



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 179 OF 2017

OMOGO HANDSON NYAMBEKI..... PLAINTIFF

VERSUS

FREDRICK MAEBA KEBUSE..... 1ST DEFENDANT

KENYA COMMERCIAL BANK.....2ND DEFENDANT

RULING

1. The plaintiff vide a plaint dated 21st September 2017 but indicated to have been filed in court on 20th September 2017 commenced the instant suit. The plaintiff in the plaint avers that he entered into a sale agreement on or about the 24th July 2013 with the 1st defendant to purchase from the 1st defendant land parcel **Nyaribari Chache/B/B/ Boburia/9659** (“the suit property”) for the consideration of kshs. 510,000/=. The plaintiff made a down payment of kshs. 336,000/= and the balance was to be paid against the transfer of the property. The plaintiff however states the 1st defendant notwithstanding the agreement for sale, the 1st defendant went ahead and charged the property to Gusii Development Joint Board on 27th November 2013 to secure a sum of kshs. 90,000/= and later on 7th April 2017 the 1st defendant charged the property to the 2nd defendant to secure a sum of kshs. 1,000,000/=. The 2nd defendant has threatened to sell the property through public auction in exercise of its power of sale conferred under the charge.

2. The plaintiff prays for judgment against the defendants for:-

(a) An injunction restraining the defendants by themselves, their employees or servants or otherwise howsoever from selling, alienating and/or interfering with land parcel No. Nyaribari Chache/B/B/Boburia/9659.

(b) Damages.

(c) An order for specific performance.

(d) Costs and interest.

(e) Any other relief that this court may deem fit to grant.

3. The plaintiff vide a Notice of Motion application dated 28th September 2017 filed on 29th September 2017 under a certificate of urgency sought an interim order of injunction restraining the 2nd defendant from disposing off, alienating and/or selling the suit property by public auction and/or in any other manner interfering with the plaintiff’s interest in the property. The application was grounded on the grounds set out in the body of the application and on the affidavit sworn in support by the plaintiff. The 2nd defendant filed grounds of opposition to the application on 16th October 2017. The court on 17th October 2017 granted an interim order of injunction pending the hearing of the plaintiff’s application inter partes. The 1st defendant did not appear and has not filed any response to the suit.

4. The plaintiff’s application for injunction is directed against the 2nd defendant who holds a charge over the suit property and the intent is to restrain the 2nd defendant as chargee from exercising its statutory power of sale conferred under the charge and the statute. The grounds as can be deduced from the application are that if the 2nd defendant sells the suit property, the plaintiff who has an interest over the property as a purchaser is likely to suffer irreparable injury that cannot be compensated by an award of damages. Further the plaintiff/applicant contends the 1st defendant acted fraudulently in offering the suit property for sale to the plaintiff and at the same time offering the same property as security to the 2nd defendant. The plaintiff thus asserts that he has a prima facie case with an overwhelming chance of succeeding and on that account is deserving of an order of temporary injunction. The plaintiff in support of the application places reliance on the sale agreement dated 24th July 2013 and 28th November 2016 annexed as “OHN-2 and -3” in the plaintiff’s affidavit sworn in support.

5. The 2nd defendant vide the filed grounds of opposition inter alia states that it holds a valid charge over the suit property and there is no basis for the plaintiff to seek to prevent it from exercising its statutory power of sale over the property which has accrued following default in servicing of the loan by the 1st defendant. Additionally, the 2nd defendant avers that it was not privy to any dealings between the plaintiff and the 1st defendant relating to the suit property. The 2nd defendant further disputes the validity of the sale agreement dated 24th July 2014 which the further agreement dated 28th November 2016 seeks to extend the validity to 1st May 2017. The 2nd defendant further contended that the plaintiff cannot satisfy the conditions for grant of temporary injunction as established in the case of **Giella -vs- Cassman Brown Co. Ltd [1973] E.A 358** and therefore does not deserve to be granted an injunction.

6. The parties argued the application by way of written submissions. The submissions by the plaintiff/applicant reiterate the facts as set out in the affidavit in support of the application. Simply put, the submissions are to the effect that the plaintiff entered into an agreement of sale to purchase the suit property from the 1st defendant and that he paid the full purchase price over time but before he could obtain the consent of the Land Control Board for the transaction, the 1st defendant charged the property to the 2nd defendant who is now intent on selling the charged property by public auction in exercise of its statutory power of sale. The plaintiff asserts that the 1st defendant acted fraudulently both to the plaintiff and the 2nd defendant by misrepresenting the factual position as relates to the suit property. This the plaintiff submits discloses a prima facie case within the definition of a prima facie case in the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** where the court stated:-

“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.”

7. The 2nd defendant submits that the 1st defendant having been advanced money against the security of the property and the 1st defendant having defaulted in the payment, the 2nd defendant was entitled to enforce the security. The 2nd defendant submits the plaintiff is a stranger to it and the plaintiff having no registered and/or registrable interest over the suit property cannot be entitled to an order of injunction against the 2nd defendant over the suit property. There is no privity of contract between the plaintiff and the 2nd defendant who is a stranger to any dealings that the plaintiff may have had with the 1st defendant affecting the suit property.

8. In the **Giella -vs- Cassman Brown** case [supra] the court laid down the principles that should guide the court in granting or not granting a temporary injunction. Those principles though enunciated over 40 years ago still remain valid. The applicant has to demonstrate a prima facie case with a probability of success; it has to be demonstrated that the applicant stands to suffer irreparable damage and that damages would not be an adequate remedy unless the injunction is granted and lastly in the event the court is in doubt, it can determine the application on consideration of the balance of convenience.

9. On the issue whether or not the plaintiff has demonstrated a prima facie case with a probability of success, I am not persuaded he has done so. The plaintiff has founded his claim on two alleged agreements of sale one dated 24th July 2013 and the other 28th November 2016. These agreements as attested by the further agreement dated 28th November 2016 were subject to the Land Control Board consent. Among the completion documents that were required to be furnished to the buyer was, duly executed forms of Land Control Board consent and Transfer. There is no evidence that the consent of the Land Control Board was ever obtained. Indeed the plaintiff in his submissions concedes that no consent was obtained from the Land Control Board. That being the position it means that the agreements became null and void upon expiry of 6 months from the date they were entered into under the provisions of Section 6 and 8 of the Land Control Act, Cap 302 Laws of Kenya. The court in the premises cannot enforce a contract that has become void by operation of the law. The plaintiff's prayer for an order of specific performance against the defendants would be unavailable. If anything, the plaintiff would only be entitled to damages and/or refund of any monies paid to the 1st defendant pursuant to the agreement that has become null and void as provided under Section 7 of the Land Control Act.

10. In the circumstances, the plaintiff has not in my view demonstrated a prima facie case with any probability of success, at any rate, not against the 2nd defendant with whom he had no dealings whatsoever. The exhibits furnished by the plaintiff specifically the copy of the certificate of official search dated 19th May 2017 “**OHNS**” confirm the 1st defendant was registered as owner of the suit property and issued a title on 1st September 2011 and that a charge was registered in favour of the 2nd defendant on 7th April 2015 to secure a sum of kshs. 1,000,000/=. The registered charge in favour of the 2nd defendant would take precedence over any unregistered interest the plaintiff may have had over the suit property and the 2nd defendant would in my view be properly entitled to seek to enforce the terms of the charge if there was default by the 1st defendant. The 2nd defendant has submitted that at the time of the registration of the charge there was no encumbrance registered against the property and thus the charge was validly taken. The plaintiff has no valid interest over the property and there can be no basis to injunct the 2nd defendant from enforcing the contract it had with the 1st defendant in the nature of the charge.

11. While I have held and found that the plaintiff has not demonstrated he has a prima facie case which has a probability of success, I would further add that even if I had held a prima facie case had been established I would nonetheless not have granted an injunction for the reason that the plaintiff would not suffer any damage that would not be compensatable in damages. In the sale agreement dated 24th July 2013 the plaintiff and the 1st defendant had provided for any incidence of default or breach by any party to the agreement. The agreement provided that any party who breached the agreement would be liable to pay the innocent party kshs. 250,000/= as agreed liquidated damages. The plaintiff under the plaint prays for damages which is an indication that damages would suffice.

12. As I entertain no doubt that no prima facie case has been established by the plaintiff and/or that damages would not be an adequate remedy, I need not consider the application on the balance of convenience.

13. The upshot is that I find no merit in the plaintiffs Notice of Motion dated 28th September 2017 and I order the same dismissed with costs to the 2nd defendant. The order of interim injunction granted herein on 17th October 2017 is hereby discharged.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 11TH DAY of MAY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Momanyi for Sagwa for the plaintiff

N/A for the 1st defendant

Mr. Anyona for Mose for the 2nd defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE