



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.18 OF 2014

CAROLINE AWUOR ODHUNO.....PLAINTIFF

VERSUS

1. HOUSING FINANCE CORPORATION OF KENYA LIMITE.....DEFENDANT

2. QUERNSEY ISLAND INVESTMENT LTD.....DEFENDANT

RULING

1. The Plaintiff has by the Notice of Motion dated 12.2.2014 sought from this court orders of temporary injunction directed at the defendants and restraining them either by themselves, servants, agents assigns and any person claiming under them from advertising for sale, selling by public auction, disposing off or in any other manner interfering with the suit property known as sub division No.13379. (original number 334/5), section 1 Mainland North Mombasa also known as BAMBURI – AWANI 1 together with the buildings and/or improvements thereon and specifically house No.6815 pending the hearings and determination of the suit.

2. The facts upon which the application is grounded are that during the month of January 2014 the plaintiff as a customer of the 1st defendant was introduced and persuaded by one Rhoda Mwambonui a branch Manager at the 1st defendants Moi Avenue branch to invest her money, then deposited with the defendant, in purchasing the suit property.

3. As a result of that introduction, the plaintiff avers that, she was introduced to the Managing Director of the 2nd defendant one Adrian Sharrot with whom an agreement was struck resulting in a sale agreement dated 19.2.2011 evidencing the sale of two units identifiable on the site plan as No.15 & 6. The price disclosed in the said agreement is kshs.5,450,000/= with a deposit of kshs.1,300,000/=.

4. It appears from annexure CAO 2 that there was a transfer of Kshs.1,300,000 from the account of the plaintiff to the account of the 2nd defendant on 21.2.2011. *Ipsa facto* therefore the agreement between the two parties appear to have been sealed through the 1st defendant and with its knowledge if the annexure “CPO”3 is anything to go by.

5. To the application the 1st defendant filed a replying affidavit by PATRICK MWANGI WAINAINA in which the chronology in event leading to the dealings between the 1st and 2nd defendant is detailed. That was delved into to prove that there exits no privity of contract between the plaintiff and the defendant in the contract of charge and therefore the plaintiff has no pedestal to stand upon in seeking to benefit from that charge.

6. Of interest is the response to the plaintiffs assertion that the 1st defendant knew about her dealing with the 2nd defendant and that it was the 1st defendants branch manager who moved the idea of the plaintiff buying a portion of the charged land and that the deposit paid to the 2nd defendant was infact sitting with the 1st defendant and was transferred into an account held by the 2nd defendant with the 1st defendant. The replying affidavit denies knowledge of the transaction, payment of the deposit and asserts that the knowledge of the transaction by its branch manager was personal and not corporate to the 1st defendant. In summary reliance was put on the advice of counsel that the plaintiff is not entitled to an injunction on the principle of privity of contract.

7. Additionally the 1st defendant filed a notice of preliminary objection premised on the fact that she has no established proprietary interests on the land and that she cannot sustain a suit nor obtain an order for injunction for lack of *locus standi* as she was not a party to the legal charge.

8. It is that preliminary objection the parties chose to argue separately on whether or not this matter ought not be rested at this juncture without hearing the application and the suit.

9. When a point ought to be treated as a preliminary point raising pure point of law and meritting determination as such is now a well beaten path. It must be succinct and not blurred by factual details and capable of disposing the action. I say that a preliminary objection ought to be self evident and requiring no explanation or strenuous arguments like has been witnessed here.

10. Although argued as three points, to me the objection is straight forward on what it says and asks: *Can a non party to a transaction seek to benefit out of it by way of an injunction?*

What is not clear to me from the pleadings and the submissions is whether the plaintiff is seeking to derive a benefit of cause of action from the contract of charge between the defendants or the suit is grounded on the contract of sale between the plaintiff and 2nd defendant.

11. In my view it is doubtful that one party who has spent kshs.1,300,000 to buy a property valued at 5,450,000 can be said to have no proprietary interests on the propriety just because he has not been registered or shown to be registered as such proprietor. To maintain such would be to defeat that remedy in the law of contract known us specific performance or indeed damage for breach of contract. Infact my understanding is that the equitable remedy of injunction is not legislated by the land statutes but are largely court enacted law as coded in Order 40 Civil Procedure Rules.

Rules 1 & 2 upon which the application in this matter as grounded provides as follows:-

Order 40 Rules 1 & 2:

Where in any suit it is proved by affidavit or otherwise;

(1) (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by an order grant a temporary injunction to restrain such acts.....”

12. It would equally be inimical to my understanding of justice to hold that such a party has no *locust standi* to pursue his/her right purely because after his/her dealing with his/her vendor the same vendor alienates the subject property to a third party. Worse still it would defeat the essence of being heard fairly if this suit would be determined on such contested points of law.

13. May be the salvation would be different if the plaintiff totally excluded the 2nd defendant from the proceedings. She has not done that and, it should come to pass that the 2nd defendant ought to attend court and tell the court what knowledge,

if at all, was availed to the 1st defendant, about the plaintiff interests.

14. In my view the objection raised in this matter ought to have been argued as an opposition to the application itself and not in limine. The words of Sir Charles **Newbold in Mukisa Biscuits -vs- Westend Distributor Ltd.[1969]E.A.697** which I think informed the decision of the Rules Committee in seeking to include preliminary objection as a way of opposing an application, are to me well meaning and guiding. The judge said:-

“The improper raising of point by preliminary objection does nothing but unnecessarily increase costs and on occasions, confuse the issues this improper practice should stop.”

15. Those words are well meaning to me in that had the points been raised as resistance/opposition to the application, as they go to the merits, we would by this ruling have left the application behind us and pave way to hear the suit in its substance or lack of it. We have spent lot of time unnecessarily. It is however a big lesson at case management by this court.

16. As the objection go to the merits or alleged demerits of the plaintiff suit and applicant and having said it should have been collapsed and argued in the application, the preliminary objection is dismissed with costs to the Respondent/plaintiff and it is ordered that the plaintiffs application dated 12.2.2014 at the fixed for hearing at the earliest opportunity.

Dated, signed and delivered at Mombasa this 15th day of April 2016.

In the presence of:-

Mr.Tindika for Plaintiff/Applicant

Mr.Kongere for Defendant/Respondent.

P.J.O.OTIENO

JUDGE