



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO.153 OF 2017

AL ARIBA LIMITED.....PLAINTIFF

VERSUS

SAMMY MURITHI MBAABU.....1ST DEFENDANT

SOYONIN FARM COMPANY LIMITED.....2ND DEFENDANT

DYNASTY INTERNATIONAL LIMITED.....3RD DEFENDANT

CEM-BERG INTERNATIONAL LIMITED.....4TH DEFENDANT

KENYA COMMERCIAL BANK.....5TH DEFENDANT

SUSAN M. NABULINDO.....6TH DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....7TH DEFENDANT

RULING

(Application for injunction; suit property having been purchased and registered in name of plaintiff company; later parallel title apparently issued and owner of the parallel title charging it to the bank; no sale of land by the plaintiffs to the chargors; prima facie case established; application for injunction allowed; order of inhibition also issued)

1. This suit was commenced by way of a plaint filed on 5 April 2017. The plaintiff is a limited liability company and it has averred in the plaint that it is the lawful owner of the land parcel Nakuru Municipality/Block 20/43 (hereinafter described as "the suit property") after purchasing it from its previous registered owner, Soyonin Farm Limited on 6 July 2007. It then became registered as proprietor on 18 March 2008 and was issued with a Certificate of Lease. It then took occupation and had the property fenced with barbed wire. In July 2016, a property agent by the name of Mr. Otieno, approached the plaintiff to inquire about the property as he had been instructed to sell it on commission by the 1st defendant. A search was conducted which revealed that the 1st defendant had obtained another title to the suit property in the name of the 2nd defendant, after claiming that it got lost on 5 August 2014, while moving offices. It is pleaded that without any notice to the plaintiff, the 6th defendant cancelled the plaintiff's title and issued the 2nd defendant with another title on 4 December 2014, while the plaintiff still retained the original title issued to it. It is averred that the 2nd defendant then charged the suit property to the 5th defendant, to secure a sum of Kshs. 60,000,000/= on 22 October 2015. It is the plaintiff's case that the defendants conspired to defraud the plaintiff of its ownership of the suit property. In the suit, the plaintiff has inter alia sought orders of cancellation of the title issued to the 2nd defendant on 4 December 2014 and a permanent injunction to restrain the defendants from the suit property.

2. Alongside the plaint, the plaintiff filed an application for injunction seeking to restrain the defendants from entering the suit land or entering into any dealings, over the suit land. It is that application which is the subject of this ruling. The supporting affidavit is sworn by Mr. Paschal Peter Oyuko Mbeche, a director of the plaintiff company. He has more or less repeated the averments in the plaint and has annexed various documents to support the said averments. He has explained that the land was purchased from Soyonin Farm Limited and the title transferred to the plaintiff company. Later, another title was issued to Soyonin Farm Company Limited (not the original Soyonin Farm Limited who sold the land to the plaintiff) after purporting that the original title to the suit land is lost, and it is this title that was charged to the 5th defendant, with the 4th defendant as borrower of the Kshs. 60,000,000/=. On 23 October 2015, the Registrar of Companies notified the 2nd defendant that there existed another company in the name of Soyonin Farm Limited and the 2nd defendant then changed its name to Dynasty International Limited, the named 3rd defendant.

3. I allowed the 1st-4th defendants to be served by way of advertisement in the local dailies as it was stated that they cannot be traced. So far, they have not entered appearance to this suit. The State Law Office entered appearance on behalf of the 6th and 7th defendants but did not file anything to oppose the application for injunction. Only the 5th defendant filed a replying affidavit sworn by Mr. Patrick Muhindi, its

Senior Corporate Manager, to oppose the motion.

4. In his replying affidavit, Mr. Muhindi has deposed inter alia that the 5th defendant is a stranger to the plaintiff and to its allegations of fraud. He has averred that the charge registered over the suit property by the 5th defendant is legal and valid and that the 5th defendant had no notice of any defect in the title. He has averred that the bank is therefore entitled to realize the security as the 4th defendant's account is in arrears of Kshs. 42,618,232.15/= and the requisite statutory notices have been issued. It is his view that the balance of convenience lies in favour of the 5th defendant.

5. I invited counsel to file written submissions and counsel for the plaintiff and 5th defendant duly did so. I have considered these in arriving at my decision.

5. What is before me is an application for injunction and the principles upon which an application of this nature are determined were set out in the case of *Giella vs Cassman Brown (1973) EA 358*. It was held that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success; show that he stands to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience.

6. The plaintiff's case is of course that it is the rightful owner of the suit land having purchased it for consideration in the year 2007 and title having been issued to it in the year 2008. From the affidavit of Mr. Mbeche, the director of the plaintiff company, I have seen copies of the sale agreement and the Certificate of Lease issued to the plaintiff on 18 March 2008. I have also seen the rates statement from the Municipal Council of Nakuru, indicating that the plaintiff company is the recognized rate payer. Mr. Mbeche also annexed two different extracts of the register of the suit land. In one, the first owner is shown to be Soyonin Farm Company Limited, and the second owner as Al Ariba Limited (the plaintiff company). There is then cancellation of the name of Al Ariba Limited and then follows a re-issue of the Certificate of Lease and the charge in question. The second register only has Soyonin Farm Company Limited as proprietor, without indicating any registration of Al Ariba Limited as proprietor. It is the case of the plaintiff that the cancellation of its name as proprietor and the issuance of a new title to Soyonin Farm Company Limited was fraudulent. It will also be recalled that the plaintiff has contended that this second Soyonin Farm Company Limited was fraudulently registered to mirror the first Soyonin Farm Limited, which is demonstrated by the later change of name to Dynasty Limited, after notification by the Companies Registrar.

7. The 1st-4th defendants have not filed anything to explain their position and explain how they acquired title to the suit land and had it charged. Neither have the 6th and 7th defendants tendered any affidavit to state why they cancelled the name of the plaintiff from the register of the suit land. The position of the 5th defendant is that it did due diligence, and from it, it was convinced that the 2nd defendant was owner of the suit land.

8. Having looked at the material tabled before me at this stage of the proceedings, it is my view that the question of why the title of the plaintiff was cancelled and another one issued, needs explanation. It may very well be that the title of the plaintiff was wrongfully cancelled thus paving way for issuance of a new title and subsequent charge of which the plaintiff company was not aware of. I am thus of the view that the plaintiff has demonstrated a prima facie case with a probability of success. If I do not grant the order of injunction, there is risk that the 5th defendant may move to exercise its statutory power of sale, which may permanently deprive the plaintiff of title to the suit land, therefore making the plaintiff suffer irreparable loss. There is no question that the value of the suit land is colossal as it was used to secure advances amounting to Kshs. 60,000,000/=. I am not in doubt, but even if I was, the balance of convenience is not in favour of the 5th defendant, but would favour preserving the subject matter of the suit, so as to enable the plaintiff present its case.

9. For the above reasons, I allow this application for injunction and now make the following order:-

(i) That pending the hearing and determination of this case, the defendants and/or their servants/agents, are hereby restrained by an order of injunction, from interfering with the plaintiff's possession of the land parcel Nakuru Municipality / Block 20/43, and are further restrained from offering for sale, selling, leasing, charging or further charging, or enter into any other disposition.

(ii) That pending the hearing and determination of this case, there is hereby issued an order of inhibition, inhibiting the registration of any transaction and/or dealings in the register/s of the land parcel Nakuru Municipality/Block 20/43.

(iii) That the plaintiff shall have the costs of this application.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 26TH day of April 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Rop holding brief for Mr. Ojou for the 5th defendant.

All other parties: absent.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU