall be met by the 2nd Respondent.

50. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 19TH DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Maina HB for Gacoya for the 1st – 5th Plaintiffs/Applicants

1st & 2nd Defendants/Respondents – Absent

Irene and Njeri, Court Assistants