



REPUBLIC OF KENYA



**Mwaura v Irimu & 3 others (Environment & Land Case E001 of 2024)
[2024] KEELC 6971 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E001 OF 2024
LC KOMINGOI, J
OCTOBER 17, 2024**

BETWEEN

PHILIP NGETHE MWAURA PLAINTIFF

AND

STEPHENSON MARIGU IRIMU 1ST DEFENDANT

KCB BANK LTD 2ND DEFENDANT

KANGETHE ENTERPRISES AUCTIONEERS 3RD DEFENDANT

**ATTORNEY GENERAL (SUED ON BEHALF OF THE REGISTRAR OF LAND
KAJIADO NORTH REGISTRY) 4TH DEFENDANT**

RULING

1. This is the Notice of Motion dated 15th January 2024 brought under;

(Article 40 and 159 (2) (d) of *the Constitution* of Kenya, Sections 1A, 1B and 3A and 63 (c) of the *Civil Procedure Act* Cap 21, Order 40 Rules 1 and 2 Civil Procedure Rule, 2010 and all other enabling provisions of Law).
2. It seeks orders;
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to grant an Order of Temporary injunction restraining the 2nd and 3rd Defendants/Respondents either by themselves, nominated agents, servants and/or anyone claiming and/or acting under the said Defendants/Respondents and in particular M/s Kang'ethe Enterprises Auctioneers, from advertising, re-advertising, selling and/or otherwise



dealing with parcel of land known as Ngong/Ngong/16744 (herein after referred to as the ('Suit Property'), vide Public Auction or Private Treaty, whatsoever, in exercise of (sic) the 2nd Defendant's/Respondent's statutory Power of Sale, pending the hearing and determination of the suit herein;

4. Spent;
5. Pending the hearing and determination of the suit herein, a prohibitory injunction be and is hereby issued against the 3rd Defendant, 4th Defendant and the Land Registrar of Kajiado North Land Registry, their agents, employees or persons claiming on their behalf or their instructions prohibiting them from entering, remaining, transferring, leasing, creating a further or a second charge, exercising statutory Power of sale or otherwise disposing off or developing the property known as Ngong/Ngong/16744;
6. Costs of the application be provided.
3. The grounds are on the face of the Application Notice of Motion and are set out in paragraphs 1 to 9.
4. The Application is supported by the Affidavit of Philip Ngethe Mwaura, the Plaintiff/Applicant herein, sworn on the 15th January 2024.
5. The 1st and 3rd Defendants/Respondents, did not enter appearance and did not file a response to the Notice of Motion.
6. The Application is opposed by the 2nd Defendant/Respondent. There is a Replying Affidavit sworn by Nelly Musau, the Credit Administration Manager, Moi Avenue Branch sworn on the 27th March 2024.
7. The 4th Defendant/Respondent intimated to the court on the 10th July 2024 that they did not wish to participate in this Notice of Motion.
8. On the 29th April 2024 the Court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Plaintiff's/Applicant's Submissions.

9. They are dated 5th July 2024.
They raise three issues for determination;
 - a. Whether the Plaintiff/Applicant has established a prima facie case with a probability of success;
 - b. Whether the Plaintiff/Applicant will suffer irreparable injury, which would not adequately be compensated by an award of damages, and
 - c. Where does the balance of convenience lie?
10. Counsel submitted that the Plaintiff/Applicant has demonstrated how he acquired the suit property. That he took possession and put up rental apartments and a family house.
11. It is further submitted that the Plaintiff/Applicant has been enjoying quiet possession of the suit property until January 2024, when he learnt that it was about to be sold by public auction. The Plaintiff/Applicant also submitted that the manner in which his title was transferred to the 1st Defendant was fraudulent hence the said title tainted with illegality, untenable and no good interest was acquired. The Plaintiff/Applicant has established a prima facie case with a probability of success at the trial. He has put forward the cases of Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Mrao



Ltd Vs. First American Bank of Kenya & 2 others (2014) eKLR. Nguruman Ltd Vs. Jan Bonde Nielsen & 2 Others (2014) eKLR.

12. It is the Plaintiff's submission that the suit property is illegally charged in favour of the 2nd Defendant who is in the process of exercising its statutory power of Sale. It is the Plaintiff's case that the suit property is his home where he lives with his family, has erected rental apartments where he derives income.

Further that, the disposal of the suit property will no doubt result into ejecting him from the suit property.

He has put forward the case of Nguruman Ltd (Supra) as cited in Nicholas Muchina Muiruri & Another Vs. Salesio Kiarie Thati & 4 Others (2021) eKLR.

13. It is further submitted that the Plaintiff resides on the suit property hence the balance of convenience tilts in his favour.

He prays that the Application be allowed.

14. As stated earlier the 1st Defendant did not enter appearance or file response. He did not file any submissions.

The 2nd Defendant's Submissions.

15. They are date 5th April 2024.

It is submitted that the Plaintiff has failed to establish a prima facie case as set out in the case of Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others (2003) eKLR.

That there exists a competing certificate of title of the same suit property in the name of the 1st Defendant.

16. Further that the 2nd Defendant conducted due diligence on the suit property before advancing the 1st Defendant credit facilities on the basis of the said security.

It has put forward the case of Geoffrey Wahome Muotia Vs. National Bank of Kenya Limited (2020) eKLR.

17. It is further submitted that the Plaintiff has failed to demonstrate that he would suffer irreparable harm if the orders sought are not granted. Reliance is placed on the cases of Ooko Vs. Barclays Bank of Kenya Ltd (2002) eKLR ; William Arusei Vs. Shem Lagat (2018) eKLR ; Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR.

18. It is submitted that the 2nd Defendant is capable of paying damages that are recoverable in law, as an adequate remedy, however strong the Plaintiff's claim may appear. It has put forward the case of Nguruman Ltd (Supra).

Analysis and Determination.

19. I have considered the Notice of Motion, the Affidavit in support and the annexures. I have also considered the response thereto, the rival submissions and the authorities cited.

The issues for determination are;

- i. Whether the Plaintiff/Applicant's application meets the threshold for grant of temporary injunction.



- ii. Who should bear costs of this Application?
20. The Court of Appeal in *Nguruman Ltd Vs. Jan Bonde Nielsen & 2 Others* (2014) eKLR set out the principles which courts must consider when considering whether to grant interim injunction; it stated thus;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted...”

21. The Plaintiff has demonstrated that he is the legal and rightful owner of Ngong/Ngong/16744 which was fraudulently transferred to the 1st Defendant. He has never transferred the same to the 1st Defendant or anyone else. He is in control and possession of the suit property.

I find that he has established a prima facie case with a probability of success at the trial.

22. The 2nd Defendant in paragraph 12 of the Submissions, submit that the 1st Defendant ought to be given the benefit of doubt as he has a title deed.

I find this submission to be misconceived. The 1st Defendant who was duly served with the pleadings and summons to enter appearance neglected to enter appearance and/or file any response. He ought to have appeared in this court to defend his title. In the absence of any response from the 1st Defendant his title will be treated to have been acquired fraudulently.

23. There is no doubt that the 2nd Defendant is in the process of exercising its Statutory Power of Sale. The Plaintiff is likely to suffer irreparably as he may lose his home and the rental properties. I find that he has demonstrated that he will suffer irreparable injury which he cannot be adequately compensated by an award of damages.



24. It is the 2nd Defendant who ought to have done due diligence before advancing the 1st Defendant the loan facility, on the security of the title.
25. I find that the balance of convenience tilts in favour of the Plaintiff who is the legal and rightful owner of the suit property.
26. I find merit in this Application and the same is allowed in the following terms;
 - a. That a temporary injunction is hereby issued restraining the 2nd & 3rd Defendants/ Respondents either by themselves, nominated agents, servants and/or any one claiming under them from advertising selling and/or in any manner dealing with the suit property known as Ngong/Ngong/16744 vide a public auction or private treaty in exercise of the 2nd Defendants/ Respondents Statutory Power of Sale pending the hearing and determination of this suit.
 - b. That a temporary injunction is hereby issued restraining the 2nd and 3rd Defendants/ Respondents , their agents, employees or persons claiming on their behalf from transferring, leasing, creating a further charge or disposing of the suit property known as Ngong/Ngong/16744 pending the hearing and determination of this suit.
 - c. That costs of the Application do abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF OCTOBER 2024.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Maina for the Plaintiff.

N/A for the 1st Defendant.

N/A for the 2nd, 3rd Defendants.

Court Assistant – Mutisya.

Ruling ELC E001 OF 2024 Page 3 of 3

