



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 124 OF 2017

EVANS KEMBOI KOECH.....PLAINTIFF/APPLICANT

VERSUS

MARY JUSTER CHEPLETING.....DEFENDANT/RESPONDENT

AND

AGRICULTURAL FINANCE CO-OPERATION.....INTERESTED PARTY

RULING

There are two applications on record one dated 22.3.2017 where the plaintiff prays for orders that pending the hearing and determination of this suit, there be temporary injunction restraining the plaintiff whether by herself, her agents, servants, employees and/or assigns from encroaching into, trespassing, gaining entry, stocking animals, or in any way carrying out any activity on all that property known as Land Reference Number 3209/1 situated in Arbabuch Area – Moiben, Uasin Gishu County. That costs of this application be provided for.

The application is premised on grounds that the plaintiff is the bona fide purchaser of all that parcel of land known as Land Reference No. 3209/1 situated in Arbabuch Area-Moiben, Uasin Gishu County measuring approximately 305 acres, having purchased the suit property in a public auction held on 0.09.2016 on the instructions of Agricultural Finance Corporation (“the charge”). That the plaintiff was declared the highest bidder with a bid of Kshs.100,000,000.00 whereupon he paid a deposit of Kshs.25,000,000.00 as stipulated in the conditions of sale at the fall of the hammer with the balance of the purchase price, i.e. Kshs.75,000,000.00 being paid with the 90 days period thus making the auction sale complete.

The plaintiff took possession of the suit property upon payment of the full purchase price whereupon he fenced off the property, deployed his employees and planted maize therein. That the defendant has been interfering with the plaintiff’s possession of the property by trying to gain forceful entry into the suit property with the help of hired goons purposely to interfere with the plaintiff’s rights therein but the same has been resisted. That the defendant has flatly refused to remove her animals from the suit property feigning ignorance of the public auction. The defendant’s persistence to gain forceful entry into the property prejudices the plaintiff’s statutory right to enjoy the use of the property more so after investing his financial resources to purchase the suit property hence the need to issue injunctive orders against her. The defendant lost her rights on the suit property at the fall of the hammer at the public auction held on 9.09.2016 hence she has no justifiable reason to lay any claim on the property. That the plaintiff is apprehensive that the defendant might cause damage on the suit property and/or put it to waste unless the orders sought herein are granted thus occasioning him irreparable loss and damage.

The gist of the supporting affidavit sworn by Evans Kemboi Koech, is that he is *the bonafide* purchaser of all that parcel of land known as Land Reference No. 3209/1 (the suit property) situate in Arbabuch Area-Moiben, Uasin Gishu County measuring approximately 305 acres, having purchased the suit property in a public auction held on 9.09.2016 by M/s Legacy Auctioneering Services on behalf of Agricultural Finance Corporation (“the charge”). That he learnt of the intended public auction through an advertisement placed in the Standard Newspaper on 17.08.2016. That he duly verified the details of the charged property prior to purchasing it and was satisfied with the findings therein. He then participated in a competitive bidding process at the public auction held on 9.09.2016 and emerged the highest bidder with a bid of Kshs.100,000,000.00. He paid a deposit of Kshs.25,000,000.00 as stipulated in the conditions of sale and immediately signed the Memorandum of Sale. He subsequently paid the balance of the purchase price being Kshs.75,000,000.00 within the ninety (90) days period as set out in the conditions of sale whereupon he was granted possession of the suit property by Agricultural Finance Corporation.

The defendant has been trying to gain forceful entry into the suit property with the help of hired goons purposely to interfere with his rights therein but the same has been resisted. That he intends to put the suit property into agricultural use hence the need to injunct the defendant from trying to gain forceful entry into the property. The defendant has flatly refused to remove her animals from the suit property feigning ignorance of the public auction. That he believes on the advice of his Advocates on record that the auction sale became complete the moment he paid the full purchase price of Kshs.100,000,000.00 hence the defendant has no basis to interfere with his rights on the suit property. That he further believes on the advice of his Advocates on record that the defendant lost her rights on the suit property at the fall of the hammer hence she has no justifiable reason to lay any claim on the property. That he is apprehensive that the defendant might cause damage on the suit property and/or put it to waste unless the orders sought herein are granted thus occasioning him irreparable loss and damage. That this application will be rendered nugatory and useless if the orders sought are not granted. That it is in the interest of justice that this application be allowed.

The application is opposed by the respondent Mary Juster Chepleting in her Replying Affidavit states that the foresaid ex-parte orders were issued through misrepresentation and non-disclosure of material facts and that the plaintiff/Applicant has conspired with the interested party (AFC) to purport to declare the plaintiff/Applicant as the purchaser of the suit property. That the plaintiff/respondent is guilty of perjury as he has never participated or been a *bonafide* purchaser of this suit land through public auction which was conducted on the 09.09.2016. That the plaintiff/Respondent used forged or fraudulently acquired documents to mislead the Honourable court in issuing the ex-parte orders which are being used to evict her from her matrimonial home. That the plaintiff/Respondent has used the irregularly obtained orders to evict and/or wantonly destroy her homestead, poisoning her livestock, felling trees and doing other activities which are inconsistent with her rights.

The plaintiff/respondent is using his gimmicks hoodwinked, the honorable court in relying on a forged or fraudulently obtained letter dated 09.09.2016 from the interested party (AFC) purporting to declare him to be the purchaser of the suit land. That its within her knowledge that if indeed there was a public auction though denied, the highest bidder as per the records from AFC is one SPACELER COMPANY LTD (letter dated 09.1.2017 marked MJC '4') and not the plaintiff/Applicant herein.

She has personally tried to inquire from the auctioneers (legal auctioneers) Mr. Sila to confirm who purchased the suit land during the public auction sale on the 09.09.2016, however he has become evasive only referring me to AFC for clarification which indeed casts doubt as to whether the property was ever sold to a 3rd party. The plaintiff/Respondent has not exhibited any document to show that indeed he was declared the highest bidder (purchaser) to wit the certificate of sale, prove of payment and notification of sale due on the 09.09.2016. The interested party cannot purport to sale what they do not have as the lease has not been commuted hence stands expired and I shall invoke the doctrine of *Nemo dat Quod non-habet*. It crystal clear from the letter addressed to the purchaser dated 09.01.2017 confirming that their predicament at the Lands Office regarding the change of ownership from herself to the purchaser. The plaintiff/Respondent are mere trespassers and/or grabbers who are being used by senior and well-connected politicians to intimidate and cause psychological torture to her person and also deprive her of

her property.

The second application is dated 27.3.2017 filed by the defendant who seeks orders that the ex parte orders irregularly obtained on 22.3.2017 be discharged, varied or set aside and that the plaintiff be cited for contempt and punished for perjury, misrepresentation and/or misleading and lowering the integrity and dignity of the court. The application is based on grounds that the defendant/applicant is still the registered owner of the suit parcel of land namely L.R. No. 3209/1 measuring 305 acres. The plaintiff/respondent has irregularly obtained ex-parte orders against the defendant/applicant through misrepresentation and material non-disclosure of facts.

That the plaintiff/respondent misled the court in using forged letters or documents fraudulently obtained from the interested party herein (AFC). The plaintiff/respondent has used the irregularly obtained ex-parte temporary orders to evict the defendant from her matrimonial homestead. According to the defendant, the plaintiff has never purchased the suit property through public auction as alleged in his pleadings. That the plaintiff/respondent is a busy body who is being used by a cartel or well-connected people to frustrate the defendant/applicant. The interested party herein has never sold the suit property (land) through its agents (Legacy Auctioneers) to the plaintiff/respondent.

The purported memorandum of sale dated 09.09.2016 is a fictitious document or forged Memorandum of sale. The plaintiff/respondent's supporting document (Annexure EKK "3") letter from AFC dated 09.01.2017 is fraudulently obtained or collusion between the plaintiff and the interested party herein. The public auction conducted on the 09.09.2016 declared (Spacer Company Limited, P. O. Box 25216-00100) as the highest bidder (purchaser) and not Evans Kemboi Koech. The irregularly obtained ex-parte orders should be discharged, varied or set aside. According to the supporting affidavit of 1st defendant/applicant, she states. That she has been served with the ex-parte orders which was irregularly obtained by the plaintiff/respondent herein.

That on the 22.03.2017, the plaintiff/respondent moved this Honourable court under certificate of urgency and obtained ex-parte orders against her. That the foresaid ex-parte orders were issued through misrepresentation and non-disclosure of material facts. That the plaintiff/applicant came to this court with unclean hands as he misleads this Honourable court to issue orders contrary to the position maintaining on the suit land. That the plaintiff/respondent is a busy body with no locus standi to bring this suit and/or obtain the ex-parte orders against her. That the plaintiff/respondent is guilty of perjury as he has never participated or been a *bonafide* purchaser of this suit land through public auction on the 09.09.2016. That the plaintiff/respondent used forged or fraudulently acquired documents to mislead the Honourable court in issuing the ex-parte orders which are being used to evict her from her matrimonial home. That further, the plaintiff/respondent using his gimmicks hoodwinked the honourable court in relying on a forged or fraudulently obtained letter dated 09.09.2016 from the interested party (AFC) purporting to declare him to be the purchaser of the suit land. That it is within her knowledge that if indeed there was a public auction though denied the highest bidder as per the records from AFC is one Spacer company Ltd. The plaintiff/respondent has not exhibited any document to show that indeed he was declared the highest bidder (purchaser) to wit the certificate of sale, prove of payment and notification of sale due on the 09.09.2016. That she instructed Advocate Limo Rotich & Company Advocates to request the interested party (AFC) to furnish them with the certificate of sale and notification of sale done on the 09.09.2016 in vain.

That the plaintiff/respondent has used the irregularly obtained orders to evict and/or wantonly destroy her homestead, poisoning livestock, felling trees and doing other activities which are inconsistent with her rights.

That the interested party cannot purport to sell what they do not have as the lease has not been commuted hence stands expired and she shall invoke the doctrine of *Nemo dat Quod non-habet*.

That it is crystal clear from the letter addressed to the purchaser dated 07.01.2017 confirming that their predicament at the Lands Office regarding the change of ownership from herself to the purchaser.

That the plaintiff/respondent are mere trespassers and/or grabbers who are being used by senior and well-connected politicians to intimidate and cause psychological torture to her person and also deprive her of her property.

That it is within her legal knowledge being an Advocate of the High Court that an order of injunction is an equitable relief only issued to prevent the ends of justice from being defeated and it may be discharged, varied or set aside if it shown that it was irregularly obtained as in this particular scenario.

Mrs. Rose A. Ochanda, an Advocate of the High Court of Kenya and the Chief Manager Legal Services of Agricultural Finance Corporation states that sometime on or about 5th June, 1996, the defendant applied for and received Kshs.7,800,000 for purchase of the suit land known as L.R. No. 3209/1, Kshs.1,720,000 for purchase of a Ford tractor 5640 4WD and Kshs.580,000 for implements totaling to Kshs.10,100,000 which sum was to be repaid in full with interest and costs within a cumulative period of 10 years.

That as a cardinal principal, the Interested Party would only finance the defendant after being furnished with collateral for the credit facility, which information was adequately conveyed to the defendant. Considering that the Interested Party was financing the purchase of the suit property, it retained the certificate of title and registered a charge against the whole of that parcel of land known as L.R. No. 3209/1 in its favour to secure the loan sum advanced to the defendant together with interest and costs thereon.

That on or about 14th March 1997, the defendant applied for and received a further loan of Kshs.1,750,000 for purchase of New Holland 7840 Tractor, Kshs.280,000 to purchase 5 discs Nardi plough and 24 discs, Kshs.1,610,000 to purchase New Holland Form 6640 4WD tractor Kshs.700,000 to purchase baler 565T – New Holland and Kshs.1,553,650 to purchase Canter track Ford Holland 100H totaling to Kshs.5,893,650 which sum above with interest and was to be repaid in full within a cumulative period of 3 years. That likewise, the abovementioned loan was secured by the suit parcel.

Immediately after inception of the above said loans, the defendant breached her contractual obligation by adamantly, deliberately and/or purposely refusing to honour her part of the loan agreement. That on several occasions, the defendant was reminded of her indebtedness and the outstanding amount in her loan account which were in heavy arrears but she was never moved to regularize her loan account save for the many proposals that were never honoured. Subsequent to the reminders made to the defendant without any response, the Interested Party issued a statutory notice dated 29th September, 2000 recalling the entire outstanding sum of Kshs.32,683,023.55. The Interested Party communicated to the defendant the rate at which interest was accruing as a result of the heavy arrears.

The defendant/respondent on 17th October, 2000 clearly indicating that she had made arrangements to have the mortgage transferred by directly liquidating the account through a loan guaranteed by an international bank. This is a proposal that has never been honored by the defendant to date and at on the following day to wit, 18th October, 2000, the defendant drew a postdated cheque of Kshs.200,000/= purporting to repay the loan only for the cheque to be dishonored by the bank upon presentation. That it is worth noting that since inception of the loans approximately 21 years ago, the defendant never repaid any single cent towards her loan. It is in fact accurate to state that the defendant has always been reminded of the outstanding loan amount and tabulation thereon which position she has never rebutted and/or challenged either impliedly or expressly.

When it became perceptible that the defendant was determined to defeat the Interested Party's right to loan repayment by all means, the Interested Party was constrained to initiate recovery process by instructing Jomuki Enterprises to realize the said security and accordingly, the said auctioneers served upon the defendant a notification of sale together with a 45 days redemption notice.

Upon receiving the above said notices, the defendant pleaded with the Interested Party not to proceed with the intended auction since she was seeking a suitable buyer to purchase the suit parcel for purposes

of clearing the outstanding loan. Indeed, the Interested Party suspended the auction and indulged the defendant to proceed with her plans to sell the suit land within 90 days and meet her loan repayment obligations. This turned out to be another calculated move to defeat the Interested Party's statutory power of sale as the sale never materialized.

On or about 23rd July 2002, the Interested Party issued a fresh statutory notice and immediately the defendant made another well-orchestrated move to delay the Interested Party's pursuit of its money by requesting for interest concession of the then outstanding loan amount of Kshs.58,205,700.70. The Interested Party once again accommodated the defendant and offered her interest concession to redeem the loan at Kshs.27,213,676 payable within 90 days. In her usual modus operandi, this turned out to be an exercise in futility. That as a result of the defendant's failure to honour her contractual obligations and several proposals, the Interested Party initiated another recovery process in exercise of its statutory power of sale by issuing a couple of statutory notices to the defendant recalling the outstanding sums in full together with interest and appurtenant costs thereon. That indeed, in total compliance with the law, the Interested Party instructed its agent Legacy Auctioneering Services to issue 45 days redemption notice and a notification of sale of all that parcel of land known as L.R. No. 3209/1 upon the defendant giving her ample time to salvage and/or redeem her account failing which the auctioneers to auction the suit parcel in a public auction. That the said public auction was successfully conducted by the Interested Party's agent Legacy Auctioneering Services on 9th September, 2016.

Prior to the successful auction, the defendant had filed several suits and vexatiously sought to restrain the Interested party from exercising its statutory power of sale. These cases are Eldoret Environment and Land Case Number 151 of 2015 (Mary Juster Vs Agricultural Finance Corporation), Kisumu Hccc No. 108 of 2006 (Mary Juster Vs Agricultural Finance Corporation) and Eldoret Hccc No. 50 of 2006 (Mary Juster Vs Agricultural Finance Corporation).

That on 12th August 2016, the court in its wisdom dismissed the defendant's injunction application in Eldoret Environment and Land Case Number 151 of 2015 (Mary Juster Vs Agricultural Finance Corporation) and as if the defendant had not vexed the interested party enough, she proceeded to make an application purportedly to stay the dismissal order made by the court. That accordingly, the application for stay was dismissed on 9th September, 2016 and the Interested Party was at liberty to and thereby exercised its statutory power of sale. That the plaintiff was the highest bidder in the said auction and subsequently nominated Spaceler Company Limited as the transferee. That the plaintiff has since made payment towards the said purchase of the suit property. That she is advised by their Advocate on record the advice she verily believe to be true that the redemption right of the defendant extinguished upon the fall of the hammer. That the suit parcel was in vacant possession and the plaintiff herein who was the purchaser too possession and went ahead to fence the entire land.

She is informed by their Advocate on record, the information she verily believes to be true that the defendant has come to this court with dirty hands considering the fact that she leased out the entire suit parcel to unsuspecting third party despite knowing very well that the land had been successfully auctioned and she had lost her right to the same and that further to paragraph 24 above, the defendant purported to make a loan repayment proposal to settle her loan account even after the suit parcel had been auctioned.

That she is aware of and it is within her own knowledge that the defendant obtained the suit parcel through loan provided by the Interested Party, she developed the same through a loan provided by the Interested Party, she gained from usage of the parcel for a period of over 20 years and still considered it proper not to meet her loan repayment obligation. That the Interested Party which has all along acted in good faith is yet to recover the entire sum owed to it by the defendant. That it goes without saying that the defendant has treated the Interested Party with impunity and in any case, there must be an end to litigation. That it is only just and fair if the defendant's application is dismissed with costs as it is a clear demonstration of abuse of the court process considering that she is fond of filing suits to purely frustrate the Interested Party's interest.

In the replying affidavit to the application dated 27.3.2017, Mr. Evans Kemboi Koech states that he duly took part in a competitive public auction conducted by the Auctioneers was declared the purchaser of the

suit land and was given possession after paying Kshs.25,000,000 out of Kshs.75,000,000. He took possession and fenced it off. He was issued with genuine documents. He states that he owned possession of the property. He states that he did assign the interest of the suit property to M/s Spaceler Co. Ltd. In the supplementary affidavit, he confirms what is stated in the replying affidavit.

I have considered the application and rival submissions and do find that the plaintiff has demonstrated on the face of it that on 17.8.2016, there was an advertisement for a public auction in the Standard Newspaper for the sale of the suit property on Friday, 9.9.2016 at 11.00 a.m. at Nacha Plaza, 3rd Floor, Room 19 along Kijabe Row in Nakuru town. There is a memorandum of sale that at the sale by public auction on 9.9.2016 of all that parcel of land known as L.R. Number 3209/1 – Arbabuch area, Moiben, Uasin Gishu County in the Republic of Kenya together with buildings and or any other improvements enacted there was processed by Evans Kemboi Koech Ltd No. 23665762 at a price of Kshs.100,000,000 and paid a deposit of Kshs.25,000,000 by way of deposit to the auctioneer. The agreement for sale was also availed to the court.

The Agricultural Finance Corporation of Kenya acknowledged the payment and authorized the plaintiff to take possession. From the evidence on record, the plaintiff is in possession in view of the admission that by the defendant that she was in possession until 14.3.2017 and the court order was issued on 23.3.2017.

In such application, the court is guided by the decision of Spry J in *Giella Vs Cassman Brown, & Co Ltd* [1973] EA 358 where it was held the applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

In the case, I do find that the plaintiff has established a *prima facie* case with a likelihood of success as he purchased the property in a public auction as certified by the Interested Party. The defendant has not on *prima facie* basis established that there was fraud, however, this will be considered at the hearing of the suit.

Whether the plaintiff is likely to suffer irreparable harm if injunction is not granted, I do find that this was not properly brought out. On the balance convenience, I do find that it tilts towards maintaining *status quo*. Ultimately, I do order that the *status quo* on the ground to be maintained, thus, the plaintiff to remain in possession, however, no construction, or any kind of wastage, alienation in respect of the suit parcel of land until hearing of the suit. This order settles both applications. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2017.

A. OMBWAYO

JUDGE