



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 397 OF 2017

SIDIAN BANK LIMITED.....PLAINTIFF

VERSUS

ALICE AWALO LITUNYA.....1ST DEFENDANT

ZENITH PHARMACEUTICAL LIMITED.....2ND DEFENDANT

GREGORY KIVUVA MUINDE3RD DEFENDANT

JANET MUNYIVA NZOMO.....4TH DEFENDANT

THE LAND REGISTRAR KAJIADO

(SUED THROUGH THE ATTORNEY GENERAL)5TH DEFENDANT

RULING

The application before this court is a notice of motion dated the 22nd November, 2016 brought pursuant to Section 3 A of the Civil Procedure Act, Order 40 (1) & (2) of the Civil Procedure Rules and all the other enabling provisions of the law. The Plaintiff is seeking for the following prayers:

1. Spent
2. A temporary injunction be granted restraining the Defendants/Respondents, severally and jointly whether by themselves, their servants, proxies and any other person acting under their authority from charging, selling, alienating and/or transferring or dealing with the Suit property known as Title Number Kajiado/Kaputei North/ 24052 in any other manner whatsoever pending the hearing and determination of this application.
3. An order directed at the 5th Respondent, the Land Registrar, Kajiado do issue directing the 5th respondent to reinstate the charge dated 5th December, 2014 on the suit Property known as Title Number Kajiado/Kaputei North/24052 with the Plaintiff as Chargee for the sum of Kenya Shillings Fifty Million (Kshs. 50,000,000) pending the hearing and determination of this application.
4. An order directed at the 5th Respondent, the Land Registrar, Kajiado do issue directing the 5th respondent to reinstate the charge dated 5th December, 2014 on the suit Property known as Title Number Kajiado/Kaputei North/24052 with the Plaintiff as Chargee for the sum of Kenya Shillings Fifty Million(Kshs. 50,000,000) pending the hearing and determination of this Suit.
5. A temporary injunction be granted restraining the Defendants/Respondents, severally and jointly

whether by themselves, their servants, proxies and any other person acting under their authority from charging, selling, alienating and/or transferring or dealing with the Suit property known as Title Number Kajiado/Kaputei North/ 24052 in any other manner whatsoever pending the hearing and determination of the main suit.

6. Such other or further Orders as this Honourable Court may deem fit to grant

7. THAT the costs of this application be provided for.

The application is premised on the following grounds:

1. The 1st Defendant in collusion with the 2nd, 3rd, 4th and 5th Defendants have fraudulently caused the disappearance of the original Green Card/register in relation to property Title Number Kajiado/Kaputei/ 24052 (*herein referred to as the suit property*) registered in the name of the 1st Defendant, in favour of the Plaintiff vide a Charge instrument dated 5th December, 2014 and registered on an even date.

2. The 1st Defendant further, fraudulently and without disclosing that there was an existing legal charge registered against the property in favour of the Plaintiff, caused the reconstruction of a new register/Green Card through the requisite legal procedures, had the same published as Gazette Notice No. 8982 in Kenya Gazette Vol. CXVII - No. 133 of 4th December, 2015 had a new Green Card reconstructed on 1st March, 2016.

3. On 29th August, 2016 upon conducting an official search on the Suit Property in order to ensure that the interests of the Plaintiff were fully covered, the Plaintiff was surprised to find records purportedly showing that the Suit property was unencumbered and there was no Charge registered against the Property, in favour of the Plaintiff.

4. There is imminent danger and / threat that the aforesaid Suit property may be illegally sold, alienated and /or transferred to a third party any time from now.

5. The Plaintiff will be highly prejudiced if the Application herein is not allowed as the Plaintiff is likely to lose more than Kenya Shillings Sixty One Million, Five Hundred and Eighty Thousand, One Hundred and Twenty Six Hundred and Thirty Four Cents(Kshs. 61, 580,126.34) borrowed by the 2nd Defendant and secured by a legal Charge over Title Number Kajiado/Kaputei North/24052, which property is registered in the name of the 1st Defendant.

6. It is in the interest of justice that the application be allowed.

The application is supported by the affidavit of ARNOLD KWESIGA who is the legal manager for the Plaintiff. He states that on or about September, 2014 the 2nd Defendant through its Directors the 3rd and 4th Defendant made an application for a loan facility with the Plaintiff. On 26th November, 2014 the Plaintiff issued a letter of offer where it was stipulated that the loan was to be secured by a first legal charge over property Title number Kajiado/Kaputei - North/24052 registered in the name of Alice Olwalo Litunya the 1st Defendant herein. The Property was thereafter charged to the Plaintiff for a sum of Kshs. 50,000, 000. He avers that the 2nd Defendant defaulted in loan repayments and this compelled the Plaintiff to issue the requisite statutory notices to notify 1st and 2nd Defendants of their intention to sell the suit property sold through a public auction on 25th November, 2016. He avers that the 1st Defendant through a Deed of Indemnity dated 21st October, 2015 falsely declared she had never given the suit property as security, mortgage or charge to any person, or any institution contrary to the Charge instrument dated 5th December, 2014 registered in the Plaintiff's favour. In the Supplementary Affidavit filed by the Plaintiff sworn by one PRISCAH WAMBUA who was the lawyer who undertook the transaction giving rise to the Charge over the suit property, she avers that the 1st Defendant indeed appeared before her and stated she is a widow and hence could not provide spousal consent over the charge. She insists that the 1st Defendant signed the Charge documents. She further states that the Charge documents were registered at the Kajiado Land Registry but however the Clerk who took the said documents for registry has since left her employment.

The 1st Defendant ALICE OLWALO LITUNYA opposed the application and swore an affidavit, where she avers that she is the proprietor of the suit property Title number Kajiado/Kaputei - North/24052. She states that at the period she was alleged to have appeared before the bank lawyer to execute the Charge documents, she was out of the country working for United Nations High Commission for Refugees (UNHCR) at a place called Hoima in Uganda and she annexed her passport No. C029769 as Annexure 'AOL 3" as proof. She denies any knowledge of the transaction and avers that the title deed to the suit property has always been in custody of her Advocate Dorcas Ayoma Nanjero. She further avers that the transaction in question was a fraud and she even reported the matter to the CID in Nairobi who advised her to report it to the CID Kajiado where the property is situated and the same was booked as OB No. 16/12/0/2017, and she is aware the investigations are still on going. She denies receiving any consideration from the 2nd, 3rd and 4th Defendant nor being a beneficiary of the said sum of Kshs. 50 million. She avers that she should not suffer as a result of the fraud perpetrated against the Plaintiff/Applicant. She states that the purported postal address on the consent form is not hers nor the signatures appearing on the Charge documents. She further avers that the procedure she followed to seek the reconstruction of the Green Card pertaining to her parcel of land was legal.

The 2nd, 3rd and 4th Defendants opposed the application and filed an affidavit by one GREGORY KIVUVA MUIINDE who is the 3rd Defendant and a director to the 2nd Defendant. He avers that the 2nd Defendant does not deny taking the loan of Kshs. 50 million from the Plaintiff on or about November, 2014. He states that on 4th December, 2014, they executed a Charge instrument in favour of the Plaintiff bank and the 1st Defendant where the 1st Defendant was granted a loan by the Plaintiff. The 2nd, 3rd and 4th Defendants admit the loan arrears and confirm that they are ready to repay the outstanding loan. Their only issue of contention is the procedure with which the 3rd and 4th Defendants who are directors of the 2nd Defendant were enjoined in this suit contrary to the Companies Act.

The 5th Defendant opposed the application and filed a replying affidavit sworn by one Mr. DAVID NYAMBASO NYANDORO who is the Principal Land Registrar Kajiado. The deponent avers that they reconstructed the Green Card of the suit land title number Kajiado/Kaputei - North/24052 after receiving a report on 21st June, 2007 on missing land documents relating to the said title, from the 1st Defendant who stated she was the owner. He stated that they followed the due process of receiving an Indemnity from the 1st Defendant after which they gazetted the loss of the missing land documents. It is after the gazette that he reconstructed a new Green Card for the suit land. He stated that on 5th December, 2014, no Charge was registered against the suit property Kajiado/Kaputei - North/24052 at the Kajiado Land Registry as the Registry was closed through a directive from the Cabinet Secretary, Ministry of Land and Urban Planning for reorganization. He further averred that no documents were received or processed as evidenced by the extract of the day book register he annexed to his replying affidavit. He stated that the Title Deed over the suit property and the Charge documents presented by the applicant to Court were a forgery.

Issues and determination

All the parties filed their written submissions which were highlighted by their respective counsels on 6th April, 2017. The Plaintiff's Counsel Mr. Muthama argued that the Charge Documents were authentic and that since there were allegations of fraud then the Court should preserve the suit property. He stated that the Plaintiff had established a prima facie Case to warrant the grant of an injunction.

All the Defendants' Counsels opposed the application and stated that the Plaintiff had not established a prima facie case. The Counsel for the 1st Defendant Mr. Mutuli stated that the Plaintiff had miserably failed to demonstrate the three requirements warranting the granting of an injunction as demonstrated in the **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**. He urged the Court to dismiss the Plaintiff's application as he was a victim of fraud from the 2nd, 3rd and 4th Defendants.

The Counsel for the 2nd, 3rd and 4th Defendants stated that the application by the Plaintiff should be dismissed and that they were ready to repay the outstanding loan.

Upon perusal of the pleadings filed herein and hearing submissions of the counsels from the respective

parties, the Court finds that the following is the main issue for determination:

- Whether the 1st Defendant's property land title number Kajiado/Kaputei - North/24052 was charged to the Plaintiff to secure a loan of Ksh 50,000,000 on behalf of the 2nd Defendant.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In the instant case, the Court notes that there are serious conflicts of facts raised by the respective parties which can only be determined at the full hearing and not at this interlocutory stage. This position is well settled in the case of **Ougo & Anor Versus Otieno 1987 KLR 364** where the Court of Appeal held that **'the general principle is that where there are serious conflicts of facts the trial court should maintain the status quo until the dispute has been decided at the trial'**.

The Court finds that there are triable issues raised in the instant application but based on the conflicting issues highlighted it is only inclined to grant prayer No. 5 of the Motion that:

'A temporary injunction be granted restraining the Defendants/Respondents, severally and jointly whether by themselves, their servants, proxies and any other person acting under their authority from charging, selling, alienating and/or transferring or dealing with the Suit property known as Title Number Kajiado/Kaputei North/ 24052 in any other manner whatsoever pending the hearing and determination of the main suit.'

I will further urge the parties to comply with order 11 and set the suit down for hearing.

The costs will be in the cause.

DATED AND DELIVERED AT KAJIADO THIS 13TH DAY OF JUNE 2017

CHRISTINE OCHIENG

JUDGE

REPRESENTATION.

Maina holding brief for Muthan for Applicant

Muluhi for respondent

Court Assistant- Mpoye