



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 1154 OF 2016

MOHAMED ADAN BARE.....PLAINTIFF

=VERSUS=

AIMA ENTERPRISES LIMITED1ST DEFENDANT

GULF AFRICA BANK LIMITED.....2ND DEFENDANT

AFRICAN BANKING CORPORATION LIMITED.....3RD DEFENDANT

MAGAN & GABABA COMPANY LIMITEDINTERESTED PARTY

RULING

1. This is a Ruling in respect of a Notice of Motion dated 20th September 2016, which was filed in Court on 21st September 2016, in which the applicant sought the following orders:-

1. For reasons to be recorded and on the grounds set in the Certificate of Urgency, service of this application be dispensed with and the application herein be heard ex-parte in the first instance for purposes of prayer 2, 3, and 5 herein.

2. This application be certified urgent and be heard forthwith and/or on priority basis.

3. Pending the hearing and determination of this Application inter-partes a temporary injunction do issue to restrain the Defendants and / or employees and/or agents and/or assigns and/or anybody whosoever from selling and/or taking possession of all that piece of land together with the buildings, fixtures and other developments thereon comprised in the Land Reference Number 209/11095/ (IR No. 79735), situate in the City of Nairobi containing by measurement 0.0302 of a hectare of thereabouts.

4. Pending the hearing and determination of this suit, an order of injunction do issue restraining the defendants or any of them by itself, its servants, agents howsoever from selling, transferring , disposing of or in any other way wasting, alienating or encumbering of all that piece of land together with the buildings, fixtures and other developments thereon comprised in the as Land Reference Number 209/11095/95 (IR No.79735) , situate in the City of Nairobi containing by measurement 0.0302 of a hectare or thereabouts.

5. This application be heard inter-partes on a date to be directed by this Honourable Court.

6. The Defendants to pay costs of this application.

2. The Plaintiff was the registered owner of LR No.209/11095/95 (I.R 79735) and LR No.209/18512 (IR 110319). The first Defendant/ Respondent took a loan from the second Defendant/ Respondent to which the applicant guaranteed it to a maximum of Kshs.48,000, 000/=. A charge over LR No.209/11095/95 was created as security. This loan was later taken over by the third Defendant/Respondent and a charge was created over the two properties.

3. The first Respondent defaulted in repaying the loan taken forcing the third Respondent to issue requisite statutory notices which culminated in sale of LR No. 209/1852 which is now registered in the name of the interested party *M/s Magan & Gababa Company Limited*.

4. The applicant now contends that he was not involved in the discharge of title No. 209/11095/95 and the subsequent takeover of the loan by the third Respondent whereby the two properties were charged in favour of the third Respondent. He states that his signature was forged and

that he never appeared before Miller & Co. Advocates where the discharge and charge are said to have been executed. He states that he engaged the services of a forensic examiner who examined the purported signature on the charge documents which was found not to have been made by him.

5. The applicant's wife who is said to have signed a spousal consent swore an affidavit denying that she appeared before the offices of Miller & Co. Advocates for purposes of executing the said spousal consent to the charge.

6. The first Respondent never responded to the applicant's application. The second Respondent opposed the applicant's application based on grounds of opposition dated 8th June 2017. The third Respondent opposed the applicant's application through a replying affidavit sworn by its Senior Legal Officer on 5th December 2016. The third Respondent contends that the applicant's application is an abuse of the process of the Court in that the applicant has filed two other suits seeking similar reliefs. The first one is ELC 868 of 2016 filed in July 2016. The second one is HCCC No. 375 of 2016 filed in the Commercial and Admiralty division of the High Court.

7. The third Respondent contends that the applicant guaranteed financial facilities taken by the first respondent to the maximum of Kshs.100,000,000/=and duly signed the charge documents in respect of the two properties . There was spousal consent obtained and the takeover of the loan from the second respondent was procedural. In view of the applicant's denial that he executed the charge documents, the third respondent sought the opinion of a forensic examiner who confirmed that the charge documents were signed by the applicant.

8. The Advocate before whom the applicant and his wife appeared has sworn an affidavit confirming that the two appeared before him and executed the charge documents. All the requisite statutory notices were served using the address in the charge document. The third respondent denies the particulars of fraud attributed to it and states that this application is just a delaying tactic.

9. This is an application for injunction. The principles for grant of an injunction were well set out in the case of **Giella Vs Cassman Brown & Co.Ltd (1973) EA 358**. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not issue unless otherwise the applicant will suffer injury which will not be compensated in damages. Thirdly, if the Court is in doubt it will decide the application on a balance of convenience.

10. The first issue to be determined in this application is whether the applicant has demonstrated that he has a prima facie case with probability of success. A prima facie case was defined in the case of **Mrao Vs First America Bank of Kenya Ltd & 2 others (2003) KLR 125** as follows;-

“ A prima facie case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

11. In this case there is no doubt that the applicant was aware about the sale of his property way back in 2014. He has stated so in his supporting affidavit. He has even stated that he saw press advertisements in May 2015. Though he talks of knowing about the advertisement in November 2015, he has annexed a press advertisement of 25.5.2015. This advert does not refer to any of the two properties in issue in this case. However be that as it may, the applicant was aware of the sale process but did not take any action until September 2016, when he filed the present application.

12. The applicant did not seek any orders restraining sale of LR No.209/18512 in his application which is the subject of this ruling. Shortly thereafter on 11th October 2016, this property was registered in the name of the interested party the same having been sold in a public auction on 7th September 2016, well before the filing of this suit and application . Though the Plaintiff was amended on 24th October 2016 to bring in this particular property, the amended plaint seems not to have been filed as there is no stamp on it. The application was also not amended.

13. The applicant denies having executed the charge document in favour of the third respondent. The third respondent on the other hand contends that the documents were signed by the applicant. The applicant and the third respondents have separately engaged the services of forensic examiners who have given rival reports. At this stage of considering whether there is a prima facie case, I am not expected to closely examine the documents to make my position known regarding the respective positions of the parties. In **Nguruman Limited Vs Jan Bonde Nelson & 2 Others Civil Appeal No 77 of 2012** , the Court of Appeal had this to say;-

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 violated or is threatened with violation. Positions of parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case”.

14. The applicant had filed ELC 868 of 2016 which he later withdrew. He was seeking similar orders as in this case. There is also HCCC No.375 of 2016 before the Commercial and Admiralty Division of the High Court. The case is still pending though the applicant is trying to say that it was not filed with his consent. The filing of these cases is a pointer to a person who is out to achieve a certain result. There were statutory notices served upon the applicant. The applicant did not do anything to stop the sale which appears to have been carried out properly. Though the applicant denies ever receiving the notices, the notices were sent through the address given in the charge document.

15. One of the properties has already been sold and is now registered in the name of the interested party. No injunction can issue to restrain that which has happened. In the case of **Priscillah K Robought Grant Vs Kenya Commercial Bank & 2 others** Nairobi Civil Appeal application No 227 of 1995 the High Court had declined to grant the appellant an injunction in which the appellant wanted to restrain the bank from transferring the auctioned property to the purchasers. The appellant moved to the Court of Appeal where she sought an injunction against the Bank. The Court of Appeal in declining to grant an injunction observed that the property had already been transferred to the purchasers and there was no evidence of conspiracy between the bank and the purchasers. They said that the appellant's remedy lay in

damages if she succeeded in her claim that the sale was irregular.

16. From the materials placed before the Court, there is no evidence that any of the applicant's right has been infringed as to call for grant of injunction. To this extent, I do find that the applicant has failed to prove that he has a prima facie case with probability of success. One of the properties having been sold and is already registered in the name of the interested party, the applicant's remedy lies in damages if he will succeed to show that he never signed the charge documents.

17. I do not know the fate of the other property that is LR No.209/11095/95. However whatever it's fate, it is clear that an injunction cannot be issued in the circumstances. The properties are capable of being valued and the third respondent can compensate if it turns out that it took over the properties in an irregular manner and that sale of one of them was irregular. The property which was sold was charged to the third Respondent. The balance of convenience therefore tilts in favour of the third respondents who are the chargees of the property from the interested party. I therefore find no merit in the applicant's application which is hereby dismissed with costs to the 2nd and 3rd respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 26th day of February 2018.

E.O.OBAGA

JUDGE

In the presence of :

Mr Kiplangat for Mr Muriuki for 3rd Defendant

Mr Gikunda for Interested Party

Court Assistant: Kevin

E.O.OBAGA

JUDGE