



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC No. 333 OF 2017

FRANCIS MUTHOGA MUHIKA.....PLAINTIFF

VERSUS

PAUL NJUGUNA KAHIA.....1ST DEFENDANT

KENYA COMMERCIAL BANK.....2ND DEFENDANT

RULING

1. This ruling is in respect of Plaintiff's Notice of Motion dated 22nd August 2017, an application pursuant to which the following orders are sought:

1. Spent.

2. Spent.

3. That this honourable court be pleased to restrain the defendants herein jointly and severally by themselves, their agents employees and/or anyone working through or for them from selling, auctioning, alienating, interfering and/or in any other way from adversely dealing with LR No. 3777/749 (IR No.60706) pending the hearing and determination of the suit.

4. Costs of this application be borne by the defendants/respondents.

2. The application is supported by an affidavit sworn by the plaintiff. It is stated therein that the 1st defendant is the registered proprietor of a parcel of land known as LR No. 3777/749 (IR No. 60706), the suit property. Pursuant to an agreement dated 12th April 2003, the plaintiff purchased 5 acres of the suit property and paid the purchase price fully over the period between the signing of the agreement and September 2006. The payments were made in the form of school fees paid for the 1st defendant's children and direct payment to the 1st defendant. Upon purchasing the land, the plaintiff constructed a school on it and registered it with the Ministry of Education on 29th April 2009. The 1st defendant did not however process and issue the plaintiff with a title deed in respect of the portion purchased. To the plaintiff's shock, he saw an advertisement in a daily newspaper on 21st August 2017 to the effect that the 2nd defendant intended to sell the suit property on 24th August 2017. The sale was owing to the fact that the 1st defendant had charged the suit property in favour of the 2nd defendant to secure a loan advanced to one Gideon Mwangi Macharia. The plaintiff neither knows Gideon Mwangi Macharia nor was the plaintiff a party to the transaction between the defendants and the said person. The suit property measures about 49.39 acres and the plaintiff suggests that the court orders excision of a portion thereof that would offset the amount due to the 2nd defendant and the rest be released partly to the plaintiff and the balance to the defendant.

3. The 1st defendant responded to the application through his replying affidavit sworn on 5th September 2017. Not surprisingly, he supports the application as well as the suggestion by the plaintiff that an excision be ordered. He adds that he has sold a total of 15 acres of the suit property to purchasers including the plaintiff and some of the purchasers have developed the permanent structures on their portions. He confirms that he charged the suit property in favour of the second defendant as stated by the plaintiff.

4. The 2nd defendant opposed the application through a replying affidavit sworn by Julius Munene Njeru, a Branch Manager at its Olkalau Branch. He confirmed that the suit property is indeed charged in favour of the 2nd defendant to secure a loan facility advanced to Gideon Mwangi Macharia (borrower). The said borrower defaulted and his account was in arrears of Kshs.1, 767, 204.10 as at 14th October 2017. Owing to the said default, the 1st defendant and the borrower were served with the relevant statutory notices and the 2nd defendant is thus entitled to exercise chargee's power of sale. He added that there is no privity of contract between the plaintiff on the one hand and the defendants as well as the borrower on the other hand.

5. The application was heard by way of written submissions. The plaintiff's submissions were filed on 20th December 2017 while the 2nd defendant's submissions were filed on 22nd November 2017. The 1st defendant who attended the court in person told the court that he would not file any submissions. Indeed he did not.

6. I have carefully considered the application, the affidavits filed and the submissions. The injunction sought is for all intents and purposes an injunction to stop the 2nd defendant from exercising the chargee's statutory power of sale. I say so because even though on its face the application seems to target both defendants, the evidence in the affidavit in support of the application shows that according to the plaintiff, it is the 2nd defendant that is attempting to sell the suit property. Little wonder then that 1st defendant also supports the application.

7. In an application for an interlocutory injunction, the applicant must satisfy the test laid down 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 will not be issued if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court will determine the matter on a balance of convenience. As was 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.

8. There is no dispute that the borrower has defaulted. There is also no dispute that the 2nd defendant has issued the necessary statutory notices. The plaintiff's only complaint is that the transaction between the defendants and the borrower was done behind his back. He thus in effect admits that he is not party to the contract between the defendants and the borrower. There is therefore no privity of contract between him and the defendants as well as the borrower.

9. In the case of **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR** the Court of Appeal stated as follows in regard to the doctrine of privity of contract:

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER (supra) and WILLIAM MUTHEE MUTHAMI V BANK OF BARODA (supra).

Thus in AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

10. In the context of a registered charge, **section 103(1)** of the **Land Act, 2012** lists persons who can seek relief against the exercise by the chargee of any of the remedies available under the Act. The section provides:

103. Application for relief by chargor

(1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 90 (3) may be made by—

(a) the chargor;

(b) if two or more persons are joint chargors, by one or more of them on their own behalf;

(c) a spouse of the chargor to the extent that the spouse was required to give consent to the creation of the charge but did not give consent;

(d) deleted by Act No. 28 of 2016, s. 75;

(e) the trustee in bankruptcy of the chargor.

11. The plaintiff herein, not being a party to the aforesaid contract between the defendants and the borrower, and not being one of the persons listed under **section 103(1)** of the **Land Act, 2012**, cannot now seek to stop the natural flow of consequences which the parties to the contract had contemplated and freely agreed upon. Though the plaintiff claims that he bought part of the suit property and paid the purchase

price largely through paying school fees for the 1st defendant's children, I find that the evidence of the sale is scanty. There is no evidence of actual payment of school fees to particular schools. Further, though the plaintiff claims that he constructed a school on the portion that he purchased long before the charge to the 2nd defendant was registered, there is no formal evidence of when the construction took place. Such evidence would possibly be in the nature of approved plans, construction contracts, and evidence of expenditure among others. The certificate of registration in respect of the school which the plaintiff exhibited does not indicate the location of the school as being on the suit property. Finally, needless to state, the plaintiff's interest on the land has not been introduced into the register. On the other hand, the 2nd defendant has a validly registered charge.

12. In view of the foregoing discourse, I find that the plaintiff has not established any *prima facie* case. That being the case, I need not investigate whether the other limbs of the test in **Giella** have been satisfied.

13. In the end, Notice of Motion dated 22nd August 2017 is dismissed with costs to the 2nd defendant.

Dated, signed and delivered in open court at Nakuru this 20th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ngugi holding brief for Mrs Mukira for the plaintiff/applicant

No appearance for the 1st defendant/respondent

Mr Langat holding brief for Mr Ojo for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi