



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 486 OF 2013

GEORGE KINYANJUI MURIITHI PLAINTIFF

VERSUS

GRACE RODAH OSOME1ST DEFENDANT

MOLYN CREDIT 2ND DEFENDANT

LAND REGISTRAR NAKURU3RD DEFENDANT

JANE WAMBUI MWANGI4thDEFENDANT

JANNET NELINA NYUKURI.....5TH DEFENDANT

RULING

1. The facts of the plaintiff's case are that sometime in 2012, being the registered owner of **Njoro/ Ngata block 1/5014** and **Njoro /Ngata Block 1/ 5105** and wanting to dispose off the two parcels in the usual Kenyan fashion he let word out of his intentions and a land broker by the name **Mburu Kamau**, introduced him to an interested buyer, one **Grace Rhodah Osome** the 1st Defendant herein.**Njoro/Ngata block 1/5014 (hereafter referred to as the first suit parcel)** was developed with a four bedroomed incomplete house and **Njoro /Ngata Block 1/ 5105 (hereafter referred to as the second suit parcel)** was a vacant plot.

2. The plaintiff and the 1st Defendant went to the firm of **Mongeri & Company Advocates**, where a sale agreement was drawn that **George Kinyanjui** would sell the two suit parcels to **Grace Rhodah Osome for Kshs.5,600,000**. Kshs.500,000 was to be paid upon execution of the sale agreement and the balance would be paid upon completion of the four bedroomed house.

3. The Kshs.500, 000 was never paid as agreed. Instead the 1st defendant paid to the plaintiff Kshs.350,000 which she later took back until the plaintiff was left with a mere Kshs.45,000. In addition the 1st defendant, behind the plaintiff's back altered the first page of the agreement to read that parties had entered into a sale agreement whereby the purchase price for the two parcels was Kshs. 5,000,000

and the 1st defendant had paid the full purchase price upon execution of the sale agreement.

4. The 1st defendant did not stop there. She somehow managed to get the original titles from the plaintiff leaving behind some forged titles. She presented the titles together with forged transfer forms to the lands office and got the two suit parcels registered in her name. She then approached the 2nd defendant and took out a loan of Kshs.2,000,000 against the first suit parcel. She defaulted in paying the loan and the 2nd defendant has now issued an Auctioneers notice of their intention to sell the first suit parcel by way of public auction. The 1st defendant was arrested and is now facing a criminal charge for making a document without authority.

5. The plaintiff filed this suit and contemporaneously filed a notice of motion on **31st July, 2013** seeking injunction orders against the 2nd defendant by itself, its agents and or servant, from selling, transferring, and or in any way dealing with the first suit parcel pending the hearing and determination of the suit. This is the application before me for determination.

6. The defendants have a different version of the facts and oppose the application through the 1st defendant's replying affidavit sworn on **30th September, 2013** and the 2nd defendant's replying affidavit sworn on **17th September, 2013**.

7. The 1st defendant avers that she fully paid the plaintiff Kshs.5,000,000 in cash and he confirmed this in a note dated **25th June, 2012** six months after the sale; She alleges that the criminal charge is a mere allegation yet to be proved.

8. The 2nd defendant deponed that they carried out due diligence and after confirming that the title presented to them by the 1st defendant was registered in her name and that no caution was registered against the title, they advanced the 1st defendant a loan of Kshs. 2,000,000 and therefore hold a valid charge over the first suit parcel. The charge being duly registered against the title, they should be allowed to exercise their statutory power of sale now that the 1st Defendant had defaulted in repaying the loan.

9.The 3rd and 5th defendants entered appearance and filed their respective Defences but did not respond to the application. The plaintiff and the 2nd Defendants filed written submissions on **24th January, 2014** and **3rd February,2014** respectively which I have considered alongside the pleadings and affidavits.

10.The issue for determination is whether the applicant has met the principles for grant of a temporary injunction, set down in ***Giella V Cassman Brown & Co Ltd. (EA) 358***, namely that ***he has a prima facie case with a probability of success, that unless an injunction is granted, he might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.***

11. At this stage the court is not required to make any final findings on the facts. That will be for the main hearing. The issue is therefore whether the applicant satisfies the above conditions. 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. However, traditionally, courts have always considered all the three principles.

12. A prima facie case was described as follows in the case of ***Mrao v First American Bank (2003) KLR 125***;

“..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case.” (at p138)

13. From the above dictum I need to be satisfied that the plaintiff not only has an arguable case, but that he has a case that has a good probability of success at the trial. The standard as noted is higher than merely an arguable case. My own opinion of what constitutes a *prima facie* case is that it is a case in which from the material presented, it appears that the applicant will most likely succeed in the suit if all matters hold constant. A *prima facie* case is a case that appears to be headed for success on merits. It is of course only a preliminary assessment at an interlocutory stage yet critical on the decision of how the subject matter of the suit ought to be preserved pending the hearing of the suit on merits.

14. On the first limb, to show that he has a *prima facie* case with probability of success the applicant has annexed copies of the two sale agreements, transfer forms, Auctioneers notification of sale, demand notice to Grace Rodah Osome from the auctioneer and a charge sheet.

15. The 1st defendant on her part admits entering into a sale agreement with the plaintiff. She alleges that she paid him the full purchase price of Ksh.5,000,000 and has annexed a sale agreement as evidence. She has also annexed a note in the plaintiff own handwriting confirming that he sold the two suit parcels to her.

16. On their part the 2nd Defendants to prove that they hold a valid charge over Njoro/Ngata Block1/5104 have exhibited a copy of title deed for the suit land in the name of the 1st Defendant, copy of official search confirming the 1st Defendant as the owner of the first suit parcel, another copy of official search showing entries of encumbrance by **Molyn Credit Limited** against the first suit parcel and an agreement between the 2nd Defendant and the 1st Defendant to secure the loan of Kshs.2,000,000.

17. After considering the affidavit evidence placed before me I hold the view that this is a matter that would require further interrogation of the parties' evidence by way of oral submissions by the parties at the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered. However, at this stage all the applicant is required to demonstrate is not a case which must succeed but one which may succeed. I am satisfied that a *prima facie* case with a probability of success has been established.

18. Will the applicant stand to suffer irreparable damage if the injunction is not granted? It is clear that if the first suit parcel is not preserved then the same will be sold by the 2nd defendant in a public auction as admitted by the 2nd defendant. If this happens the applicant will have lost the opportunity to recover the first suit parcel which loss may not easily be compensated by way of damages taking into consideration that the plaintiff's claim is ideally against the 1st Defendant.

19. Having found that the plaintiff has established a *prima facie* case and will suffer irreparable damage, I need not consider the third limb.

20. In light of the foregoing, I hereby allow the Notice of Motion dated **31st July, 2013** with costs to the plaintiff.

Dated signed and delivered in open court at Nakuru this 11th day of July 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Waichungo holding brief for Mr. Ngure for plaintiff/Applicant

N/A for 1st,2nd,3rd,4th.& 5th Defendants

Emmanuel Juma : Court Clerk

L N WAITHAKA

JUDGE