



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 524 OF 2016**

**(Formerly Nairobi ELC Case No. 718 of 2016)**

**ANNE NJERI NDWARU.....PLAINTIFF**

**VERSUS**

**MOLYN CREDIT LIMITED.....1<sup>ST</sup> DEFENDANT**

**WISKAM AUCTIONEERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR KAJIADO.....3<sup>RD</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion dated the 29<sup>th</sup> June 2016 brought pursuant to Order 40 rule 1 and Order 51 rule 1 of the Civil Procedure Rules as well as section 1A, 1B, 3A and 63 ( e) of the Civil Procedure Act and all the other enabling provisions of the law. It seeks the following orders:

1. Spent
2. That an order of inhibition do issue inhibiting and or prohibiting the transferring, leasing and or charging or dealing in any way with Title Number NGONG/NGONG/48250 pending the hearing and determination of this application.
3. That this Honourable Court do grant a temporary injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents/defendants by themselves, their servants, agents and or any other persons authorized by them from alienating, altering with land records and dealing in any way with the suit parcel of land known as Title Number NGONG/NGONG/48250 pending hearing and determination of this application.
- 4. THAT** this honourable court grant a temporary injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents/defendants by themselves, their servants, agents and or any other persons authorized by them from wasting, alienating, altering with land records and dealing in any way with the suit parcel of land known as Title Number NGONG/NGONG/48250 pending the hearing and determination of this suit.
- 5. THAT** an order of inhibition do issue inhibiting and or prohibiting the transferring, leasing and or charging or dealing in any way with Title Number NGONG/NGONG/48250 pending the hearing and determination of this suit.
- 6. THAT** the costs for this application be provided for.

The application is premised on the grounds that on 24<sup>th</sup> March, 2015 the plaintiff deposited her title deed for land parcel NGONG/ NGONG/ 48250 hereinafter referred to as the 'suit land' for a simple deposit basis as a security for repayment of monies amounting to Kshs. 3,000,000/= advanced to her on 27<sup>th</sup> April, 2015. The Plaintiff was to repay the loan at a monthly instalment of Kshs. 141, 000/= but the 1<sup>st</sup> Defendant transferred the suit land to its name even before the 1<sup>st</sup> instalment could be repaid. The 1<sup>st</sup> Defendant has colluded with the 3<sup>rd</sup> Defendant to illegally and fraudulently transfer the suit land in favour of the 1<sup>st</sup> Defendant. The property is under imminent threat of being wasted, alienated and or otherwise disposed off without the Plaintiff's consent or authority.

The application is supported by two affidavits of ANNE NJERI NDWARU the Plaintiff herein where she avers that she paid a loan processing fee of Kshs. 100,000 to the 1<sup>st</sup> Defendant that later disbursed Kshs. 3,000,000 to her. She states that she made monthly instalments of Kshs. 141,000 until the month of December where she experienced financial difficulties. She confirms defaulting in her loan repayment and fell into arrears to the tune of Kshs. 705, 000/=. She contends that on 6<sup>th</sup> June, 2016 she received letters of notification of sale of movable properties from the 2<sup>nd</sup> Defendant having been instructed by the 1<sup>st</sup> Defendant to distress her for rent of Kshs. 198,000/=. She

claims the 2<sup>nd</sup> Defendant has illegally proclaimed her goods amounting to Kshs. 500,000/= and the 1<sup>st</sup> Defendant illegally transferred the suit land to itself, with the title deed having been issued on 23<sup>rd</sup> April, 2016 even before funds had been released to her. She denies the existence of any conveyance between them and insists the transfer was illegal as she never attended the land control board. She reiterates that the 1<sup>st</sup> Defendant has illegally and fraudulently accepted an offer for purchase of the suit land at a cost of kshs. 6, 300,000/= whilst in fact the suit land is valued at Kshs. 18,000,000/=. She disputes the interest rates meted on the loan amount and claims it is excessive as within 14 months the loan stands at Kshs.8,119,868/=

The application is opposed by the 1<sup>st</sup> Defendant that filed a replying affidavit sworn by MOSES ANYANGU , its Finance Director who avers that the Plaintiff is misleading the Court as the suit land is registered in the name of the 1<sup>st</sup> Defendant. He explains that the Plaintiff approached the 1<sup>st</sup> Defendant claiming she was hard pressed for cash and wanted to transfer or sell the suit land. He contends that at that time the Plaintiff did not have the physical title but requested the 1<sup>st</sup> Defendant to pay off one PETER WAITHUNGURI for a loan of Kshs. 1, 144,500/= which she had taken from him and given her title deed as security, which led to the 1<sup>st</sup> Defendant giving the said PETER WAITHUNGURI an undertaking on 10<sup>th</sup> April, 2015 to do so. On 9<sup>th</sup> April, 2015, the 1<sup>st</sup> Defendant entered into a Sale Agreement with the Plaintiff who agreed to sell and transfer the suit land to the 1<sup>st</sup> Defendant for a valuable consideration of Kshs. 4,000,000/= and hence the Plaintiff cannot claim the transfer was fraudulent as it was effected as well as finalized in accordance with section 37 of the Land Registration Act. He insists the 1<sup>st</sup> Defendant paid a one off payment of the purchase price as per the agreement and its rights as a lawful proprietor cannot be defeated. Further, that upon the transfer the Plaintiff was to give vacant possession but requested to remain in the suit land and pay a monthly rent of Kshs. 15, 000/= but she defaulted in paying the same culminating in the 1<sup>st</sup> Defendant levying distress for rent arrears amounting to Kshs. 180,000/= owing from May, 2015 to April, 2016. He confirms that an order to that effect was issued by Hon. E Mbicha vide CMCC MISC APP NO. 18 OF 2016; WILSON KARIUKI T/A WISKAM AUCTIONEERS & MOLYN CREDIT LIMITED VS ANNE NJERI NDWARU, on 24<sup>th</sup> May, 2016 granting authority to the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant to levy distress to recover the outstanding rent. He reiterates that after levying distress, the Plaintiff vacated the suit land and is no longer a tenant at the said premises. He states that the application is full of material non disclosure and the Plaintiff misled the Court to issue restraining orders that she is misusing to get back to the suit land. He disputes that the Plaintiff deposited her title to get a loan and contends that there are no documents to that effect, as the transaction between them was for sale and not a loan. Further that the Plaintiff executed the Sale Agreement, signed Transfer Forms, applied for consent of the land control board to transfer, and it is not true these documents were executed ignorantly. He further denies that the 1<sup>st</sup> Defendant issued any loans to the Plaintiff and states that the Plaintiff's acts are malicious as well as mischievous. He reaffirms that the 1<sup>st</sup> Defendant is a Credit Company and is the proprietor of the suit land and has been quiet possession of the same. Further, that the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant, the application is frivolous as well as vexatious and that the Plaintiff has not established a prima facie case.

The Plaintiff ANNE NJERI NDWARU filed a further affidavit where she reiterated her claim and contended she is the proprietor of the suit land and not the 1<sup>st</sup> Defendant who acquired the same through unscrupulous means. She denies selling the suit land but avers that on or about 24<sup>th</sup> March, 2015 she approached the 1<sup>st</sup> Defendant herein for a credit facility offered on a soft loan basis for an aggregate amount of Kshs. 3,000,000/= to be repaid in monthly installments of Kshs. 141, 000/= until repayment in full. She deposes that she has been in possession of the original title of the suit land, which she offered as security for the observance of her obligations. Further, that she was to deposit with the 1<sup>st</sup> Defendant on a "simple deposits basis" her Original Title Deed for the suit land together with a copy of National Identity Card and PIN Certificate. She claims on the 24<sup>th</sup> March, 2015 she deposited with the 1<sup>st</sup> Defendant/Respondent the said documents and the same were well received and acknowledged by the 1<sup>st</sup> Defendant's agents, servant and or employee by the name of NAOMI GITHINJI of identity card number 28501322, She states that at the time the 1<sup>st</sup> defendant claims they entered into an agreement on the 9<sup>th</sup> April 2015, she had already deposited with it her title documents including the aforementioned other documents which they acknowledged receipt and she proceeded to pay the 1<sup>st</sup> Defendant the loan processing fee of Kshs. 100,000/= to enable facilitation and processing of her soft loan request. She denies selling the suit land to the 1<sup>st</sup> Defendant for Kshs. 4,000,000/= as alleged or at all and that she never executed any sale agreement, transfers and or applied for any land control board consent and all these documents are a forgery and at the optune time, she shall seek the leave of the court to call upon the Registrar sued as the 3<sup>rd</sup> Defendant to be cross examined on the authenticity of these documents. She reiterates that the said transfer was perpetrated through fraud and forgery of documents and her signature hence cannot enjoy the safeguards of section 37 of the Land Registration Act. Further, that the 1<sup>st</sup> defendant has not proved how he paid her the purported Kshs. 4,000,000/= as there is no transaction either in form of a cheque and or bank transfers given that the amount is way over a million shillings. She further denies ever giving vacant possession but contends that she was unlawfully, illegally an dun-procedurally evicted from the suit land through dubious concocted proceeding instituted exparte by the 1<sup>st</sup> Defendant in cahoots with the 2<sup>nd</sup> defendant on disguise that they were distressing for rent whereas there is no rent agreement and or Tenancy agreement produced to corroborate the 1<sup>st</sup> Defendant's allegations.

The Plaintiff and the 1<sup>st</sup> Defendant thereafter filed their respective written submission.

In her submissions, the Plaintiff she stated that the rule in granting of injunction orders has been set beyond peradventure and the onus is on the Applicant to satisfy these tests before the court can grant an injunction which must meet the mandatory conditions laid down in the celebrated case of **GIELLA V CASSMAN BROWN & CO. LTD (1973) E.A. 358**. She reiterated her claim and submitted that the allegation that the suit land was sold vide a sale agreement (see annexure "MA 1") is merely meant to derail the court and cloud issues in an attempt by the Defendant to win a match against the plaintiff. Suffice to state that the 1<sup>st</sup> defendant has not challenged the validity of all the annexed documents availed by the plaintiff in her application.

She stated that she has clearly established a prima facie case with a high probability of success and that the documents on record to support her case, the subsequent titles issued to the 1<sup>st</sup> defendant/respondent in relation to the suit property is nonexistent and simply bad as it was acquired through fraud, forgery and manipulation of documents and not through any existing legal system.

She submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> are in cohorts in an illegal, fraudulent, irregular and real attempt to disposes the plaintiff/applicant of her property being tile number NGONG/NGONG/48250 and unless and until the Court intervenes, her proprietary rights over the said property risks being extinguished without her consent and or authority. Further, that the 1<sup>st</sup> defendants actions are merely meant to put the

suit land beyond the plaintiff's reach. She insists she is the legal owner of the suit land and stands to suffer grave prejudice since she may be left with no parcel and probable multiple suits by third parties who have been fleeced of their money as innocent purchasers for value without notice.

She submitted that if the orders are not issued, the 1<sup>st</sup> defendant may proceed to dispose of the property to a third party who is an innocent purchaser for value, thereby denting her chances of safeguarding and regaining her property back. On the other hand, the 1<sup>st</sup> defendant has nothing to lose since they have not put up any financial investments on the property and given that the property had been put as a security for a loan which they are not claiming is in arrears or unpaid hence they will not suffer any loss. She stated that the balance of convenience shifts in her favour as she stands to suffer more if the injunctive orders are not granted and then she succeeds in the final outcome of the case. She relied on the following cases to support her claim:

**Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others (2016) eKLR; Jane Wambui Ngeru v Timothy Mwangi Ngeru (2015) eKLR; CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) being sued through its official namely Stephen Mutoro & 2 others (2014) eKLR; Hezekia Kipkorir Maritim & 10 other V Philip Kipkoech Tenai & 2 others (2016) eKLR.** She submitted that if the court is however of the contrary opinion, she urged the Court to exercise its discretionary powers and order for an undertaking as to damages by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents as a condition for not granting of the injunction.

The 1<sup>st</sup> Defendant reiterated its arguments and insisted that the Plaintiff sought to further mislead this Court with her misleading theory of seeking to replace the sale agreement with the loan agreement when she is fully aware that the two were separate agreements with different terms and conditions. It disputed the Applicant's annexure "ANN 2" as defective and could not have possibly been issued by the 1<sup>st</sup> Respondent for the reasons that;

- a. The letter is purported to have been written/issued by the 1<sup>st</sup> Respondent Executive Director by the Name Lydia N. Anyangu having an entry of her name but the same was not signed to give it authenticity if at all it was true, this then takes us to the question whether the applicant's annexure marked as "ANN 2" is a forgery?
- b. The said letter is not dated at the top left thereby in its very ambiguity it lacks the effective date even if the Applicant wishes it to be considered.
- c. NAOMI GITHINJI who is a purportedly a signatory in the Applicant's annexure marked as "ANN 2" was a receptionist was not authorized to sign for any documents on behalf of the company without the Executive Director Lydia Anyangu authorizing her by signing the form.

They submitted that the Plaintiff never paid any loan processing fees as looking at the evidence in support of such payment through annexure marked "ANN 3A" and "ANN 3B" respectively. It first shows payment of Kshs. 92,500/= and not Kshs. 100,000/= as alleged. The 1<sup>st</sup> Defendant submitted that the sale agreement between the Plaintiff and themselves did not include the payment made by the 1<sup>st</sup> Defendant to the third Party for the reason that the Third Party Peter Waithuguri was not a party to the sale transaction and could not at any one point be called upon to sign any transfer documents. They insist they paid the full purchase price of Kshs. 4,000,000/= .The 1<sup>st</sup> Defendant clarified that clarify that there existed a distinct and separate loan agreement between the Plaintiff and the 1<sup>st</sup> Defendant which is separate from the sale agreement over the suit land.

The 1<sup>st</sup> Defendant submitted that the Plaintiff has come to Court with unclean hands by misleading the Court on misrepresentation of facts that led to it being the rightful owner of the suit land and they have not enjoyed the same since the 30<sup>th</sup> June 2016 when the applicant obtained restraining orders.

### **Analysis and determination**

Upon perusal of the Notice of Motion dated the the 29<sup>th</sup> June 2016 together with the supporting and replying affidavits including the parties' submissions, the only issues for determination at this juncture, is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiff and the 1<sup>st</sup> Defendant are staking claim over the suit land. The Plaintiff insists she is the registered proprietor of the suit land but the 1<sup>st</sup> Defendant fraudulently got registered as its owner. Both parties do not dispute that the Plaintiff approached the 1<sup>st</sup> Defendant for monies. The 1<sup>st</sup> Defendant insists it purchased the suit land from the Plaintiff and paid the purchase price as follows: Peter Waiguthunguri Kshs. 1, 144, 500/=, Erick Balongo Kshs. 150,000/=, Anne Ndwaru Kshs. 1, 414, 850/= and balance of processing fees Kshs. 290, 650/=.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

In line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff was initially registered as the proprietor of the suit land which is now in the 1<sup>st</sup> Defendant's name, which fact she disputes. She contends that she approached the 1<sup>st</sup> Defendant for a loan and did not sell her land. She insists she was in possession of the suit land until the 2<sup>nd</sup> Defendant through instructions of the 1<sup>st</sup> Defendant evicted her. The 1<sup>st</sup> Defendant on the other hand states that the Plaintiff was evicted as a result of a

Court Order. The Plaintiff did not controvert the evidence of the 1<sup>st</sup> Defendant on how he paid the purchase price but insists the suit land was transferred fraudulently.

**In the case of UCB Vs Mukoome Agencies (1982) HCB22 it was held as follows 'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'.**

Looking at the documents presented by the Plaintiff, it is clear the Plaintiff's claim over the suit land is not baseless. Although several issues are curious about how the 1<sup>st</sup> Defendant got registered as the owner of the suit land. The 1<sup>st</sup> Defendant however did not explain how it obtained consent to transfer the suit land from the Land Control Board. It is my finding that all the issues raised by the Plaintiff and the 1<sup>st</sup> Defendant cannot be determined at this interlocutory stage but once oral evidence is adduced. It is against the foregoing that I find that the Plaintiff has indeed established a prima facie case with a probability of success.

On the second principle as to whether the Applicant suffers irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and Defendant claim ownership of the suit land and the 1<sup>st</sup> Defendant has already evicted the Plaintiff from the suit land. . In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that '**...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'**

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as she has demonstrated the harm she has suffered and continues to suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the substratum of the suit is not preserved, it may be wasted away.

Since both the Plaintiff and the 1<sup>st</sup> Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 1<sup>st</sup> Defendant being in occupation thereon, I find that these are issues are best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

1. An inhibition order be and hereby registered by the Land Registrar Kajiado North as against land parcel number NGONG/NGONG/48250 of any dealings, lease or charge pending the hearing and determination of the suit.
2. Prevailing Status Quo be maintained pending the outcome of the Suit.
3. The costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 28th day of June, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**