



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 658 OF 2016

DANIEL KABIRU NDUNGU.....1ST PLAINTIFF

LUCY NYAMBURA KABIRU.....2ND PLAINTIFF

VERSUS

MOLYN CREDIT LIMITED.....1ST DEFENDANT

WILSON KARIUKI T/A WISKAM AUCTIONEERS.....2ND DEFENDANT

LAND REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

What is before me is the plaintiff's Notice of Motion application dated 20th June, 2016 seeking the following orders:

- 1) That a temporary injunction be issued restraining the 1st defendant from entering, cultivating, digging, building, alienating, selling, transferring, charging, licensing or otherwise dealing with all that parcel of land known as L.R. Ngong/Ngong/34016 (hereinafter referred to as "the suit property") pending the hearing and determination of the suit.
- 2) That an order be issued restraining the 2nd defendant from selling the household goods collected from the plaintiffs' house on the suit property and an order that the same be returned forthwith.
- 3) A declaration that the suit property was illegally and fraudulently transferred to the 1st defendant and that its rightful owner is the 1st plaintiff.
- 4) An order be issued directing the 3rd defendant to rectify official records of the suit property, cancel the title deed issued to the 1st defendant and issue a new title for the suit property in the name of the 1st plaintiff.
- 5) That the court be pleased to issue such other orders as it may deem fit and convenient in the circumstances of the case.
- 6) That costs of the application be awarded to the plaintiffs.

The plaintiff's case:

The plaintiff's application is supported by an affidavit and further affidavit sworn by the 1st plaintiff on 20th June, 2016 and 18th July, 2016 respectively. The 1st plaintiff has contended that he was at all material times the registered owner of the suit property. The 1st plaintiff has contended that in March 2015, he approached the 1st defendant which is a money lending company for a loan facility in the sum of Kshs 1,000,000/-. After filling the loan application form at the 1st defendant's office, the 1st defendant agreed to lend him the said sum of Kshs. 1,000,000/- repayable within 72 months at Kshs.50,000/- per month. It was a term of the loan agreement between the 1st plaintiff and the 1st defendant that the suit property would be charged to the 1st defendant as a security for the said loan. The instrument of charge was prepared by the 1st defendant's advocates and executed by the plaintiff after which the 1st defendant disbursed to the 1st plaintiff the said sum of Kshs 1,000,000/- on 27th April 2015, less legal fees and other charges. The 1st plaintiff has contended that he was not furnished with copies of the loan application form and the instrument of charge which were executed by him. He however retained a copy of the application for consent of the land control board which was signed by the 1st defendant and him. The 1st plaintiff has denied that he sold the suit property to the 1st defendant and that the 2nd plaintiff consented to the said sale. The 1st plaintiff has contended that he never executed an agreement for sale of the suit property to the 1st defendant and that the signatures appearing in the purported agreement for sale which the 1st defendant has claimed to have been signed by him are forgeries. The 1st plaintiff has also denied signing an application for consent of the land control board to transfer the suit property to the 1st defendant. The 1st plaintiff has contended that he paid to the 1st defendant a loan processing fees of Kshs.43,300/-.

The 1st plaintiff has contended that on 10th June, 2016, the 2nd defendant while acting on the instructions of the 1st defendant moved into the suit property and proclaimed the plaintiffs' household goods in a purported distraint for rent amounting to Kshs.360,000/-. The 1st plaintiff has contended that following the said proclamation, the 2nd plaintiff who is the 1st plaintiff's spouse visited the 1st defendant's offices where she was informed that the suit property was on sale. The 1st plaintiff has contended that the 2nd plaintiff was coerced by the 1st defendant into making a proposal to purchase the suit property at Kshs 3,100,000/-.

The 1st plaintiff has contended that following these developments, he conducted a search on the title of the suit property on 13th June, 2016 which revealed that the 1st defendant had caused the suit property to be transferred to its name on 22nd April, 2015. The 1st plaintiff has contended that the transfer of the suit property to the 1st defendant was carried out fraudulently since the suit property was only offered to the 1st defendant as security for the amount he had borrowed. The 1st plaintiff has contended further that the consent of the 2nd plaintiff was not obtained for the purported sale. The 1st plaintiff has contended that the 1st defendant had written to him on 19th October, 2015 to regularize his loan account thereby making him to believe that the suit property was still charged to the 1st defendant. The 1st plaintiff has contended that the 1st defendant had placed guards at the entrance of the suit property thereby causing them anxiety and apprehension of imminent eviction.

The defendants' case:

The application is opposed by the 1st defendant though a replying affidavit sworn by its finance director, Mr. Moses Anyangu on 1st July, 2016. The 1st defendant has contended that the suit property was sold to it by the 1st plaintiff through an agreement for sale dated 9th April, 2015 at a consideration of Kshs 1,000,000/-. The 1st defendant has denied that the suit property was transferred to it fraudulently. The 1st defendant has contended that the 1st plaintiff applied for the land control board consent to transfer the suit property to it on 5th March 2015 and that the application was approved.

The 1st defendant has contended that the sale and transfer of the suit property by the 1st plaintiff to the 1st defendant was consented to by the 2nd plaintiff as the spouse of the 1st plaintiff on 20th April, 2015 after which the instrument of transfer was registered on 22nd April, 2015. The 1st defendant has contended that it paid to the 1st plaintiff the purchase price as agreed in the sale agreement. The 1st defendant has contended that having acquired the suit property for valuable consideration, its title to the suit property cannot be defeated.

The 1st defendant has contended that upon the transfer of the suit property to it, the 1st plaintiff who was to give vacant possession of the suit property requested to be allowed to continue staying in the property as a tenant at a monthly rent of Kshs 30,000/-. The 1st defendant has contended that the plaintiffs defaulted in payment of rent prompting it to levy distress for rent to recover rent arrears amounting to Kshs. 360,000/- for the period May, 2015-April, 2016. The 1st defendant has contended that after distress was levied against the plaintiffs, they vacated the suit property and the 1st defendant took possession thereof. The 1st defendant has contended that the plaintiffs are guilty of material non-disclosure. The 1st defendant has contended that the plaintiffs misled the court into issuing orders of injunction which they have used to move back to the suit property thereby interfering with the 1st defendant's quiet possession thereof.

The 1st defendant has contended that the transaction between it and the 1st plaintiff concerned the sale of the suit property and not a loan agreement under which the suit property was to be used as a security. The 1st defendant has termed the alleged loan agreement as an afterthought. The 1st defendant has contended that the 1st plaintiff executed a sale agreement, transfer forms, applied for land control board consent to transfer the suit property, had his wife execute a spousal consent and released the completion documents to the 1st defendant. The 1st defendant has denied having advanced a loan to the 1st plaintiff with the suit property as security. The 1st defendant has contended that the 1st plaintiff did not place before the court copies of the charge instrument and the letter of offer of the said loan in support of his claim.

The 1st defendant has contended that it had a separate and distinct loan agreement dated 24th April, 2015 with the 1st plaintiff which was not related to the agreement for sale of the suit property. The 1st defendant has contended that there is no indication in the said loan agreement that the suit property was to be used as a security for the said loan. The 1st defendant has contended that its letter to the 1st plaintiff dated 19th October, 2015 which referred to the suit property as security for a loan was written in error as the suit property was not a security for the loan which it advanced to the 1st plaintiff.

The 1st defendant has contended that it is a money lending company and that any restriction on its rights to use or dispose the suit property would cause it irreparable damage and loss. The 1st defendant has contended further, that the balance of convenience tilts in its favour having established that it followed the due process in acquiring the suit property. The 1st defendant has contended that the plaintiff has not established a prima facie case with probability of success to warrant the grant of the orders sought since no infringement of the law has been established and no evidence of fraud or illegal action on its part has been produced.

Determination:

The application was argued by way of written submissions. The plaintiffs filed their submissions on 10th January, 2017 while the 1st defendant filed its submissions in reply on 13th January, 2017. I have considered the application and the affidavit filed by the 1st defendant in opposition thereto. I have also considered the parties' respective submissions and the authorities that were cited in support thereof. The plaintiffs have sought both prohibitory and mandatory interlocutory injunction. The plaintiffs have also sought other reliefs which in my view cannot be granted at the interlocutory stage of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In the case of, Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358, it was held that an

applicant for interlocutory injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) Eklr the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 which has been cited by the parties in their submissions and went further to state 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. ...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 threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide 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. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

With regard to interlocutory mandatory injunction, the principles applied by the court were set out in the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.”

On the material before me, I am satisfied that the plaintiffs have satisfied the conditions for granting the injunctive orders sought. As I have stated above, the plaintiffs’ case is that, what the 1st plaintiff sought and obtained from the 1st defendant was a loan of Kshs.1,000,000/- and that instead of registering a charge over the suit property to secure the said loan amount, the 1st defendant fraudulently caused the suit property to be transferred to its name on the allegation that the same was sold to it by the 1st plaintiff at a consideration of Kshs. 1,000,000/-. Although the 1st defendant has denied that the suit property was offered to it as a security, the evidence before the court seems to support that position. The 1st plaintiff has exhibited in his affidavit in support of the application, an application for land control board consent dated 25th March, 2015 duly signed by the 1st plaintiff and the 1st defendant seeking consent to charge the suit property to the 1st defendant. The 1st plaintiff has also exhibited a letter dated 19th October, 2015 from the 1st defendant which states in part as follows :-

“Pursuant to an agreement dated 12th March 2015 entered into between yourself and Modyn Credit Limited, you were advanced a loan in the sum of Kenya Shillings 1,000,000/-. The subject amount was advanced at your sole request and receipt thereof has been duly acknowledged by you. The subject loan was secured by a legal charge registration(sic) over property/asset registered as LR No. Ngong/Ngong/34016...”

In the 1st defendant’s replying affidavit, the 1st defendant has exhibited among others, a credit application dated 12th March, 2015 between the 1st plaintiff and the 1st defendant under which the 1st defendant agreed to advance to the 1st plaintiff a loan of Kshs.1,000,000/-. This is the agreement referred to in the letter mentioned above. I am not persuaded at this stage of the proceedings that the 1st plaintiff and the 1st defendant had two transactions, one involving the sale of the suit property by the 1st plaintiff to the 1st

defendant at Kshs. 1,000,000/- and the other involving a loan of Kshs. 1,000,000/- which was advanced by the 1st defendant to the 1st plaintiff. The 1st plaintiff has denied selling the suit property to the 1st defendant. The material so far placed before the court in proof of the purported sale does not add up. The 1st plaintiff having denied the agreement, the burden was on the 1st defendant to prove the same. No evidence has been placed before the court showing how the purchase price of Kshs. 1,000,000/- was paid to the 1st plaintiff. The agreement for sale is dated 9th April, 2015. The consent of the land control board which is said to have approved the sale was issued on 10th March, 2015 before the agreement was entered into. The purported spousal consent was also issued on 20th April, 2015 long after the date of the agreement. Under section 26 (1) of the Land Registration Act, a certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. Such a title is however, subject to challenge on grounds of fraud or misrepresentation to which the person is proved to be a party or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. I am satisfied that the plaintiffs have established an arguable case against the 1st defendant on the manner and circumstances under which the suit property was transferred and registered in the name of the 1st defendant. I am also satisfied that the distress which was levied against the plaintiffs had no basis. There is no evidence before the court that the plaintiffs were the 1st defendant's tenants. The 1st defendant did not place any evidence before the court in proof of its allegation that the 1st plaintiff had agreed to remain in occupation of the suit property as a tenant paying a rent of Kshs. 30,000/- per month. In the absence of landlord and tenant relationship between the parties, the purported distress for rent was illegal. I am satisfied that the plaintiffs have established a case with a high probability of success against the defendants which warrant the grant of both prohibitory and mandatory injunction sought.

On irreparable loss, the plaintiffs stated that the suit property was their matrimonial home. In my view, the plaintiffs are likely to suffer loss which cannot be compensated by damages if the orders sought are not issued. Having found that the plaintiff has established a prima facie case with a probability of success and that they would suffer irreparable loss which cannot be compensated in damages, it is not necessary for me to consider where the balance of convenience lies. If I was to consider the same, I am of the view that it would tilt in favor of the plaintiffs. The plaintiffs would suffer more inconvenience if the interlocutory injunction is refused as compared to the 1st defendant if the injunction is granted.

In conclusion, I find merit in the Notice of Motion dated 20th June, 2016. The application is allowed in terms of prayers 3, 4 and 8 thereof. Prayers 5 and 6 cannot be granted at interlocutory stage of the proceedings herein. The same are refused.

Delivered and Signed at Nairobi this 6th day of October 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Karani	for the Plaintiff
Mr. Ondieki h/b for Ms. Manegene	for the 1 st Defendant
No appearance	for the 2 nd Defendant
No appearance	for the 3 rd Defendant
No appearance	for the 4 th Defendant

Catherine

Court Assistant