



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 135 OF 2013

VALERIA TANZI.....PLAINTIFF/APPLICANT

=VERSUS=

1. GIULIO GIRO

2. FATMA BARALLION

2. FIDELITY COMMERCIAL BANK.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. What is before me is the Plaintiff's Application dated 7th August, 2013 filed pursuant to the provisions of Articles 40, 48, 159 and 160 of the Constitution, Order 40 of the Civil Procedure Rules and Section 91 and 96 of the Land Act.

(a) That this Honourable Court be pleased to issue an order of temporary injunction against the 3rd Defendant, its agent, representative, assignee, employees, servants or any person acting through them from selling, attempting to sell, interfering, trespassing, dealing with and meddling in the property known as PLOT NO. 178 KIJIWETANGA, pending the hearing and determination of the suit herein.

(b) That in the alternative to the prayer above, the Court do order and direct the 1st and 2nd Defendants/Respondents herein to deposit in court the sum of Kshs.5,000,000 (Five Million) as security for the loan they took from the 3rd defendant pending the hearing and determination of the instant suit.

(c) THAT, the Honourable court do direct that 1st and 2nd Defendants do sign the transfer documents in respect of PLOT NO.178 KIJIWETANGA to the Plaintiff, pending the hearing and determination of the instant suit and or the title to the said property be deposited in court, under lock and key.

(d) THAT the costs of this application be provided for.

2. The Application is premised on the grounds that the Plaintiff bought the suit property from the 1st

Defendant on 5th June 2010; that unknown to the Plaintiff, the 1st and 2nd Defendants obtained a loan from the 3rd Defendant and that the 3rd Defendant has issued a 45 day notice of their intention to sale the property.

The Plaintiff's/Applicant's case:

3. According to the Affidavit of the Plaintiff, he bought the suit property by way of an agreement dated 5th June 2010 from the 1st Defendant; that the agreed purchase price was Kshs.12,000,000 and he has so far paid to the 1st Defendant Kshs.7,000,000.
4. The Plaintiff further deponed that since the signing of the agreement of sale, the 1st Defendant has carried himself as the owner of the suit property; that he has since learnt that the land belongs to the Defendant's former wife, the 2nd Defendant and that in March 2012, the 2nd Defendant entered into another contract with the Plaintiff in which she acknowledged having received 60,000 Euros from the Plaintiff.
5. Unknown to the Plaintiff, it was deponed, the 1st and 2nd Defendants obtained a loan from the 3rd Defendant. The Plaintiff only came to know about the borrowing when he was served with the notice of sale on 19th July 2013; that he has no other home and business other than the suit property and that the scheduled auction of the suit property shall cause him considerable harm and damage that is irreparable.
6. The Plaintiff finally deponed that the obtaining of the loan by the 1st and 2nd Defendants from the 3rd Defendant was fraudulent and malicious and was meant to defraud him of his land.

1st Defendant's case

7. The 1st Defendant filed his Replying Affidavit on 12th September 2013 and stated on oath that the Applicant entered into a contract of sale with the 2nd Defendant who is the registered owner of the suit property for the sale of the property at Kshs.12,000,000; that the Plaintiff paid 60,000 Euros upon signing the agreement and that the Plaintiff agreed to give the 1st and 2nd Defendants postdated cheques for the balance of the purchase price.
8. It is the 1st Defendant's position is that the Plaintiff was aware of the loan which was due to the 3rd Defendant and that part of the purchase price was meant to defray the said loan; that the Plaintiff refused to pay the balance of the purchase price culminating in the threat to sale suit property by way of public auction by the 3rd Defendant by way of public auction.
9. The 2nd defendant finally deponed that the Plaintiff should deposit the balance of 60,000 Euros with the 3rd Defendant to enable the 3rd Defendant release the title document to the 2nd Defendant.

3rd Defendant's case

10. The 3rd Defendant's Supervisor of Finance deponed that the 3rd Defendant availed to the 1st Defendant a loan facility subject to its usual terms and conditions; that the 2nd Defendant consented vide a letter dated 23rd November 2011 to pledge her property as security and that the borrower has since defaulted in repaying the loan.

Plaintiff's Supplementary Affidavit

11. In response to the Defendants' responses, the Plaintiff deponed in a supplementary affidavit that the original contract of sale between him and the 1st Defendant was entered into on 5th June, 2010 although he took possession of the land on 28th December 2009; that the loan was obtained in January 2012 and that he was to pay the balance of the purchase price by installments up to and including March 2014.
12. The parties filed their respective written submissions which I have considered.

Analysis and findings:

13. The law relating to the grant of injunctive orders is well settled. The Plaintiff has to establish that he has a prima facie case with chances of success and that he will suffer irreparable loss that cannot be compensated by way of damages and if the court is in doubt, then it should decide the Application on a balance of probabilities.
14. The Plaintiff has annexed on his Supporting Affidavit two agreements of sale in respect to the suit property. The first agreement is between himself and the 1st Defendant. In the said agreement, the 1st Defendant agreed to sell to the Plaintiff the suit property for Kshs.12,000,000. The Plaintiff was to pay an initial amount of 20,000 Euros and 1,000 Euros per month until payment in full. The agreement is dated 5th June 2010. There is no evidence that the signatures of the Plaintiff and the 1st Defendant were witnessed.
15. The second agreement for sale is undated. It was entered into between the Plaintiff and the 2nd Defendant for the sale of the suit property.
16. The said agreement shows that the Plaintiff had already paid to the vendor 60,000 Euros. The Plaintiff was to settle the balance of the purchase price by twenty four equal monthly installments of 2,500 Euros commencing 15th July 2012.
17. As I have indicated above, the Sale Agreement between the Plaintiff and the 2nd Defendant is not dated. The signatures of the vendor and the purchaser have also not been witnessed, at least from the copy which was annexed on the Supporting Affidavit, as required by section 3(3) of the Law of Contract Act. Section 3(3) of the Act provides that a suit shall not be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and is signed and the signature of each party signing has been attested by a witness.
18. In the absence of the attestation of the vendor's and the purchaser's signatures, the agreement that was entered into between the Plaintiff and the 1st Defendant in respect to the suit land is of no evidential value considering that the 1st Defendant has never owned the suit property. He could not have entered into an agreement to sell the suit property without the consent of the registered owner, the 2nd Defendant.
19. The 3rd Defendant charged the suit property on the basis of a search it conducted. The search showed that the property was registered in the name of the 2nd Defendant who consented to its being charged in favour of the 3rd Defendant. Consequently, the Plaintiff has not shown, prima facie, the basis on which the 3rd Defendant should be stopped from exercising its statutory power of sale.
20. For the reasons that I have given above, I find that the Plaintiff has not established a prima facie case with chances of success. The Plaintiff has deponed that he has paid to the 1st and 2nd Defendants more than Kshs.7,000,000 which amount has been acknowledged by the 1st and 2nd Defendants. The damages that have been suffered by the Plaintiff can therefore be computed and recovered. There is no evidence that if the suit property is sold by the 3rd Defendant, the Plaintiff is likely to suffer irreparable damage that cannot be compensated by damages.
21. In the circumstance, I dismiss the Plaintiff's Application dated 7th August 2013 with costs to the 3rd Defendant.

Dated and Delivered in Malindi this **24th** Day of **February**, 2014

O. A. Angote

Judge