



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ELC. CASE NO. 7 OF 2017.

WANJAMA KIHARA.....PLAINTIFF/APPLICANT

VERSUS.

ZEPHANIA KIHARA WANJAMA.....1ST DEFENDANT/RESPONDENT

KENYA INDUSTRIAL ESTATE LTD...2ND DEFENDANT/RESPONDENT

RULING.

History:

[1]. The applicant Wanjama Kihara is the father of Zephania Kihara Wanjama. On 30th April the said Zephania Kihara Wanjama borrowed a loan of Kshs.500,000/= with Kenya Industrial Estates The said loan was secured by a charge over land known as E. Bukusu/S. Kanduyi/9958 owned by his father Wanjama Kihara with full knowledge and Consent of the said Wanjama Kihara who attended the Land Control Board for such consent which was duly given on 12th February 2013. He also signed a deed of guarantee for the said loan. It is alleged that he 1st respondent repaid the said loan without problems but applied for a second loan on 7th July 2015 for Kshs.700,000/=. The said loan is said to have been secured by the said Land Parcel E. Bukusu/S. Kanduyi/9958 without with the full consent of the applicant who allegedly attended the Land Control Board at Kanduyi and secured a consent dated 5th May 2015. This is the loan that the said Zephania Kihara Wanjama has defaulted causing the bank to exercise its statutory power of sale.

[2]. The applicant admits giving his title to his son to charge for the 1st loan of 500,000.00 but denied ever giving the consent to the 2nd loan of Kshs.700,000.00. He equally denies ever attending the Kanduyi Land Control Board for such consent. Indeed, he reported his son to the police. Wrote a statement to that effect and the 1st defendant was charged with two counts one of making a false document contrary to section 347 (d) (iv) of the Penal Code in CM's Court Bungoma Criminal Case No. 499 of 2017. The particulars being that on 11th May 2015 at an unknown place within Republic of Kenya he made a false document namely application for consent for Land Control Board purporting it to be genuine application for consent for Land Control Board purporting it to have been made and signed by Wanjama Kihara. This case is pending in Court.

Pleadings:

[3]. The applicant then filed this case and filed the application before the court under order 40 Rule 1 and 2 orders 51 of the Civil Procedure Rules praying for a temporary injunction restraining the 2nd defendant by themselves, servants and/or agents from selling by Public Auction or otherwise alienating disposing and/or in any way interfering with the plaintiffs property known as E. Bukusu/S. Kanduyi/9958 pending the hearing and determination of this suit and/or further orders of the court.

[4]. The 2nd respondent filed a Replying Affidavit through Faith Onyango Acting Manager Legal Services. She contended that the applicant who was the owner of the suit land E. Bukusu/S. Kanduyi/9958 was aware of the two loans of Kshs.500,000.00 and 700,000.00 that he gave his consent to the use of his title deed and that he attended the Kanduyi Land Control Board and willingly gave his consent thereof. She contended that the 1st and second loans run separately in the books and records of account of the 2nd respondent. She also contended that on 15th December, 2015 the 1st respondent was in arrears of the second loan A/c. No.401099001180 with Kshs.652,940/= hence the 2nd defendant statutory power of sale crystalized and that is the loan for which the statutory power of sale was given and for which the Auctioneers were instructed to issue a redemption Notice and/or which an advertisement was issued in the Newspapers. The 2nd respondent denied that the 1st respondent stole the plaintiffs title for Parcel Number LR No. East Bukusu/South Kanduyi/9958. It averred that the tile was used with the full knowledge of the plaintiff.

Analysis:

[5]. The law on granting injunctions is well settled in the case of *Geilla Vs. Casman Brown [1973] EA 358* where the court stated that firstly an applicant must show a prima facie case with a probability of success. That an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which will not be compensated by an award of damages and Finally if the court is in doubt it will decide the application on the balance of convenience.

[6]. There is no doubt in this case that there is a dispute as to whether the applicant plaintiff gave his consent to the second Loan and charge. Indeed he reported to the police of the theft of his title and the 1st respondent has been charged with a criminal offence of making a false land control consent in respect to the suit land. The defendant/respondent himself admitted in court that he did not have his fathers consent for the 2nd Loan and that the 2nd land control consent produced in court was not given by his father. That would therefore mean that the second charge, a dealing in Agricultural land had no Land Control Boards Consent. The implications of such a consequence will obviously be dire to that charge. This will be an issue at the hearing hereof.

The plaintiff applicant in raising that issue has established a prima facie case. If this claim is established, and the Criminal case filed herein proved, the consequences will be dire to the plaintiff as the 1st respondent is son. And so too to the 1st respondent. To my mind this consequence to the applicant is not capable of remedy by damages.

[7]. I hold that the applicants application has merit I allow the same as prayed. Costs of the application shall be in the cause.

Ruling read in open Court in the presence of Counsels for the parties.

Dated at Bungoma this 22nd day of February, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Joy: Court Assistant

Miss Nafula for Mrs. Chungu for the Applicant

Firm of Milimo is for the 2nd Defendant

1st defendant in person - Absent