



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.7 OF 2016

MAKATIAT LIMITED.....PLAINTIFF

VERSUS

LIQUIDATON AGENT TRADE BANK LTD (IL).....1ST DEFENDANT

PETER N. GICHUKI T/A

SPORTLIGHT INTERCEPTS.....2ND DEFENDANT

JIMPATSAM HOLDING COMPANY LTD.....DEFENDANT

RULING

(Application for amendment of plaint and for injunction; application not opposed; prayer for amendment allowed; injunction not contested and allowed.

1. The application before me is that dated 26 February 2018 filed by the plaintiff. It is an application said to be brought pursuant to the provisions of Order 8 Rule and Order 40 Rule 2 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The application seeks two substantive orders which are prayers 2 and 3 of the application, being :-

(i) That this Honourable Court be pleased to grant leave to the plaintiff/applicant to amend the plaint.

(ii) That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of injunction restraining the defendants by themselves, their agents, servants and/or employees from selling, advertising for sale, alienating, completing process of sale, or in any other way interfering with all that parcel of land known as Nakuru/Githiriga/124 - Kuresoi.

2. The suit itself was commenced by way of plaint on 19 January 2016. In the original plaint, the plaintiff pleaded that it charged the land parcel Nakuru/Githiriga/124 (hereinafter referred to as "the suit land") to Trade Bank Limited which went under liquidation. It is averred that the plaintiff entered into negotiations with the liquidation agent, so as to pay the sum of Kshs. 16.3 Million to offset the debt, which the plaintiff pleaded that it was paying, but was on 4 January 2016 served with a notification of sale of the suit land. Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the then sole defendant, the Liquidation Agent of Trade Bank Limited, from selling the suit land until the case is heard and finalized. I gave interim orders on the said application, dated 18 January 2016, pending hearing of the application inter partes. On 28 June 2017, the date of the inter partes hearing of the application, the applicant and its counsel were absent and I dismissed the application for failure to prosecute it and also discharged the interim orders.

3. The defendant then moved to appoint an auctioneer to sell the property and an auction sale was arranged for 3 November 2017 by M/s Sportlight intercepts, whose proprietor is one Peter N. Gichuki, and it appears that at the said sale, the property was knocked down to M/s Jimpatsam Holding Company Limited.

4. In this application, the plaintiff has contended that the sale of 3 November 2017 did not actually take place and that there is no evidence that any money has been paid on the said auction sale. It is also averred that the sale is not yet complete. The plaintiff has proposed to amend its plaint to make additional pleadings challenging the sale of 3 November 2017 and has proposed to add Mr. Gichuki, Sportlight Intercepts and Jimpatsam Holding Company Limited as defendants. Among the new proposed prayers in the plaint, are an order for cancellation of the sale conducted on 3 November 2017.

5. None of the parties filed any response to the application.

6. I have considered the application. It is apparent that from the date of filing of the original suit, there have been new developments, specifically the auction sale of 3 November 2017, which is now being contested by the plaintiff. I think it is only fair that the plaintiff be allowed to present its case as it wishes and I see no reason why I should not allow the plaintiff to amend the plaint as it has proposed. The prayer for amendment of plaint is therefore allowed.

7. On the other prayer for injunction, the principles upon which an application of such nature is assessed were laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***. For one to succeed in such an application, he must 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 case on a balance of convenience. It is difficult at this stage of the proceedings to state with finality, or indeed any sort of precision, whether or not the auction sale was conducted lawfully, especially in view of the fact that I do not have any responses to the subject application. That will have to await the final determination of the matter. The plaintiff may very well have a case to present, and I think it is only fair that I give the plaintiff an opportunity to present its case. I will therefore make orders preserving the property. I also have no reason not to preserve the status quo on possession, as the party who would most be prejudiced by this order, the claimed purchaser at the auction sale, has not opposed it.

8. I now make the following orders :-

(i) That leave to amend the plaint is hereby granted and the plaintiff is directed to file and serve the amended plaint within 14 days.

(ii) That an order of inhibition is hereby issued, barring the registration of any disposition in the register of the land parcel Nakuru/Githiriga/124, until this case is heard and finalized.

(iii) That the status quo as to possession be maintained pending the hearing of this suit .

(iv) That costs of this application will be costs in the cause.

9. 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: -

Mr. Kipkenei for the plaintiff/applicant.

Ms. Akong'a for the 1st defendant/respondent

No appearance for the 2nd and 3rd defendants/respondents.

Court Assistant: Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU