



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 397 OF 2018

NANCY MUENI KAVISA (Suing on behalf of the estate of

JAMES MURIRA KIOI)PLAINTIFF

VERSUS

SAMMY MATHENGE MWATHI.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

NAIROBI CITY COUNTY.....4TH DEFENDANT

RULING

The dispute before the court revolves around the ownership of all that parcel of land known as Nairobi/Block 102/41 (hereinafter referred to only as “the suit property”). At all material times, the suit property was registered in the name of James Murira Kioi, deceased (hereinafter referred to only as “the deceased”) as the leasehold proprietor thereof. The deceased was issued with a certificate of lease in respect of the suit property on 23rd September, 2003. The deceased died on 5th October, 2017.

The suit property was transferred and registered in the name of the 1st defendant, Sammy Mathenge Mwathi on 21st December, 2017. Soon after acquiring the suit property, the 1st defendant obtained a loan and an overdraft from the 2nd defendant on the security of the suit property which was charged to the 2nd defendant on 27th February, 2018 to secure a principal amount of Kshs.5,000,000/=.

The plaintiff is the legal representative of the deceased. The plaintiff brought this suit against the defendants on 19th September, 2018. The plaintiff averred that while preparing to commence succession proceedings in respect of the estate of the deceased, she conducted a search on among others the suit property which revealed that the property was transferred to the 1st defendant on 21st December, 2017 and charged to the 2nd defendant by the 1st defendant on 27th February, 2018. The plaintiff averred that she was a widow of the deceased and that she was residing on a permanent building on the suit property with her two children whom she had with the deceased. The plaintiff averred that the transfer of the suit property to the 1st defendant that was carried out after the death of the deceased and the subsequent charge that was registered on the property by the 1st defendant in favour of the 2nd defendant were fraudulent. The plaintiff averred that the 1st defendant acquired the suit property after the death of the registered owner and that the 2nd defendant did not conduct due diligence on the suit property before accepting the same as security. The plaintiff averred that she was apprehensive that unless this court issued an order of injunction, the 2nd defendant could proceed with the auction of the suit property an act that would occasion irreparable loss to her and the estate of the deceased.

The plaintiff sought judgment against the defendants jointly and severally for; an order restraining the 2nd defendant from realising its security over the suit property; an order for the cancellation of registration of the suit property in the name of the 1st defendant and the charge in favour of the 2nd defendant; an order for the property to revert to the name of the deceased and the costs of the suit.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 18th September, 2018 seeking a temporary injunction restraining the defendants from advertising for sale, disposing of, alienating, dealing with, selling by public auction or private treaty, transferring, leasing or in any other manner howsoever interfering with the ownership of the suit property pending the hearing and final determination of the suit. The application that was supported by the affidavit of the plaintiff sworn on 18th September, 2018 was brought on the same grounds as those set out in the plaint. The plaintiff added that the 2nd defendant had issued a notice of intention to realise its security over the suit property and that she was apprehensive that the 2nd defendant would proceed to sell the property by public auction. The plaintiff annexed to her affidavit in support of the application among others, a copy of a limited grant of letters of

administration that was issued to her in respect of the estate of the deceased on 27th August, 2018, a copy of a certificate of lease in respect of the suit property in the name of the deceased, a copy of a certificate of official search on the register of the suit property, a copy of a demand letter sent to the 1st defendant by the 2nd defendant dated 5th September, 2018 and copies of letters dated 24th April, 2018 addressed to the 2nd, 3rd and 4th defendants regarding the transfer of the suit property to the 1st defendant and the creation of security over the same in favour of the 2nd defendant.

The plaintiff's application was placed before the Duty Judge on 20th September, 2018 who directed that the same be served upon the defendants for hearing inter partes on 2nd October, 2018. The 2nd defendant was served with the application on 28th September, 2018 while the 3rd and 4th defendants were served on 1st October, 2018. The 1st defendant was not served. When the application came up for hearing on 2nd October, 2018, only the advocates for the plaintiff and the 4th defendant attended court. The advocates for the 2nd and 3rd defendants did not attend court despite service having been effected upon them. On that day, the advocate for the 4th defendant asked for time to respond to the application. The advocate for the plaintiff did not object to the request but asked the court to grant the orders sought in the application on an interim basis pending the hearing of the application inter partes. The court granted time to the defendants to respond to the application and adjourned the same to 29th April, 2019 for hearing. The court also granted interim orders of injunction pending the hearing of the application.

None of the defendants responded to the plaintiff's application by filing a replying affidavit or grounds of opposition. The 2nd defendant responded to the application by filing another application on 11th January, 2019 by way of Notice of Motion dated 10th January, 2019 seeking the setting aside of the interim order of injunction that the court had granted on 2nd October, 2018 and liberty to sell the suit property by public auction. The 2nd defendant's application was brought on the grounds that although the plaintiff was granted interim orders on 2nd October, 2018, the plaintiff did not extract and serve the order upon the 2nd defendant within three (3) days as provided under order 40 Rule 4 (3) of the Civil Procedure Rules. The 2nd defendant contended further that in any event, the order should have lapsed on 16th October, 2018, 14 days after issuance. The 2nd defendant averred further that the suit property did not belong to the deceased and that the charge created by the 1st defendant over the property in favour of the 2nd defendant was lawful and not fraudulent as claimed by the plaintiff since the property was owned by the 1st defendant. The 2nd defendant averred that it carried out due diligence before granting a loan to the 1st defendant on the security of the suit property.

The 2nd defendant annexed to the affidavit sworn by its Garden City Mall Branch Manager, Joshua Gitonga Ngari on 10th January, 2019 among others, a copy of a certificate of lease dated 21st December, 2017 in the name of the 1st defendant, a copy of a letter of offer of a loan and overdraft facility to the 1st defendant dated 23rd January, 2018 and a charge over the suit property dated 23rd February, 2018.

The plaintiff's application dated 18th September, 2018 and the 2nd defendants' application dated 10th January, 2019 were heard together on 29th April, 2019. In his submissions in support of the plaintiff's application, the plaintiff's advocate Mr. Njuguna reiterated the contents of the plaintiff's affidavit in support of the application. He submitted that the 1st defendant acquired the suit property fraudulently after the death of the deceased. He submitted further that since the 1st defendant acquired the suit property fraudulently, he had no valid interest in the suit property that he could charge to the 2nd defendant. The plaintiffs' advocate submitted further that if the suit property was sold by the 2nd defendant, the plaintiff's suit would be rendered nugatory as the property would be put beyond the reach of the plaintiff. He submitted that the plaintiff was residing on the suit property and had also buried her husband on the same. He submitted that if the orders sought were not granted, the plaintiff stood to suffer irreparable harm. The plaintiffs advocate submitted that the defendants stood to suffer no prejudice if the orders sought were granted since the value of the suit property appreciates every day and the interest also continue to accrue on the loan amount that was advanced to the 1st defendant. He urged the court to allow the application.

In response, the 2nd defendant's advocate Mr. Wawire informed the court that the 2nd defendant was relying on its application dated 10th January, 2019 in opposition to the plaintiff's application. Mr. Wawire reiterated the contents of the affidavit of Joshua Gitonga Ngari filed in support of the application and submitted that the plaintiff had not established a prima facie case against the defendants. He submitted that the 2nd defendant had placed sufficient evidence before the court showing that the suit property was owned by the 1st defendant and that the same was properly charged to the 2nd defendant. The 2nd defendant's advocate submitted that if the suit property was sold, the plaintiff would have recourse in damages against the 1st and 2nd defendants which the two defendants were able to meet. He submitted further that the 2nd defendant would suffer irreparable harm if it was stopped from selling the suit property because the 1st defendant was not servicing the debt and the interest was accruing daily. He submitted that the outstanding loan was likely to increase above the value of the suit property. The 2nd defendant's advocate submitted that there was no evidence that the plaintiff was in a position to compensate the 2nd defendant for the difference in the value of the suit property and the outstanding loan if she loses the suit at the trial. He urged the court to dismiss the application and allow the 2nd defendant to proceed with the auction of the suit as prayed in the 2nd defendant's application.

I have considered the two (2) applications. I am of the view that the 2nd defendant's application was subsumed in the plaintiff's application. Since the court has heard the plaintiff's application inter partes and is rendering its decision on the same, nothing turns on the interim order that was given pending the hearing of the application which order the court will confirm or discharge based on its findings. I am satisfied from the evidence before me that the plaintiff has established a prima facie case with a probability of success against the 1st and 2nd defendants. The plaintiff placed uncontroverted evidence before the court showing that as at the time of his death on 5th October, 2017, the deceased was the registered owner of the suit property. It was common ground that the 1st defendant became registered as the owner of the suit property on 21st December, 2017, two months after the death of the deceased. There is no evidence before the court on how the 1st defendant acquired a property of a deceased person after his death before even a grant of letters of administration had been issued in respect of his estate. In the absence of evidence that the 1st defendant acquired the suit property lawfully, the plaintiff's contention that the 1st defendant caused himself to be registered as the owner of the suit property fraudulently is not farfetched. If the 1st defendant had a fraudulent title, the 2nd defendant's charge had no leg to stand on.

I am also persuaded that the plaintiff would suffer irreparable harm if the injunction sought is not granted. The 2nd defendant did not dispute the plaintiff's claim that she was in occupation of the suit property. It was also not disputed that the 2nd defendant was planning to put up the suit property for sale by public auction. If the injunction sought is refused and the 2nd defendant proceeds with the sale of the suit property, the plaintiff and her family will have to vacate the suit property or risk eviction. The inconvenience that the plaintiff and her family is likely to suffer cannot be quantified for compensation in the event that she succeeds at the trial against the defendants. Due to the foregoing, I am satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction that were laid in the case of Giella v Cassman Brown & Company Ltd. (1973) E. A. 358.

In conclusion, I find merit in the plaintiff's application dated 18th September, 2018. The application is allowed in terms of prayer 3 thereof. The costs of the application shall be in the cause. The 2nd defendant's application has been overtaken by events following the decision in the plaintiff's application. In the circumstances, it is not necessary for me to consider the same.

Dated and delivered at Nairobi this 19th Day of December, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

N/A for the plaintiffs

Mr. Kiragu h/b for Mr. Wawire for the 2nd defendant

Ms. Omollo h/b for Mr. Munyasia for the 4th defendant

Ms. C. Nyokabi-Court Assistant