



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 331 OF 2017

BENJAMIN NDULA.....1ST PLAINTIFF

JOSEPHINE WAYUA MWINZI.....2ND PLAINTIFF

PATRICK MULWA.....3RD PLAINTIFF

FIDELIS MUSEMBI.....4TH PLAINTIFF

ELIZABETH NDUNGE KILAMBYA.....5TH PLAINTIFF

VERSUS

CAROLINE NGINA MWONGELA.....1ST DEFENDANT

SETH WANZAU.....2ND DEFENDANT

RAFIKI MICROFINANCE BANK LIMITED....3RD DEFENDANT

RULING

1) There is before me a notice of motion application expressed to be brought under sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 Rule 1 and Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law for orders that;

1. Spent

2. Spent

3. That this Honourable court be pleased to grant an order of temporary injunction restraining the 3rd defendant, its agents, servants or anyone acting through it from repossessing, selling, advertising for sale and or in any other manner interfering with the suit properties herein being MAKUENI/UNOA/2790, 2798, 2808 & 2811 pending the hearing and determination of the suit herein.

4. That the defendants/respondents bear the costs of the application herein.

The application is dated 30th August, 2017 was filed in court on the 31st August, 2017. It is predicated on the grounds on its face and is supported by the affidavit of Benjamin Ndula Ndaka, the first applicant, sworn on behalf of his co-applicants at Machakos on the 30th August, 2017.

2) The application is opposed by the third respondent vide its grounds of opposition dated 15th September, 2017 and filed in court on the 18th September, 2017. The first and the second respondent are not opposed to the application.

3) On the 18th September, 2017, the court directed that the application be disposed off by way of written submissions. The applicants and the third respondent filed their submissions on the 9th November, 2017 and 7th December, 2017 respectively.

4) Both the applicants counsel and the third respondent's counsel are agreed that the grant or otherwise of temporary injunction in this motion is pegged on the principles set out in the famous case of **Giella Vs Cassman Brown Ltd [1973]EA 358**. These principles are :-

I. The applicant must show a prima facie case with probability of success.

II. That on interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which cannot be compensated in damages.

III. That if the court is in doubt, it will decide the application on the balance of convenience.

5) Regarding the principle of prima facie case, the applicants' counsel submitted that the applicants have demonstrated beneficial ownership of the suit properties herein by way of sale agreements. The counsel pointed out that the first and the second respondents have not denied the said sale. The counsel went on to submit that the applicants have equally demonstrated their actual occupation and use of the suit properties which the respondents do not deny. It was also the applicants' counsel's submissions that the applicants have imputed fraud and illegality in the transfer and registration of the title to the suit properties in favour of the first respondent, an issue the first and the second respondents do not deny. The counsel added that the applicants contend that the charge created over the suit properties was illegal and fraudulent which issue the respondents have not denied. The counsel pointed out that the third respondent has confirmed the applicants' apprehension that it is keen on selling the suit properties and hence the need for the grant of the orders sought. On the other hand, the third respondent's counsel submitted that it is not disputed that the first respondent charged the property to the third defendant to secure the sum of Kshs. 10,000,000 and consequent to which she executed a charge over the suit property in favour of the 3rd respondent. The counsel further submitted that contrary to the applicants claim that they are beneficial owners of the suit property by way of sale agreements, the 1st respondent is the registered owner of the same and hence has proprietary interest on the said suit property. The counsel pointed out that the applicants have not demonstrated that they have a prima facie case with probability of success to warrant an injunction order.

6) The applicants have in paragraph 3 of their supporting affidavit acknowledged that the land is registered in the name of the 2nd respondent. They have deposed in paragraphs 5 and 6 of their supporting affidavit how they purchased their respective parcels of land from sellers who had purchased those parcels of land presumably from the 2nd respondent. Of importance to note is that neither the applicants herein nor the sellers from whom they purchased the land from had ownership of their respective parcels of land transferred in their names. The applicants did not offer any explanation for their failure to affect transfer of ownership of the suit property. In addition, I presume that the suit property is agricultural land and as such the grant of consent made in the prescribed form to the appropriate land control board within 6 months within the making of the agreement was necessary as required under section 8(1) of the Land Control Board chapter 302 of the laws of Kenya. There is no evidence of such application having ever been made by the applicants herein. I, therefore, agree with the 3rd respondent's counsel that under the provisions of section 26 of the Land Registration Act, the certificate of title herein is deemed as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate ... Even though their no evidence of the 1st respondent having charged the property to secure a loan facility of Kshs. 10,000,000 as was submitted by the 3rd respondents counsel, it is clear that the suit land was to be sold for failure of the 1st and 2nd respondent's to pay to the 3rd respondent Kshs. 293,734/58 upon issuance of statutory notices of sale by the latter. As such it is clear that the applicants have not demonstrated that they have a prima facie case without probability of success.

7) On the issue of irreparable injury which cannot be compensated in damages, the applicants counsel submitted that the applicants have demonstrated in the photos annexed to their supporting affidavit the developments that they have carried out on the suit property whose sale would occasion huge and irreparable loss which cannot be compensated by damages. On the other hand, the counsel for the 3rd respondents submitted that it is the 3rd respondent that is likely to suffer irreparable loss and damage if the application is allowed in that the loan amount which is yet to be serviced by the 1st respondent will continue to accrue interest thereby diminishing the value of the security held by it. The counsel pointed out that if the applicants succeed at the trial, the 3rd respondent is in a position to pay damages which in the circumstances would be adequate remedy. Further the counsel submitted that the charge that was duly executed by the 1st respondent to guarantee repayment of the loan facility to the 3rd respondent and upon failure by the former to liquidate the same, the 3rd respondent's statutory power of sale crystallized.

8) Arising from the above, my finding is that the value of the developments that the applicants have invested on the suit property is quantifiable and can be compensated in damages. The applicants have not shown that their investments are of sentimental value which cannot be quantified. I agree with the 3rd respondent that if anything, it is the latter that is likely to suffer irreparable injury if the application is allowed.

9) On the balance of convenience, the applicant's counsel submitted that the applicants have proved that the suit property is in danger of being alienated by the 3rd respondent and would effectively delay and/or obstruct the applicants in having their properties back from the would be purchasers should the court eventually find in their favour. On his part, the counsel for the 3rd respondent submitted that since there is no dispute that the 1st respondent is the registered owner of the suit property and she is in default of loan repayment of Kshs. 293,734/58 as at 10th July, 2017 arising from the charge over the suit properties in favour of the 3rd respondent, the balance of convenience tilts in favour of the 3rd respondent. The counsel relies on the case of **Maithya V Housing Finance Co . of Kenya and Another [2003] EA133** at 139.

10) I wish to state that this court is not in doubt and even if it were, the balance of convenience would clearly tilt and it tilts under the circumstances, in favour of the 3rd respondent. There is no denial of the fact that the 1st respondent secured a loan facility and she is in default of the loan repayment in the sum of Kshs. 293,734/58 as at 10th July, 2017 as was submitted by the counsel for the 3rd respondent. Even if the applicants were to succeed at the substantive hearing of the suit herein and thereafter they are unable to recover their properties from the new owners, the value of their properties is quantifiable and can be compensated in damages as I have stated principle herein above in principle number two.

11) Arising from the above, it is my finding that the application by the applicants lacks merits and same is dismissed with costs to the 3rd respondent.

Signed, dated, and delivered at Makueni this 1st day of March, 2018

MBOGO C.G

JUDGE

In the presence of:

Ms Kyalo for the applicants

Mr. Muthiani holding brief for Mr. Onyancha for the 1st and 2nd respondents

S.I Mwaura & Co. Advocate for the 3rd respondent

3rd respondent present through its Wote Branch Manager

Mr. Kwemboi Court Assistant

MBOGO C.G

JUDGE

1/3/2018