



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 193 OF 2018

MUNIR MOHAMED SKETTY.....PLAINTIFF

VERSUS

OMAR SHARRIF AHMED.....1ST DEFENDANT

MOMBASA HOUSEWARES LIMITED.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

RULING

1. I have considered the Notice of Motion application dated 20th August, 2018 brought herein under Certificate of Urgency pursuant to the provisions of the High Court (Practice & Procedure) Rules and Order 40 Rules 1, 2, 2 and 9 of the Civil Procedure Rules. I have equally considered the respective responses thereto filed by the Respondents as well as the oral submissions made by the Learned Advocates for the parties.

2. As was stated by Spry V.P in the celebrated case of **Giella -vs- Cassman brown (1973) EA 358:**

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

3. Arising from the foregoing, it is incumbent upon this Court to first and foremost enquire if the Applicant has established a prima facie case. As the Court of Appeal stated in **Mrao -vs- First American Bank of Kenya Ltd & 2 others (2003) KCR 125:**

“a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

4. Looking at the facts of the case before me, the Plaintiff states that he is the Legal Representative of the Estate of the late Nassor Ali Nahdy who was the registered proprietor of all that parcel of land known as Plot No. 1004/III/MN LR No. 41931 measuring 3.390 Ha or thereabouts. The said Nassor Ali died intestate on 25th September, 1964 and the Grant of Letters of Administration to his estate were issued to his brother Mohamed Ali Nahdy who also passed away on 21st August, 1972. Thereafter a Grant of Letters of Administration De-Bonis-Non was issued to Nassor Muhamad Nahdy who again passed away on 19th December, 2015. The Applicant Munir Mohamed Sketty is currently the holder of the Grant of Letters of Administration having obtained the same on 31st March, 2017.

5. It is the Applicant’s case that by an Instrument of Transfer dated 13th December, 2013, the late Nassor Muhamad Nahdy purported to transfer the suit property to the 1st Defendant in consideration of love and affection. It is the Plaintiff’s case that the late Nassor Muhamad Nahdy was only registered as a trustee for the beneficiaries of the Estate and could therefore not transfer the property as he purported to do.

6. I have considered the record herein. It is evident to me that the said Nassor Muhamad Nahdy was the Administrator of the Estate in 2013 when he transferred the suit property to the 1st Defendant. Indeed while the Plaintiff purports that the signature on the transfer documents is forgery, I note from the Replying Affidavit filed by the 1st Defendant who is also a director of the 2nd Defendant that he avers at Paragraph 4 thereof that the signature is not a forgery and that he is the duly registered proprietor of the suit property. While he curiously does not object

to the application for injunction, the 1st Defendant states at Paragraph 5 of the Affidavit that the property was legally transferred to him.

7. It is noteworthy in this regard that the 1st and 2nd Defendants do not deny that they used the property to secure a loan of Kshs.10,000,000/= from the 3rd Defendant Bank as per the charge annexed to the Plaintiff's Affidavit. In addition, they neither deny that they owe the 3rd Defendant the sum claimed nor offer any insight as to any payments they may have made to redeem the loan.

8. The 1st and 2nd Defendants have not denied that the 3rd Defendant issued them with appropriate notices prior to the advertisement to sell the property. As it were, there is an ever present need for the courts to always preserve a balance between the respective rights of both the chargor and the chargee. In the words of Lord Bingham of Cornhill, spoken in **Royal Bank of Scotland PLC -vs- Etridge (2002) 2 AC 733, (2)**:

“... the law must afford both parties a measure of protection. The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence that it may at an appropriate time enforce the security, is also protected.”

9. Arising from the circumstances of this case as outlined, it would not be proportionate of me to deny the 3rd Defendant the right to dispose of the subject property by way of public sale. From the apparently deliberate withholding of information thereon by the 1st and 2nd Defendant, it is apparent to me that the right has accrued. I am accordingly not satisfied that the Plaintiff has a prima facie case with a likelihood of success and I therefore refuse to go into the issue as to whether they will suffer irreparable damage if there is no injunction.

10. Accordingly, I decline to restrain the 3rd Defendant from exercising its power under the security pledged to it by the 1st and 2nd Defendants. The application dated 20th August, 2018 is therefore dismissed with costs to the 3rd Defendant.

Dated, signed and delivered at Malindi this 29th day of August, 2018.

James Olola

JUDGE