

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 224 OF 2014(O.S)

VIRGINIA NJOKI GITAU..... PLAINTIFF/APPLICANT

VERSUS

SAMUEL KIHARA NDUNG’U...DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant brought this suit by way of Originating Summons dated 25th February, 2014 seeking orders that, the Plaintiff/Applicant is entitled to be registered as the proprietor of all that parcel of land known as L.R No. Dagoretti/Ruthimitu/T.33 (hereinafter “the suit property”) by adverse possession under Section 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and that the said parcel of land be registered in the name of the Plaintiff/Applicant in place of the Defendant/Respondent. Together with the Originating Summons, the Plaintiff/Applicant (hereinafter referred to only as “the Plaintiff”) filed an application by way of Notice of Motion dated 1st April, 2014 seeking a temporary injunction to restrain the Defendant/Respondent (“hereinafter referred to as “the Defendant”) from entering, selling, transferring, charging, disposing of or in any manner dealing with the suit property pending the hearing and determination of the suit.

When the Plaintiff’s application came up for hearing before Mutungi J. on 23rd June, 2014 the advocates who appeared for the parties informed the court that they had discussed the matter and agreed that the application be allowed as prayed. The court made an order by consent allowing the application in terms of prayer 3 hereof. The order which was extracted on 14th July, 2015 was on the following terms;

“THAT the Respondent his agents, servants and/or employees be and is hereby restrained by an injunction from entering, selling, transferring, charging, disposing or in any manner dealing with land parcel Dagoretti/Ruthimitu/T.33 (“the suit property”) pending the hearing and determination of the suit.”

What is now before me is an application by the Plaintiff brought by way of Notice of Motion dated 17th November, 2015 seeking an order that the Defendant be committed to jail or fined for contempt of this court’s said order made on 23rd June, 2014. The application was brought on the ground that after this court made the said order on 23rd June 2014 restraining the Defendant from charging the suit property, the Defendant proceeded to charge the suit property to Microfinance Bank Ltd. and Faulu Microfinance Bank Ltd. to secure a sum of Kshs.1,400,000/= which was advanced to him. The Defendant created a charge infavour of Microfinance Bank Ltd. on 2nd May, 2014 to secure a sum of Kshs.1,000,000/= and a further charge on 17th July 2015 infavour of Faulu Microfinance Bank Ltd. to secure a sum of Kshs.400,000/=. The Plaintiff has contended that these charges were created in flagrant contempt of this court’s order of 23rd June 2014.

The application was opposed by the Defendant through a replying affidavit sworn on 12th October, 2016. The Defendant admitted that he charged the suit property to Microfinance Bank Limited and Faulu Microfinance Bank Ltd. to secure a sum of Kshs.1,400,000/= that was advanced to him by the said institutions. The Defendant denied however that the said charges were created in disobedience of the order which was made herein on 23rd June 2014. The Defendant contended that he was not aware that the order of 23rd June 2014 had restrained him from charging the suit property. He stated that what he discussed with his advocate was the sale of the suit property which he confirmed to his advocate that he

would not undertake leading to the advocate entering into the consent with the Plaintiff's advocate on 23rd June 2014. He stated that when he took a loan on the security of the suit property, he was not aware that an order had been issued prohibiting him from charging the property. He stated that the order was neither served upon him nor brought to his attention. He stated that he only became aware of the order when the present application was filed.

When the Plaintiff's application came up for hearing on 24th October, 2016 the advocates who appeared for the parties relied on the parties' respective affidavits in support of and in opposition to the application. Thereafter, they cited a number of authorities in support of their respective cases. I have considered the Plaintiff's application together with the affidavit filed in support hereof. I have also considered the affidavit filed in opposition to the application. It is not disputed that the court made an order on 23rd June 2014 by consent of the parties restraining the Defendant from among others charging the suit property. The Plaintiff has contended that despite the existence of this order the Defendant proceeded to charge the suit property to two (2) financial institutions to secure a sum of Kshs.1,400,000/= that was advanced to him by the said institutions. The Defendant has admitted that he indeed charged the suit property to secure a loan of kshs.1,400,000/= which he borrowed for his business. He has however denied that the suit property was charged in disobedience of this court's order of 23rd June 2014. The onus was upon the Plaintiff to prove the charge of contempt that she brought against the Defendant. The fact that there was an order restraining the Defendant from charging the suit property is not contested. It is also not contested that the Defendant charged the suit property while the order was in existence. What the Plaintiff had to prove was that the suit property was charged in disobedience of the said order. In this regard, the Plaintiff was under a duty to establish that the Defendant with full knowledge of the said order proceeded and charged the suit property. The Defendant has contended that he was not aware of the order when he charged the suit property. He contended that the order was neither served upon him nor brought to his knowledge. The Plaintiff had a duty to prove to a degree beyond a balance of probabilities that the Defendant was served with the order or had knowledge of the same. The Plaintiff has not placed any evidence before the court showing that the Defendant was served with the order of 23rd June, 2014. There is also no evidence that the Defendant had knowledge of the order. It is not contested that the Defendant's advocate was in court when the order was made. It is a rebuttable presumption that knowledge of an order by an advocate is equated with knowledge by his client. In this case the Defendant has contended that he did not discuss with his advocate the issue of charging the suit property before the consent order was recorded and that his advocate did not bring to his knowledge the fact that the court had barred him from charging the property.

On the material before me, I find the Defendant's contention believable. I have noted from the certificate of official search annexed to the affidavit in support of the Plaintiff's application herein that the charge to Microfinance Ltd for Kshs.1,000,000/= was registered on 2nd May, 2014. This was before the order said to have been disobeyed was made on 23rd June, 2014 by consent. The property was therefore charged before the said order. I am unable to comprehend how the Defendant could have consented to an order restraining him from charging the suit property if he had already charged the property a few days earlier. The Defendant's contention that he was not aware of the order restraining him from charging the suit property is believable in the circumstances. I am not satisfied that the Plaintiff has discharged her burden of proof. That being my view of the matter, the Plaintiff's Notice of Motion dated 17th November 2015 must fail. The same is accordingly dismissed with costs.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Kajuju Court Assistant