



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 519 OF 2017

VINCENT LOONENA NAISHO.....PLAINTIFF

VERSUS

GROFIN AFRICA FUND.....1ST DEFENDANT

WESTMINISTER COMMERCIAL

AUCTIONEERS.....2ND DEFENDANT

AND

SIDAI INVESTMENT LIMITED.....INTERESTED PARTY

RULING

The Application before me is the Notice of Motion dated 27th July, 2017 interalia seeking a mandatory injunction against the 1st and 2nd Respondents from selling by public auction, transferring, wasting, alienating, charging and mortgaging all that parcel of land known as **CIS MARA/NAILOKILOK/74** hereinafter called the suit property pending the hearing and determination of the suit herein.

The Application is based on the grounds that the Applicant is legal and absolute owner of the suit property and that he did not charge his property at a time to the 1st Defendant and any auction of the property is thus illegal and tantamount to a fraud. The Applicant further contends that the 1st Respondent has purportedly charged the property for a loan in favour of a company known as an investment limited. He further states that since he is employed by the KDF he has been in constant travel he has handed over all his original documents including title to the suit land to his brother one Eric Soine Naisho who was a director of the interested party.

The Applicant further contends that he has neither given his consent nor allowed the use of his title documents to secure a loan and he has never executed any charge instruments to secure a financial facility. He also contends that he was not served with any Statutory Notice of sale as provided for under Section 96(2) of the Land Act.

The Application was further supported by the sworn affidavit of the Plaintiff/Applicant which basically expounded on the grounds herein mentioned and he annexed various documents including copies of certificates of titles, newspaper advertisement for the sale of the land and correspondence with the 1st respondent and he contends that his efforts to have the 1st respondent to stop the auction of his property but to no avail and it is his case that unless the court intervenes to stop the auction from taking place he will suffer loss and it will be to his detriment.

The 1st Respondent in opposing the application filed a replying affidavit sworn by the investment executive officer where interalia he deponed that in compliance with condition of a grant of a loan facility the applicant and the interested party caused a first charge to be registered over CIS MARA/NAILOKILOK/74, CIS MARA OLOPITO/2246 and later title LR. 101523. He contends that all the documents were executed by the Applicant and the interested party before an advocate who also witnessed the applicants spousal consent.

The 1st Respondent also deponed that it was on or about 6th July, 2016 when the Applicant defaulted on payments of the loan facility that the 1st Respondent exercise its remedies to redeem the outstanding loans. He states that the applicant's allegation of illegality and fraud are untruths and meant to mislead the court and the death of the brother the very fraud is used as an excuse to avoid paying the outstanding money.

I have looked at the Application before me and the submissions filed by respective counsel for an order of a mandatory injunction to be issued at interlocutory stage, any party/applicant must demonstrate that his case is clear and thus exists special circumstances to warrant the issuance of the orders sought as held in the case of **KAMAU MUCHA -VERSUS- RIPLES LTD (1990-1994)EA 338**.

In the instant case it is not in dispute that the Applicant's property are charged to the 1st respondent for loan facility. However the Applicant alleges that the said fault was extended to a company that he is not a director using his property as a collateral. He further alleges that his signature were forged and the entire transaction was carried out without his consent.

Fraud is a serious matter that cant be proved at the interlocutory stage the allegations and counter allegations in this matter is one that can only be resolved where evidence shall be taken and then ascertained by each party tested by way of cross examination.

In view of the above I am convinced that a matter in which a special circumstance to fraud is alleged and in the event that the order will not be granted the applicant may suffer irreparably. In the circumstance I will allow the application and grant orders in terms of prayer 3 of the Notice of Motion.

Costs in the cause.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **20th** day of **APRIL, 2018**

Mohammed Noor Kullow

Judge

20/4/2018

In the presence of:

CA:Chuma

N/A for the parties

Mohammed Noor Kullow

Judge

20/4/2018