



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 972 OF 2016**

**BEATRICE NJOKI KIGUOYA.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK.....1<sup>ST</sup> DEFENDANT**

**PHILIP LAWRENCE KABIARU KIGUOYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 9<sup>th</sup> August 2016 and filed on 11<sup>th</sup> August 2016 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendants/Respondents from selling, disposing or in any manner interfering with the Plaintiff's use of the parcel of land known as Nairobi/Block 93/590 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Beatrice Njoki Kiguoya, sworn on 9<sup>th</sup> August 2016 in which she averred that both she and the 2<sup>nd</sup> Defendant, who is her son, applied for and obtained letters of administration in respect of the estate of her late husband, John Kiguoya Chege. It was her further averment that the suit property formed part of the estate of her said late husband and the 2<sup>nd</sup> Defendant fraudulently allocated himself the same. She further averred that the 2<sup>nd</sup> Defendant then proceeded to take a loan from the 1<sup>st</sup> Defendant and as security, charged the suit property to the 1<sup>st</sup> Defendant. Her further averment was that the 2<sup>nd</sup> Defendant defaulted in paying off the loan thereby prompting the 1<sup>st</sup> Defendant to advertise the suit property, which happens to be the Plaintiff's matrimonial property, for sale by way of a public auction. She seeks that this court do stop the public auction of the suit property.

The Application is contested. The 1<sup>st</sup> Defendant filed its Recoveries Officer, Daniel Kimaiyo's Replying Affidavit filed on 29<sup>th</sup> August 2016 in which he averred that the second defendant was advanced a loan facility by the first defendant for an amount of Kenyan shillings 10,500,000 which facility was secured by a legal charge over the suit property in the name of the second defendant. The loan was guaranteed by himself and his wife Pascalina W. Kabiaru Kiguoya. He further averred that in addition to the charge referred to herein above, the second defendant and his wife also executed deeds of guarantees and indemnity and letter of setoff in favour of the first defendant where they undertook to repay the first defendant in the event of default by the second defendant in repayment of the loan advanced. It was his further averment that on application of the loan facility herein, the first defendant took its due diligence and conducted a search on the parcel of land. He added that the search showed that the suit property was owned by the second defendant and not the plaintiff. He added that after crediting the second defendant's account with the loan amount as per the loan agreement, there were serious default in repayment on the loan account remained in arrears attracting huge interests. He further added that due to the failure by the second defendant to honour his obligation to repay the outstanding amount as per the agreed installments, the first defendant served him with the various statutory notices of sale, copies of which he annexed to his supporting affidavit. He asserted that the second defendant has failed to redeem the suit property despite the first defendant issuing him all the appropriate statutory notices that he needs to redeem the outstanding amount. On those grounds he sought for the dismissal of this application with costs.

The issue arising for determination is whether or not to grant the prayer for a temporary injunction. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

**“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 latter.”**

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

**“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”**

With that background laid down, the Plaintiff/Applicant has informed the court that the suit property belonged to the estate of her late husband. She however admits the suit property is not registered in the name of her son, who is the second defendant in this matter. She claims that her son acquired the suit property irregularly. She also claims that she is in the process of challenging the transmission of the suit property from her late husband’s estate to the second defendant. The first defendant on the part have informed the court that they carried out due diligence prior to taking the suit property as collateral for the loan that the advanced the second defendant. The informed the court that the carried out a search on the suit property and confirmed the proprietorship there to the effect that it was the second defendant was the registered proprietor of the same. No issue has been raised on the issue of notices issued by the first defendant for the sale of the suit property. The plaintiff’s sole claim, the suit property is that her son the second defendant fraudulently acquired the suit property from the estate of her late husband. At this stage, the plaintiff applicant has not demonstrated that she has a prima facie case with a probability of success at the trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See *Giella vs. Cassman Brown and Co. Ltd* 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”**

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

**“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”**

In light of the foregoing, I hereby dismiss this application. Each party shall bear their costs.

**SIGNED AND DATED BY HON. LADY JUSTICE MARY M. GITUMBI**

**AT NAIROBI THIS 12TH DAY OF APRIL 2018.**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED BY HON. MR. JUSTICE SAMSON OKONGO THIS 19<sup>TH</sup> DAY OF APRIL 2018.**

**SAMSON OKONGO**

**PRESIDING JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court clerk