



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

CIVIL CASE NO 159 OF 2016

1. CATHERINE KANINI KIOKO

2. SWABIHA ALAMIN.....PLANTIFFS/APPLICANTS

VERSUS

1. RUWEYA ALI MWINYI

2. COOPERATIVE BANK OF KENYA....DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiffs/Applicants has moved the Court under the provisions of Order 40 Rule 1 & 2 of the Civil Procedure Act and Section 3A of the Civil Procedure Act seeking the following :

a) Spent

b) Spent

c) **That injunction do issue restraining the Defendants by themselves or their servants, agents from selling, evicting or in any other matter whatsoever interfering with Plot Nos.9071/II/MN and 9086/II/MN pending the hearing and determination of this suit.**

d) **Costs of the Application to be paid by the Defendants.**

2. The Application is supported by the grounds on the face of it *inter alia* that the 1st Defendant sold the Suit Premises to the Applicants but thereafter refused to transfer the same to them. The Applicants pleaded that they have developed the Suit Premises and have been paying annual rates. However the 1st Defendant fraudulently without their permission and/or consent used the properties to secure a loan of Kshs,5,000,000.00 each which loans he has deliberately neglected and/or failed to service. That the charging of the Suit Premises was unlawful and the same should be discharged.

3. The Application is supported further by the Affidavit sworn by Catherine Kanini Kioko, the 1st Applicant. Ms. Kioko deposes that the 1st Defendant is the registered owner of the Suit Properties and which were sold to them between the years 2001 & 2005. That they developed the same and the 2nd Defendant has now valued them for purposes of selling by public auction at any time. She listed the fraudulent and unlawful actions of the 1st Defendant in paragraph 8 (a) - (d) of her Affidavit. The 1st Applicant further accused the 2nd Defendant of unlawful actions by failing to do physical inspection of

the premises and carrying out due diligence to confirm that indeed it is the Plaintiffs who are in the premises having developed the same. She also deposed that the 2nd Defendant did not follow lawful procedures including issuing proper notices. For the reasons given the Plaintiffs urged the Court to grant the temporary orders of injunction as sought.

4. The 1st Defendant is yet to enter appearance though served with the application on 27th March 2017 as per the Affidavit of Service dated 5th April 2017 and filed in Court on the 6th April 2017. The 1st Defendant is indicated to have declined signing the documents served upon her. The Plaintiffs therefore urged me to grant the orders as prayed as against the 1st Defendant. There is no action specified in the body of the Application and/or in the Affidavit in support thereof as undertaken by the 1st Defendant that warrants the granting of an order of Injunction. The temporary orders appear in my view to be directed against the 2nd Defendant who intends to realise their security. Therefore granting the orders as against the 1st Defendant would serve no useful purpose for now and will be orders given in vain.

5. The Application is opposed by the 2nd Defendant through the Replying Affidavit sworn by Ms Dorcas Aoko. Mr. Aoko deposed that she is the business banker of the 2nd Defendant based at Mtwapa therefore competent to swear the affidavit. She deposes that the 1st Defendant is undisputedly the legal and registered owner of the Suit Properties plot **NOS. 9011/II/MN and 9086/II/MN**. That the 1st Defendant used the said properties to obtain a credit of Kshs.5,000,000.00 from the 2nd Defendant via a charge dated 21st January 2010. That he 2nd Defendant was diligent by satisfying itself that the register maintained by the Land Registrar did not indicate any registered interest in the Suit Properties other than that of the 1st Defendant before disbursing the funds. Further she deposed that the 2nd Defendant was not required to inquire beyond the Certificate of Title and official search issued by the Land Registrar.

6. Ms. Aoko deposed that the only relationship the 2nd Defendant shares with the 1st Defendant is banker – customer and that the Plaintiffs do not indicate the nature of the collusion there was, merely alleging its existence. She continued that the 2nd Defendant issued the requisite notices and the Plaintiffs cannot in law dispute the notices issued. Further the 2nd Defendant states that they were stopped from realizing the security when the Plaintiff first filed the suit Mombasa **CMCC no 1140 and 1152 of 2012** which suits were struck out for want of jurisdiction. That given the Plaintiffs did not register their interest over the Suit Properties they are not entitled to frustrate the 2nd Defendant exercise of its Statutory Power of Sale that is a registered Interest. In any event that clause 5 of the contract between the Plaintiffs and 1st Defendant provided for refund therefore the 2nd Defendant contends the loss if any can be compensated by an award of damages. Lastly that the debt owing to the 2nd Defendant is growing and is likely to outstrip the securities, that in the event the Court is minded to grant an Injunction, the 2nd Defendant prays for undertaking to damages in the sum of Kshs.7,000,000 by way of bank guarantee otherwise it asked the Court to dismiss the application.

7. Parties filed written submissions which explained the principles governing the grant of injunctions and supported by case law. I have read the said submissions and taken into account their contents while writing this determination. The 2nd Defendant has given a comparison of their registered interest vis a viz the Contractual Interest of the Plaintiffs and relied on Section 36 of the Land Registration Act 2012. The Plaintiffs on their part refer to themselves as the legal owners. The Plaintiffs submit that the 2nd Defendant can sue the 1st Defendant to recover their debt. The Plaintiffs are submitting that they have disputed the notices issued in paragraph 9A of the amended plaint.

8. From the pleadings and the submissions, there was no interaction between the Plaintiffs and the 2nd defendant as regard the Suit Premises. The Plaintiffs have not challenged the deposition that they did not register any caveat on the title to protect their interest before the 2nd defendant charged the properties. The due diligence known in law is the requirement to conduct a search on the records held by the Lands Registry. The Applicant has not laid a basis under which law physical inspection is part of due diligence. Further the requirement of due diligence cuts across both sides in this instance and is supported by the

equitable doctrine that “*Equity aids the vigilant not the indolent.*” The Applicants herein pleaded to have purchased the land between 2001 -2005. Until 2010 when the 2nd Defendant came into the picture, they had not registered their interest on the title. The Applicants though guilty of indolence seeks to shift the blame wholly on the 2nd Defendant for their misfortune.

9. Be that as it may, the suit is still at an interlocutory stage and evidence is required to prove the averment that the properties were unlawfully charged in the absence of a caveat restricting their registration. In the case of **NGURUMAN LIMITED VS JAN BONDE NIELSEN & 2 OTHERS (2014) eKLR** quoted by the 2nd Defendant defined a prima facie case as “**one in which the material presented to 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 explanation or rebuttal from the latter...**” In this case, the Applicants’ interest on the suit properties though not registered but their physical possession has not been disputed. They have demonstrated how they acquired the interest by annexing the contract between them and the 1st Defendant.

10. From the dates in the contract, they are the first in time and their being in possession, the law accords them some recognition under the provisions of sections 36(2), “**nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract**” and 28(b) and (h) of the Land Registration Act and section 96(3)(h) of the Land Act, 2012, “**any other person known to have a right to enter on and use the land or the natural resources in, on or under the charged property by affixing notice at the property.**” The applicants have questioned the notices issued to the 1st Defendant thus challenging the exercise of statutory power of sale which then to me raises some triable issues. Thus the Applicants have shown a *prima facie* case with a probability of succeeding as against the Defendants.

11. On the principles of irreparable harm that cannot be compensated by an award of damages, the Applicants did not submit on the same. In the Affidavit in support the Applicant merely deposed that they will suffer substantial loss without expounding why the same cannot be compensated by an award of damages. They have not satisfied me on this limb as well. The Plaintiffs further submitted that the balance of convenience tilts in their favour. That the injunction should be granted to preserve the Suit Property pending the hearing and determination of the suit. Indeed this is the intention for granting temporary orders of injunction but the balance of convenience must be weighed against the interest of all parties to the suit. The 2nd Defendant has deposed that the loan is not being serviced and the same may outstrip the value of the properties charged. The 2nd Defendant’s explanation sounds more plausible in the circumstances.

12. However on the basis of the sections of the law quoted above and on the basis that the 2nd Defendant is agreeable to have the injunctive orders granted subject to the plaintiffs giving them an undertaking in the sum of Kshs. 7 million by way of bank guarantee; I would allow the application. Consequently, **I do hereby grant the application in terms of prayer (c) of the motion on condition that the Applicants do provide a written undertaking as to damages to be filed in Court for the sum of Kshs.7,000,000/= within Thirty (30) days of the date of delivery of this ruling.** In default, the injunction automatically lapses. The costs of the application do abide the outcome of the suit.

Ruling signed, dated & delivered at Mombasa this 31st day of Aug 2017

A. OMOLLO

JUDGE