



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 21 OF 2014

(Formerly ELD H.C. 10 of 2014)

BENARD KIPTARUS PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA & OTHERS DEFENDANTS

R U L I N G

1. This is a ruling in respect of two separate applications by the applicant which were argued on the same day. The first application is dated 15/1/2014. This application seeks orders of inhibition against the 5th respondent, the County Land Registrar Nandi from registering any dealings on Parcel No. Nandi/Kebeben/135 pending hearing and determination of the suit herein. The second application is dated 3/2/2014 and it seeks a temporary injunction restraining the 2nd defendant Sparkling Ideas Limited from interfering, hindering, obstructing quiet enjoyment and or selling, transferring alienating and or disposing LR NO Nandi/Kebeben/135 pending the hearing and determination of the suit herein.
2. The applicant had guaranteed the 4th respondent Elly Tarus Chumo who secured a loan of Kshs.600,000/= from the 1st respondent National Bank of Kenya Limited. The 4th respondent defaulted in repayment of the loan which had accumulated interest over the years. The National Bank of Kenya then exercised its statutory power of sale by realising the security which was sold in a public auction and has since been registered in the name of the second respondent Sparkling Ideas Limited.
3. The applicant contends that there was no charge prepared in respect of his property known as LR NO Nandi/Kebeben/135; that there was no public auction conducted; that the 2nd respondent in whose name the property has been registered did not take part in the public auction and that the first respondent did not exhaust all available means to recover the debt from the 4th respondent before they sold his property.
4. The 1st, 2nd and 3rd respondents opposed the applicant's application through replying affidavits sworn by their representatives. They all contend that the auction was conducted and that all procedures before sale were followed and that the applicant's application is therefore an abuse of the process of the court. The 1st respondent contends that it instructed the 3rd respondent M/S legacy Auctioneers Services to advertise the suit property for sale and that the 3rd respondent followed the instructions and sold the property according to instructions given. The 3rd respondent contends that the highest bidders during the auction were Mr Joseph K. Kitur who instructed that the property be registered in the name of the 2nd respondent.

5. I have carefully gone through the two applications by the applicants. Both applications are based on the same grounds. The grounds are that there was no public auction and that there was no charge. The applicant in his statement of claim is seeking a declaration that the power of sale over the suit property had expired. He is also seeking a declaration that the transfer of the suit property to the 2nd defendant was fraudulent, illegal and vitiated. He is also seeking a declaration that the first defendant ought to exhaust all available remedies against the 4th defendant before the guarantor is called upon to make good his guarantee. The applicant also seeks an order for rectification of the register to restore his name as owner of the suit property and a permanent injunction against the 2nd defendant from transferring charging or in any way encumbering the suit property.
6. The issue which emerges for determination is whether the applicant is entitled to orders of injunction against the 2nd defendant. The principles for grant of injunctions are now well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the applicant will suffer injury which might not be compensated in damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience. In the present case, I do not think that the applicant has demonstrated that he has a prima facie case with a probability of success. The property the subject matter of this suit has already been sold and it is now registered in the name of the 2nd defendant. The position in law is that once a chargee exercises its statutory power of sale and property is transferred to a third party, the chargor's right to the same is extinguished and if there is any remedy in the chargor's favour that remedy is in damages. Whether the statutory power of sale was exercised improperly or not, does not matter. The remedy lies in a claim for damages. It therefore follows that the applicant has not demonstrated that he has a prima facie case with probability of success in view of the prayers he is seeking in the plaint.
7. On whether the applicant will suffer injury which will not be remedied in damages, I do not think that he will suffer injury which might not be remedied in damages. The applicant offered his property as security for the loan taken by the 4th defendant. There was a value placed on the same and if he loses the land, the loss is quantifiable and can be compensated. The applicant cannot therefore be said that he will suffer injury which will not be compensated in damages. In the circumstances of this case I will not consider the third principle.
8. The applicant is seeking an order directing the Nandi County Land Registrar to register inhibition on the register prohibiting any dealings. I do not find any ground which will persuade me to make such an order. The 2nd defendant has had the property registered in its name after complying with all the requirements. It should not be hindered from enjoying its land. The upshot of this is that I find that there is no merit in both applications. The same are hereby dismissed with costs to the 1st, 2nd and 3rd respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 22nd day of July, 2014.

E. OBAGA

JUDGE

In the presence of Mr Marube for Plaintiff and Mr Wabwire for Mr Mburu for 1st defendant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

22/07/2014