



**REPUBLIC OF KENYA**

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

**ELC NO. 106 OF 2017**

**PETER ONSONGO OGETO ..... PLAINTIFF**

**VERSUS**

**SHEM OSIAGO MORUMBWA ..... 1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 13<sup>th</sup> March 2017, an application pursuant to which the following orders are sought:

**1. Spent.**

**2. Spent.**

**3. That pending hearing and determination of the suit herein, this honourable court be pleased to issue orders of injunction restraining the respondents by themselves from evicting, disposing off, wasting, further charging, selling, alienating and/or in any other manner whatsoever from interfering with the applicant's use, possession and occupation of all that parcel of land known as Njoro/Ngata Block 2/4636 (Kirobon A).**

**4. That the cost of this application be provided for.**

2. The application is supported by an affidavit sworn by the plaintiff. In it he deposed that pursuant to an agreement dated 31<sup>st</sup> December 2014, he purchased a parcel of land measuring one (1) acre from the 1<sup>st</sup> defendant. The said parcel was to be hived off a larger parcel known as Njoro/Ngata Block 2/28. The purchase price was Kshs.1, 100, 000 which the plaintiff paid in full over a period of time. Despite such payment, the 1<sup>st</sup> defendant did not transfer the land to the plaintiff. Instead, the 1<sup>st</sup> defendant obtained a title in respect of the portion which the plaintiff had bought and which upon registration became known as Njoro/Ngata Block 2/4636 (Kirobon 'A') (the suit property). The 1<sup>st</sup> defendant proceeded to charge the suit property in favour of the 2<sup>nd</sup> defendant to secure a loan of Kshs1, 100, 000. He defaulted in his repayment obligations and the plaintiff fears that the 2<sup>nd</sup> defendant may exercise its statutory power of sale.

3. The 1<sup>st</sup> defendant opposed the application through his replying affidavit filed on 5<sup>th</sup> May 2017. He deposed that the sale agreement referred to by the plaintiff was indeed entered into. He however denied that the plaintiff had paid the purchase price in full as was alleged. He urged the court to dismiss the application.

4. The 2<sup>nd</sup> defendant opposed the application through a replying affidavit sworn by Joseph Maeri, a Business Banker based at its Nakuru East Branch. He confirmed that the suit property is indeed charged in favour of the 2<sup>nd</sup> defendant to secure a loan facility of Kshs.1, 000, 000 extended to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant defaulted in his repayment obligations and as the 2<sup>nd</sup> defendant was in the process of commencing realization of the security, it was served with an order from the court. The 2<sup>nd</sup> defendant thus urged the court to dismiss the application.

5. The application was heard by way of written submissions. The applicant's submissions were filed on 19<sup>th</sup> June 2017 while the 2<sup>nd</sup> defendant's submissions were filed on 5<sup>th</sup> July 2017. The 1<sup>st</sup> defendant did not file any submissions despite being given a chance to do so. I have carefully considered the application, the affidavits filed as well as the submissions.

6. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to

issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

7. There is no dispute that the parties herein entered into a sale agreement in respect of the suit property and that the purchase price was Kshs.1, 100, 000. There is also no dispute that the 1<sup>st</sup> defendant is the registered proprietor of the suit property. Needless to state, the applicant's case is that he paid the purchase price fully and that he is therefore entitled to ownership of the suit property. Further, there is no dispute that the suit property is charged in favour of the 2<sup>nd</sup> defendant.

8. As a registered proprietor, the 1<sup>st</sup> defendant is entitled to the rights and privileges provided under sections 24 and 25 of the Land Registration Act. I am alive to the fact that the plaintiff is challenging the 1<sup>st</sup> defendant's title to the suit property. However, the outcome such a challenge can only await the hearing and determination of the main suit. For now, the 1<sup>st</sup> defendant remains registered proprietor. Until the 1<sup>st</sup> defendant's title is cancelled there would be no basis upon which to impeach the charge created by the 1<sup>st</sup> defendant in favour of the 2<sup>nd</sup> defendant.

9. From the material placed before the court, it is apparent that moneys were paid by the plaintiff to the 1<sup>st</sup> defendant towards the purchase of the suit property. Whether the purchase price has been paid in full is really not of importance at this stage. It is sufficient that the plaintiff has demonstrated a valid interest or claim over the suit property. The plaintiff's interest is threatened by the 1<sup>st</sup> defendant's action of charging the suit property in favour of the 2<sup>nd</sup> defendant. I am therefore satisfied that the plaintiff has a *prima facie* case.

10. To succeed on the application for injunction, the plaintiff must surmount the second test. He must demonstrate that damages will not be an adequate remedy. The transaction between the plaintiff and the 1<sup>st</sup> defendant entailed purchase of the suit property by the plaintiff. The purchase price was agreed at Kshs.1, 100, 000. Indeed, among the relief sought by the plaintiff in the plaint is in the alternative, judgment be entered for a refund of the purchase price plus interest to be assessed at current market price. It seems to me that damages if any can be easily ascertained in view of the terms of the sale agreement and the relief sought by the plaintiff. The plaintiff can thus be compensated by an award of damages.

11. Even if the court were to consider the balance of convenience, it would be noted that the suit property has since been charged in favour of the 2<sup>nd</sup> defendant, an entity that was not party to the sale agreement between the plaintiff and the 1<sup>st</sup> defendant. The balance of convenience in this case therefore tips in favour of not curtailing the 2<sup>nd</sup> defendant's rights under the charge document.

12. In view of all the foregoing, I am not persuaded that an injunction ought to issue herein. Accordingly, Notice of Motion dated 13<sup>th</sup> March 2017 is dismissed with costs to the defendants.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of June 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Mwangi for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

No appearance for the 2<sup>nd</sup> defendant/respondent

Court Assistants: Gichaba & Lotkomo