



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

LAND AND ENVIRONMENT CASE NO.143 OF 2017

MAIKUMA WEKESA BUCHUNJU.....PLAINTIFF

VERSUS

DONALD WEKESA MUYUNDO.....1ST DEFENDANT

CO-OP. BANK LTD.....2ND DEFENDANT

FREDRICK MUTAYI.....3RD DEFENDANT

ONESMUS MACHARIA.....4TH DEFENDANT

K.C.B. BANK LTD.....5TH DEFENDANT

A.F.C.6TH DEFENDANT

COUNTY LAND REGISTRAR.....7TH DEFENDANT

ATTORNEY GENERAL.....8TH DEFENDANT

RULING

This in respect to the Plaintiff/Applicant's Notice of Motion dated 17th October 2017 and filed on 8th November 2017. It is brought under the provisions of Order 40 Rule 1, 4 Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and all the enabling provisions of the law. The Applicant **MAIKUMA WEKESA BUCHUNJU** seeks the following orders:

a) spent

b) spent

c) *This Honourable Court be and is hereby pleased to issue orders of temporary injunction restraining the defendants, their servants, trustees agents and/or any person claiming through them from trespassing onto, entering and offering for sale, transferring charging and/or in any other way from interfering or dealing with the suit property comprised in title No. **NDIVISI/NDIVISI/177** measuring approximately 8.25Ha pending the hearing and determination of the substantive suit.*

d) *Costs of this application be provided for.*

The application is based on the grounds set out therein and also supported by the affidavit of the Applicant dated 17th October 2017.

The Applicant is the administrator of the Estate of the late Estate of the late **BUCHUNJU KIPCHANGA** (deceased) who was the registered proprietor of land parcel No. **NDIVISI/NDIVISI/177** (the suit land) where he lived with his family until his demise in 2005. Prior to that, the deceased had charged the suit land to the 6th defendant to secure a sum of Ksh.9,000 in 1976 which he repaid but on 3rd January 2017 when the Applicant visited the Offices of the 7th defendant, he was surprised to discover that the suit land had been transferred to the 1st defendant and charged to the 2nd defendant on 5th December 2016. The Applicant further discovered that in 1981, the 3rd defendant had acquired the suit land and charged it to the 5th defendant in 1986.

It is the Applicant's case that the 1st and 3rd defendants fraudulently acquired the suit land and charged it to the 2nd and 5th defendants yet that is where the deceased and his family have lived since 1963 and that is where the deceased was buried. That the 1st defendant has been visiting the suit land and if the orders sought are not granted, the suit land may be disposed off and the deceased's family evicted thus rendering the suit nugatory and exposing the deceased's family to irreparable loss and damage.

Annexed to the replying affidavit are the limited Grant of letters of Administration issued to the Applicant, the Green card and Certificate of Search for the suit land and statements from the 6th defendant in respect to the deceased's account.

Only the 2nd, 4th, 5th and 6th defendants filed responses to the said application. The other defendants appear not to have done so as per the record herein.

The 2nd defendant filed both grounds of opposition and a replying affidavit sworn by **SHADRACK TARUS** its Business Banker. It's their case, that the suit land was registered in the names of the 3rd defendant who charged it to the 5th defendant to secure a loan but defaulted in repaying it and so the 5th defendant instructed the 4th defendant to sell the said property through a public auction which was done on 4th December 2015 and the 1st defendant was the highest bidder and purchased it at Ksh.3,800,000. The 1st defendant then applied for a loan facility from the 2nd defendant to enable him pay for the suit land and was granted a mortgage facility of Ksh.2,000,000 payable in 60 months by equal instalments of Ksh.52,244,94. A charge document was drawn and the 1st defendant paid the balance of the purchase price having paid a deposit of Ksh.950,000 and the property was transferred to him.

That the plaintiff has no proprietary interest in the suit land and there is no evidence that the deceased repaid the loan granted to him by the 6th defendant nor is there any evidence of fraud on the part of the 1st and 3rd defendants and if the application is allowed, it will deny the 2nd defendant a legitimately acquired security for a loan already disbursed to the 1st defendant. The application should therefore be dismissed.

The 4th and 5th defendants through the replying affidavit of **EDWARD SIYA** dated 24th July 2018 stated that the 3rd defendant borrowed from the 5th defendant Ksh.40,000/- secured on the suit land which was registered in his name. That there was a default and so on or about 11th November 2015, the 5th defendant wrote to the Administrators of the Estate of the borrower to rectify the default. That was not done and a statutory notice of 3 months was issued and the suit land was advertised for sale by the 4th defendant where the 1st defendant was the highest bidder. A memorandum of sale was executed between the 1st and 4th defendants and a Certificate of Sale was issued to the 1st defendant. Therefore, the suit land was sold by the 5th defendant properly and through the exercise of its statutory power of sale and therefore the plaintiff's application is incompetent, misconceived, misinformed, misadvised and an abuse of the Court process. It should be dismissed as no prima facie case is disclosed nor has the Applicant demonstrated what irreparable damage he is likely to suffer.

On behalf of the 6th defendant, its legal Officer **JOHN M. KITHINJI** swore a replying affidavit dated 22nd November 2017 to the effect that on or about 1976, the deceased applied for and received from it a sum of Ksh.9,000 for dairy development and provided the title to the suit land as security. That there was a default in repayment of the loan and so the 6th defendant exercised its statutory power of sale on or about 8th March 1980. The 6th defendant placed a bid at the auction and transferred the suit land to itself which it later sold to the 3rd defendant. On or about 17th August 1980, the 3rd defendant applied for and received from the 6th defendant Ksh.30,000 to purchase the suit land whose title was furnished as collateral and a charge was registered. Therefore, the inclusion of the 6th defendant in this matter 37 years after the cause of action is not only defective but bad in law and the Applicant's application should be dismissed as it does not satisfy the requirements of an injunctive order.

The application has been canvassed by way of written submissions which have been filed both by **MR. OMONDI** Counsel for the plaintiff, **MR. MALOBA** for the 2nd defendant and **MR. MUKELE** for the 4th and 5th defendants.

I have considered the application, the rival affidavits and grounds of opposition and the submissions of Counsel.

This is an application for temporary injunction pending trial. It has to be determined in line with the now well settled principles set out in the case of **GIELLA V. CASSMAN BROWN & CO. LTD 1973 E.A. 358** which are:

- 1. The Applicant must show a prima facie case with a probability of success at the trial.**
- 2. Secondly, a temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and**
- 3. If the Court is in doubt, it will decide the application on the balance of convenience.**

A prima facie case was defined in the case of **MRAO V. FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A. CIVIL APPEAL NO.39 of 2002 (2003 eKLR)** as:

“... a case in 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.”

And in the case of **NGURUMAN LTD V JAN BONDE NIELSEN 2014 eKLR**, the Court of Appeal stated the following:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected

which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance, or as otherwise put, on a preponderance of probabilities.” Emphasis added.

Finally, as was held in **FILMS ROVER INTERNATIONAL LTD V CANNON FILM SALES LTD 1986 3 ALL ER 772**, a Court considering such an application should take the course that appears to be the lower risk of injustice should it turn out to have been wrong.

Guided by the above broad principles, it is not in dispute that the deceased was the registered proprietor of the suit land on 17th June 1963. This is clear from the copy of the Green Card annexed both to the plaintiff's affidavit and that of the 6th defendant's legal Officer **MR. JOHN KITHINJI**. It is also conceded that the deceased secured a loan of Ksh.9,000 from the 6th defendant by securing a charge using the title to the suit land. The plaintiff's case however is that the loan was fully paid and the deceased and his family continued living on the suit land up to the time of his death in 2005. The 6th defendant's case however is that the deceased defaulted in repaying the loan necessitating it to exercise its power of sale. This is what **MR. JOHN KITHINJI** its legal Officer has deponed in paragraphs 6 and 7 of his replying affidavit dated 22nd November 2017 sworn in opposition to the application:

6: *“That the late BUCHUNJU KAPCHANGA defaulted in loan repayment a breach that prompted the 6th defendant herein to exercise its statutory power of sale on or about 8th March 1980.”*

7: *“That I am aware of my own knowledge that the 6th defendant placed a bid in the said auction and purchased the same. The suit parcel was consequently transferred to itself which land was later sold to the 3rd defendant herein.”*

Indeed the Green Card to the suit land shows that it was transferred to the 6th defendant on 8th September 1980 at a consideration of Ksh.20,000. What is strange however is that the 6th defendant has not provided any notices that were sent to the deceased that he had defaulted and the suit land would be sold by public auction as alleged by **MR. JOHN KITHINJI** in the affidavit. The law is very clear as to how charged property is supposed to be disposed of and in the absence of evidence that the provisions of Sections 74(1) of the repealed **Registered Land Act** (which was the law then applicable) were complied with, the transfer of the suit land to the 6th defendant was clearly illegal and so too were all the other subsequent transfers to the other defendants. And although Section 77(1) of the repealed law allowed the 6th defendant as chargee to bid for the suit land and purchase it, it still had to comply with the provisions of Section 74(1) with regard to the Statutory notices before sale. That is sufficient evidence upon which this Court can find, which I hereby do, that there is *“a right which has been or is threatened with violation”* and therefore entitles the Applicant to an order of injunction – **NGURUMAN LTD (supra)**.

A prima facie case has been established as set out in the **GIELLA** case (supra).

Similarly, the Applicant and his family are in possession of the suit land and as deponed in paragraph 14 of the supporting affidavit, the 1st defendant has been visiting it with buyers and there is a fear they may be evicted. In **GEORGE ORAGO V GEORGE JAGALO & OTHERS C.A. CIVIL APPEAL NO.62 of 2009 (2010 KLR)**, the Court stated that where the Applicant is in possession, the denial of an order of injunction would have the effect of dispossessing him. In order therefore to preserve the suit land pending trial, it is proper that the order of injunction is granted.

On whether the plaintiff will suffer irreparable injury that cannot be compensated by an award of damage, the Applicant has demonstrated that the transfer of the suit land from the deceased to the 6th defendant was clearly not above board. It was in violation of the law and where that is shown to be the case, the defendant cannot be heard to claim that damages will be adequate compensation – **MOHAMMED V COMMISSIONER OF LANDS & OTHERS KLR (E&L)1**. It is also instructive to note that the deceased is buried on the suit land and if it is further transferred and the Applicant and his family evicted therefrom, the injury that they will suffer cannot, in my view, be adequately compensated by an award of damages.

Finally, even if I was to doubt, which I am not, the balance of convenience tilts in favour of granting the order of injunction. That carries the lower risk of injustice.

The up-shot of the above is that the Notice of Motion dated 17th October 2017 is allowed in the following terms:

1. The defendants, their servants, trustees, agents and any persons claiming through them are hereby restrained from trespassing, entering, offering for sale transferring, changing and or in any other way interfering or dealing with the land parcel No. NDIVISI/NDIVISI/177 pending the hearing and determination of this suit.
2. The parties to comply with the pre-trial directions so that this suit is heard and determined in the next 12 months otherwise the order of injunction shall lapse.
3. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018

Ruling dated, delivered and signed in open Court this 15th day of November 2018 in Bungoma.

Mr. Tsimonjero for Mr. Makokha for 2nd defendant present

Mr. Omondi for plaintiff – Absent.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018