



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC CASE NO. 49 OF 2015**

**JOHN MBURU ..... PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER IRUNGU KARIUKI ..... 1<sup>ST</sup> DEFENDANT**

**K-REP BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR - NYERI ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff herein filed a Notice of Motion dated 11<sup>th</sup> Mrch, 2015 seeking the following orders *inter alia*:

**(i) Spent**

**(ii) Spent.**

**(iii) That the 1st defendant by himself, his employees, his agents and or servants be prohibited by an injunction order from disposing, transferring, alienating and or in any other manner dealing with the property registration number. Aguthi/Gatitu/440 (suit property) pending determination of this suit.**

**(iv) That a mandatory injunction do issue compelling the 2nd defendant herein, his employees, servants and or agents to release the title documents to the suit property**

**(v) That a mandatory injunction do issue compelling the 1st defendant to effect the transfer of suit property in favour of the plaintiff and hand over all completion documents to the plaintiff.**

**(vi) That in the alternative to prayer 3, a mandatory injunction does issue to the High Court Registrar to execute the transfer of suit property in favour of the applicant.**

**(vii) That a mandatory injunction do issue to the 3rd defendant herein compelling him or her to effect the transfer of the suit property and register in the same in favour of the plaintiff.**

**(viii) Costs of this application be provided for.**

2. The application is premised on the grounds stated on the face thereof and is supported by the affidavit sworn by **John Mburu Muiruri**, the plaintiff herein. He depones that the suit parcel belonged to the 1st defendant, with whom he entered into an agreement of sale on 3rd December, 2012; that the 1st defendant charged the suit property to the 2nd defendant (bank) as security for a loan facility and failed to clear the outstanding arrears, discharge the property and hand over the title documents to the plaintiff. As a result of the above, the 2nd defendant issued notices of their intention to exercise their statutory power of sale.

3. The plaintiff apprehensive that the 2nd defendant would carry out their said intention repaid the 1st defendant's outstanding arrears and eventually repaid the entire loan.

4. Despite the loan having been fully repaid, the 1st defendant has refused to discharge the suit property and hand over completion title documents to the plaintiff.

The plaintiff fears that the 1st defendant may interfere with the title which is still registered in his name. He prays that the court grants him the orders sought.

5. The application is not opposed. The 1st defendant did not enter appearance or file any documents. The 2nd defendant filed a replying affidavit dated 15th June 2015 deponed by its legal officer Anthony Ouma.

6. The 2nd defendant admits advancing a loan facility to the 1st defendant and issuing a statutory notice of sale when the 1st defendant failed to honour his obligations to the bank. He further admits that the plaintiff undertook to clear the outstanding loan balance vide a letter dated 8th January, 2014 which loan balance he cleared in November, 2014. This was confirmed by the bank through a letter dated 6th November, 2014.

7. Mr. Ouma further depones that despite the plaintiff having repaid all the money owed to the bank by the 1st defendant and the financial interest covered by suit property having been extinguished, the 2nd defendant cannot discharge the charge and release the title documents to the plaintiff as the plaintiff is not the chargor.

8. During the hearing of the application, counsel for the plaintiff **Mr. Keiya** sought prayers 3 and 8 in the motion.

9. There was no attendance by both the defendants despite service.

10. I have considered the application, affidavits filed in support thereof the replying affidavit by the 2nd defendant and submissions by the counsel for the plaintiff and I find the only issue for determination to be is whether the plaintiff/applicant is entitled to the orders of injunction sought based on the facts and circumstances of this case.

11. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**. The Applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience.

12. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case. It must also be noted that the purpose of an injunction is to maintain status quo pending the hearing and determination of the matter before it.

13. It is noteworthy that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases. This observation was considered by Lord Diplock in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510 where he stated as follows:

**“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”**

14. In the instant case, it is not in dispute that the plaintiff is in possession of the suit property and that the title documents are in possession of the bank. It is also not in dispute that the financial interest covered by the 2nd defendant has since been extinguished courtesy of the plaintiff having repaid the loan advanced to the 1st defendant.

15. Taking into consideration that the 1st defendant is still registered as the owner of the suit property and could interfere with it and considering that the plaintiff is in possession of the suit property, I find that this court has a duty to preserve the suit property until the hearing and determination of the suit under **Order 40 Rule(1)** of the Civil Procedure Rules, 2010.

16. For the above reasons, I allow prayer 3 in the Notice of Motion dated **11<sup>th</sup> March, 2015** pending the hearing and determination of the suit. Costs of the application to abide the outcome of the suit.

**Dated, Signed and delivered at Nyeri this 13th day July, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

N/A for the plaintiff

N/A for the defendants

Court assistant – Lydia