



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 70 OF 2017

NIMROD KIMANI WAKAHIA.....PLAINTIFF

VERSUS

- 1. ANDREW MACHARIA KIMANI**
- 2. JAMII BORA BANK LTD**
- 3. COMMISSIONER FOR LANDS**
- 4. STANDARD CHARTERED BANK (K) LIMITED.....DEFENDANTS**

R U L I N G

1. The Plaintiff and the 1st Defendant are father and son. Until 1995, the Plaintiff was the registered proprietor of Land Reference Number 36/VII/Subdivision 350 situated along 1st Avenue, Eastleigh, Nairobi (hereinafter referred to as the “**suit property**”). On 12th May 1995, the 1st Defendant was registered as proprietor pursuant to a conveyance dated 10/3/1995. Subsequently, the 1st Defendant, on diverse dates, used the suit property as a collateral to secure loans from Standard Chartered Bank Limited, Savings and Loan Kenya Limited and Jamii Bora Bank Limited. The loans from the first two financial institutions were repaid. The loan from Jamii Bora Bank Limited (2nd Defendant) is outstanding and the Principal Debtor, Continental Plant & Equipment Limited, has defaulted in the agreed repayment arrangement. This has prompted the 2nd Defendant to issue a statutory notice of sale against the 1st Defendant. The sale is scheduled for Thursday 11th May 2017. It is the 2nd Defendant’s intention to realize the loan security through sale of the suit property by private treaty which has triggered this suit.

2. Through a Plaint dated 31/1/2017 the Plaintiff contends that he took the Title Instrument of the suit property to Standard Chartered Bank, Moi Avenue for safekeeping. He alleges that unknown to him, the Title left Standard Chartered Bank in 1995 and was fraudulently conveyed to his son, the 1st Defendant, who was an employee of Standard Chartered Bank. The Plaintiff contends that he got to know about the transfer of Title to the 1st Defendant in December 2016. He further contends that the Title is currently charged to Jamii Bora Bank Limited (2nd Defendant) to secure a loan of Kshs.20,000,000 advanced to Continental Plant & Equipment Limited (the Principal Debtor). As a consequence of the default on part of the Principal Debtor, the 2nd Defendant is in the process of selling the suit property by private treaty. The Plaintiff seeks among other prayers, an order restraining the 1st and 2nd Defendants against selling or dealing with the suit property.

3. Together with the Plaint, the Plaintiff filed a Notice of Motion dated 31/1/2017 and amended on 28/3/2017. Among other prayers, the Plaintiff seeks an interim injunction restraining the 1st and 2nd Defendants against selling the suit property. The other substantive prayers in the Notice of Motion are equally injunctive reliefs.

4. The 1st Defendant in a lengthy Replying Affidavit sworn on 5/5/2017 denies the Plaintiff's allegation and contends that the Plaintiff sold to him the suit property in March 1995 and executed a conveyance in his favour, witnessed by T. Maosa Advocate. He has attached a copy of the conveyance dated 10/3/1995. He further contends that he has had possession of the suit property since then. He further contends that he has several tenants in the suit property paying him rent.

5. I have noted from the pleadings in the Court File that the Plaintiff filed an Amended Notice of Motion on 18/4/2017 in which he named Standard Chartered Bank (K) Limited as a 4th Defendant. The Court File does not, however, have a copy of the Amended Plaintiff enjoining Standard Chartered Bank as a 4th Defendant.

6. The issue for determination in this Application is whether the Applicant has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. In summary, the Plaintiff must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on a balance of convenience.

7. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

8. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

“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. The applicant need not establish title. 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.”

9. The gravamen of the Plaintiff/Applicant is that he deposited his Title with Standard Chartered Bank Limited for safekeeping. Unknown to him, Standard Chartered Bank Limited parted with the Title whereupon it was transferred into the name of his son, the 1st Defendant. His son was an employee of Standard Chartered Bank at the time he acquired title to the suit property. Subsequently, his son charged the Title to Standard Chartered Bank (K) Limited, Savings & Loan Kenya Limited and Jamii Bora Bank in succession. The prayers sought in the material Application are in essence directed not against Standard Chartered Bank Kenya Limited but against Jamii Bora Bank Limited.

10. Jamii Bora Bank Limited contends that prior to accepting the title as a security instrument, it carried out proper due diligence. Indeed there is no evidence presented by the Applicant linking Jamii Bora Bank Limited (the 2nd Defendant) to the release of the Title from Standard Chartered Bank Limited to the 1st Defendant. Similarly, there is no evidence linking the 2nd Defendant to the conveyance of the Title from

the Plaintiff to his son, the 1st Defendant. At this point I pause to ask: In the circumstances, would it be a proper exercise of this court's discretionary power to issue an injunction against the 2nd Defendant, an innocent lender exercising a statutory power of sale? Put the other way, has the Applicant established a prima facie case against the 2nd Defendant against whom he seeks injunctive orders? In my view, in the absence of any evidence of impropriety or connivance on the part of the 2nd Defendant, it would be improper to grant interlocutory injunctive orders against the 2nd Defendant.

11. This court is enjoined to grant interlocutory injunctive relief when satisfied that an award of damages cannot be an effective relief. The Applicant contends that the suit property is valued at about Kshs.300,000,000 and that if the sale is not stopped he stands to lose property worth that amount. In my view, this kind of loss can be remedied through an award of damages.

12. The upshot of the foregoing is that, looking at the prayers sought and the totality of the material presented to the court, and considering the rights of the parties to be affected by the relief sought, the court is not satisfied that the Applicant has satisfied the criteria laid down in *Giella –Vs- Cassman Brown* to warrant grant of interlocutory injunctive orders in the manner sought in the Application under consideration. Consequently, the Plaintiff's Notice of Motion dated 31/1/2017 and amended on 28/3/2017 is hereby dismissed for lack of merit. The Defendants shall have costs of the Application.

Dated, signed and delivered at Nairobi on this 11th day of May 2017.

B M EBOSO

J U D G E

In the presence of:-

Mr. Mwangi Advocate for the Plaintiff

Isinta Advocate for 1st Defendant

KItur Advocate for 2nd Defendant

Nyambura Advocate for 4th Defendant

Halima- Court clerk