



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 597 OF 2017

ZACHARY OKEMWA NYANDIEKA.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LTD.....1ST DEFENDANT

LEGACY AUCTIONEERS SERVICES.....2ND DEFENDANT

RULING

The application for determination is the Plaintiff's Notice of Motion dated the 27th March, 2017 brought pursuant to order 40 rule 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Applicant filed SPMC No. 4 of 2016 at the Kajiado Law Courts and obtained orders which were extended. In SPMC No. 4 of 2016 which is pending, the Respondents raised a Preliminary Objection which has not yet been canvassed and there is also an application therein by the Plaintiff /Applicant that is yet to be determined. On 22nd March, 2017, the Applicant received a letter stating that the interim ex parte orders lapsed on 11th January, 2017 which is not the case, and the Defendants are ready to sell his property. The said orders have not expired.

The application is supported by the affidavit of ZACHARY OKEMWA NYANDIEKA the Plaintiff herein where he deposes that on 12th January, 2016 he instructed the firm of messrs ONYANCHA, NYAKUNDI & CO. ADVOCATES to file a suit against the Respondents, who also filed an application to amend the pleadings. He claims he was granted interim orders on 12th January, 2016 and the same was extended on various occasions. He avers that the Respondents raised a preliminary objection on the issue of jurisdiction which was to be canvassed on 17th May, 2016. This was as a result of the Malindi High Court Constitutional Petition No. 3 of 2016 which stayed all Chief Magistrates matters relating to land. He insists the suit is still pending and that there are interim orders in place but if the same lapsed, then it was not occasioned by him. He reiterates that it is in the interest of justice that the court do issue temporary injunction against the Defendant from selling land parcel number NGONG/NGONG/26740.

The application is opposed by the 1st Defendant whose legal Manager BONIFACE MACHUKI swore a replying affidavit where he confirmed that there is a suit KAJIADO SPMCC NO. 4 of 2016 which was filed by the Plaintiff where interim orders were issued on 12th January, 2016 but by virtue of the provisions of Order 40 rule 6 of the Civil Procedure Rules, the said orders lapsed on 11th January, 2017. He reaffirms that the Court of Appeal issued an order on 13th December, 2016 staying execution and implementation of the judgement given in Malindi High Court Petition No. 3 of 2016. He insists this suit is misconceived, bad in law and ought to be dismissed forthwith as there is nothing preventing the Plaintiff from prosecuting his application in KAJIADO SPMCC NO. 4 of 2016 except for his indolence and lethargy. He reiterates that failure by the Plaintiff to prosecute his application is prejudicial to the 1st Defendant as the Applicant has made absolutely no effort whatsoever to repay the debt that he owes the Bank while enjoying equitable orders and the said debt stands at Kshs. 3, 525, 247.65. He contends that the Plaintiff has proved incapable of repaying the debt owed to the 1st Defendant including the interest which continues to accrue thereon and it is in the interest of all parties concerned that the suit property is disposed of, noting the debt owed will soon exceed its value.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

The main issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive orders sought pending the outcome of the suit.

It is not disputed that there is a suit KAJIADO SPMCC NO. 4 of 2016 which was filed by the Plaintiff against the Defendants over the same

subject matter, where he obtain interim orders on 12th January, 2016, which suit is still pending. The Plaintiff contends that the suit was pending as it was stayed due to the Malindi High Court Petition No. 3 of 2016. The 1st Defendant reiterated that the interim orders obtained therein expired on 11th January, 2017 and the Plaintiff is still indebted to the 1st Defendant and based on the valuation report, the debt would soon exceed the value of the suit land.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

In relying on the case above, I wish to interrogate whether the Plaintiff has made out a prima facie case with a probability of success. The Plaintiff is seeking injunctive orders based on the fact that the lower court matter which granted him interim orders, could not proceed with his case because it was stayed by the decision in Malindi Petition No. 3 of 2016. The Plaintiff insists the interim orders granted therein have not lapsed.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*a prima facie case in a civil application includes but is not confined 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the other.*'

I note that the Plaintiff has not presented any proper materials on why he needs an injunction. Injunctive orders are equitable reliefs and the principles of equity are clear that he who comes to court must come with clean hands. I note the Plaintiff obtained interim injunction in January 2016 in the lower court but did not bother to prosecute the application but insists the interim orders therein which were periodically extended are still in place.

Order 40 rule 4 (2) of the Civil Procedure Rules provides as follows: '(2) **An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.**

While Order 40 rule 6 stipulates that '**Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.**'

It is in the circumstances that I find that the Plaintiff has not established a prima facie case to warrant the orders of injunction sought.

I note that the Chief Magistrate's Court now has jurisdiction to deal with land matters and the Plaintiff has not demonstrated to court what efforts he has put in place to prosecute the suit he instituted in the lower court. It seems the Plaintiff is engaging in forum shopping to obtain interim orders.

It is against the foregoing that I find that the Plaintiff's application dated the 27th March, 2017 is not merited and I dismiss it with costs.

Date signed and delivered in open court at Kajiado this 13th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Mureithi holding brief for Gathu for 1st Respondent

N/A for Plaintiff