



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 348 OF 2013

FLORENCE AMBOGO KIMIYA.....PLAINTIFF

VERSUS

KENNEDY MUGUVA OMOLO.....1ST DEFENDANT

TRANSNATIONAL BANK LIMITED.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 13th March 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from alienating, selling, transferring or in any way whatsoever dealing with the property known as Ngong/Ngong/10665 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and that the costs of this Application be borne by the Respondents.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff sworn on 13th March 2013 in which she averred that she is the wife of the late

Sammy Kimiya Chava who was the registered owner of the suit property and that she was the Administrator of his estate. She produced a copy of a title deed bearing the name of her late husband as the registered proprietor of the suit property. She further averred that she and her family live on the suit property and that she was not aware as to when the suit property changed hands from her late husband to the 1st Defendant/Respondent. She stated further that she saw an advertisement in the Daily Nation newspaper by Valley Auctioneers stating that the auction date for the suit property will be on 14th March 2013. She further indicated that she seeks the courts assistance in halting that sale and that she will ready and willing to salvage the suit property in installments if allowed to do so. She further stated that she believed that the 1st Defendant is the current registered owner of the suit property and that the only available remedy was for her to pay the amount owed and owing to the fact that she was not gainfully employed, she was able to raise Kshs. 100,000/- per month to safeguard the suit property.

The Application is contested. The 2nd Defendant/Respondent filed the Replying Affidavit of Jackline Onsando, the Head of Legal and Credit Administration, filed on 27th March 2013 in which she averred that the Plaintiff/Applicant’s late husband was not the registered owner of the suit property and that it is

the 1st Defendant/Respondent who is the registered owner of the suit property. She produced a Certificate of Official Search dated 22nd March 2013 attesting to that assertion. She further averred that the 1st Defendant/Respondent approached the 2nd Defendant and requested for a loan facility of Kshs. 1 million on 2nd November 2009 and that it was at that juncture that the 2nd Defendant conducted its due diligence and confirmed that the 1st Defendant was the duly registered owner of the suit property. She further averred that on diverse dates namely 22nd September 2010 and 22nd June 2011, the 1st Defendant requested for additional sum of Kshs. 1 million which sum was advanced to him. She further stated that the 1st Defendant subsequently failed to honor his agreement to pay back the loan within the time stipulated in the two charges leading to the 2nd Defendant notifying him of its intention to exercise its statutory power of sale. She further stated that the 2nd Defendant advertised the suit property for sale by public auction 3 times in the local dailies and at all these instances, nobody raised an objection until 14th March 2013 one hour before the auction. She further stated that it is not true that the Plaintiff/Applicant resides on the suit property since the 2nd Defendant instructed two independent valuers who were granted access by the 1st Defendant to view the property and who confirmed that the 1st Defendant was in possession of the suit property. She further stated that the Plaintiff/Applicant admitted in paragraph 10 of her Supporting Affidavit that the 1st Defendant is the registered owner of the suit property.

The Application is further contested by the 1st Defendant/Respondent who filed his Replying Affidavit sworn on 23rd July 2013 in which he averred that he is the duly registered proprietor of the suit property as per the copy of title deed that he produced and not the Plaintiff/Applicant's deceased husband. He further stated that he is willing to settle the outstanding loan with the 2nd Defendant if given proper accounts and time. He further stated that he never received any statutory notice by the 2nd Defendant therefore they cannot purport to exercise their right of redemption.

The Plaintiff/Applicant and the 2nd Defendant/Respondent filed their written submissions.

In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In this case, the Plaintiff at first stated that the suit property belongs to her deceased husband but later appeared to concede that the current registered owner thereof is the 1st Defendant. She further acknowledged that the suit property is currently charged to the 2nd Defendant and she offered to assist in clearing off the loan owed by the 1st Defendant to the 2nd Defendant. The Plaintiff has therefore made a tacit admission that the suit property does not in fact belong to her deceased husband but belongs to the 1st Defendant. Over and above that, the 1st Defendant has equally produced a copy of his title deed which bears a date of 2009 compared to the copy produced by the Plaintiff which bears the date 2000. That

points to the very possible sale of the suit property by the Plaintiff's husband to the 1st Defendant. The documents produced by the 2nd Defendant also demonstrate that the suit property was actually in the name of the 1st Defendant and not in the name of the Plaintiff's late husband at the time of advancing various loans to the 1st Defendant. All this leads to my finding that in all probability, the suit property does not belong to the Plaintiff's late husband but to the 1st Defendant. On that count therefore, the Plaintiff has failed to establish that she has a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS __4TH__

DAY OF ____JULY_____ 2014

MARY M. GITUMBI

JUDGE