



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 125 OF 2018

JAMES MOGUNDE MOGUNDE (Suing On Behalf Of and as Donee of Power
of Attorney From Edward Sakawa Nyasaka).....**APPLICANT**

VERUS

FAULU MICRO FINANCE BANK LIMITED.....RESPONDENT

RULING

(Application for injunction; principles to be applied; plaintiff owning the suit land and having title to it; suit land used to secure a charge with a third party as borrower; plaintiff residing in the USA and refuting ever entering into the charge transaction; evidence shown that the plaintiff was not in the country when the charge was executed; prima facie case displayed; order of injunction issued restraining the chargee from dealing with the property pending hearing and determination of the suit)

1. This suit was commenced by way of a plaint which was filed on 25 March 2018. The plaintiff, who it is pleaded is a resident of the United States of America (USA), is suing through his appointed attorney, one James Mogunde Mogunde. It is pleaded that the plaintiff is the registered owner of the land parcel Kiambogo/Kiambogo Block 2/15863 (hereinafter referred to as "the suit land") having purchased it on 7 November 2006 at a consideration of Kshs. 250,000/=. In the year 2016, it is averred that the plaintiff built 16 family units of 2 bedrooms each on the suit land and the value of the property is now about Kshs. 30,000,000/=. It is pleaded that in the month of October 2017, some strangers came to the property claiming that they have been sent by the defendant to value it as the suit land was used as security for a loan. A search was then carried out which revealed that there is a charge for the sum of Kshs. 10,000,000/= with one Esther Njeri Ngigi as the borrower. It is the position of the plaintiff that the said charge is fraudulent and was registered on the basis of forged documents. In the suit, the plaintiff has asked for the following orders :-

- (a) Declaratory order that the charge against Kiambogo/Kiambogo Block 2/15863 was fraudulent done and is illegal.*
- (b) An order directing the Land Registrar to discharge the suit land Kiambogo/Kiambogo Block 2/15863 and restore the status quo prior to registration of the charge.*
- (c) An order that the intended sale by the defendant is illegal and unlawful.*
- (d) A permanent injunction restraining the defendant by itself, its servants, employees and/or agents from interfering, alienating, selling, or in any other way dealing with the suit land.*
- (e) General damages.*
- (f) Costs of the suit and interest.*
- (g) Any other relief the Honourable Court may deem fit and just to grant.*

2. Together with the plaint, the plaintiff filed an application for injunction, seeking to have the defendant restrained from selling, dealing, or alienating the suit land pending hearing and determination of this suit. It is that application which is the subject of this ruling. Despite being served the defendant/respondent has not entered appearance and has filed nothing to oppose the motion. The only material that I have is therefore that displayed by the plaintiff.

3. In his supporting affidavit, the plaintiff's attorney has more or less repeated what he has averred in the plaint. He has displayed a copy of the title deed issued to the plaintiff and the same shows that the plaintiff acquired title on 7 November 2006. He has added that when the

defendant's agents came to the property in October 2017, they left with him a photocopy of a title deed which he has annexed to his affidavit. The same appears to be a duplicate of the title deed held by the plaintiff. The plaintiff's attorney has averred that he then went to the offices of the defendant to make inquiries and he was informed that the property has been used as security through its Naivasha branch. He then reported the matter to the police on 19 October 2017 and the matter is still under investigation. He also confirmed from the defendant that the property has been used to secure a loan of Kshs. 10,000,000/= to one Esther Njeri Ngigi with the plaintiff being noted as chargee. He managed to get a copy of the charge, which is dated 31 March 2017, and which shows the plaintiff as chargor. It is refuted that the plaintiff ever signed the said charge as on these dates, it is said that he was in the USA. It is said that he came into the country on 11 December 2016 and left on 13 January 2017, and was not available to sign the charge on the stated dates. A copy of the plaintiff's passport is annexed. It is further averred that the addresses used on the charge transaction are not to be the plaintiff's and the photograph in the ID card used is not that of the plaintiff. He has averred that on 13 March 2018, an auctioneer dropped a 45 days redemption notice on the property and the property is thus at risk of being sold. It is deposed that the original title deed is still in possession of the attorney and could not have been used for the charge transaction.

4. I have considered the application. What is before me is an application for injunction and the principles upon which an application of this nature is assessed, were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. It was said in the said case that to succeed in an application for injunction, the applicant has to display a prima facie case with a probability of success; demonstrate that he stands to suffer irreparable loss unless the injunction is granted and where the court is in doubt, it will determine the application based on a balance of convenience.

5. As I had earlier mentioned, the only material is that tendered by the plaintiff. The plaintiff of course refutes that he ever signed any charge to secure borrowing by the said Esther Njeri Ngigi. Of significance, the plaintiff has shown, through a copy of his passport that he flew out of the country on 13 January 2017 and could not therefore be available to sign the charge instrument on 31 March 2017. I believe the plaintiff has demonstrated prima facie, that he was never a party to the charge instrument, and it is probable that the charge instrument is a forgery. The whole truth will emerge at the hearing of the suit but I am persuaded from the documents displayed at this stage of the proceedings that the plaintiff has demonstrated a prima facie case with a probability of success. If the defendant proceeds to sell the suit property in exercise of its statutory power of sale, the plaintiff will certainly suffer irreparable loss. I am not in doubt, but if I was, the balance of convenience lies in maintaining the suit property until the case is heard and determined.

6. Given the above, I do allow this application for injunction and make the following orders :-

(a) That pending the hearing and determination of this suit, an order of injunction is hereby issued restraining the defendant from offering for sale, selling, further charging, leasing, taking over, or in any other way dealing or entering into any dispositions over the land parcel Kiambogo/Kiambogo Block 2/15863 (Mwariki).

(b) That pending the hearing and determination of this suit, there is hereby issued an order of inhibition, restricting the registration of any disposition in the register of the land parcel Kiambogo/Kiambogo Block 2/15863 (Mwariki).

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

7. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 8th day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Kaholo for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: Nelima Janepher .

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU