



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 80 OF 2013

JARED SAGINI KEEGWEPLAINTIFF/APPLICANT

VERSUS

WALTER ONCHWARI.....1ST DEFENDANT/RESPONDENT

EVALYNE ONCHWARI.....2ND DEFENDANT/RESPONDENT

NATIONAL SOCIAL SECURITY FUND..3RD DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 14th January 2013 in which the Plaintiff/Applicant seeks for orders restraining the 1st and 2nd Defendants from disposing off all that property known as Land Reference No. 189/5 situate at Nyayo Estate, Embakasi (hereinafter referred to as the “Suit Property”) and that the 3rd Defendant be restrained from releasing the title documents of the Suit Property to the 1st and 2nd Defendants pending the hearing and determination of this application and suit. The Plaintiff/Applicant also seeks for orders that the 1st and 2nd Defendant be ordered to pay rental income accruing from the Suit Property into court pending the hearing and determination of this suit.

The Application is supported by the grounds appearing on the face of it together with the Supporting Affidavit of Jared Sagini Keengwe sworn on 14th January 2014 in which he averred that on 30th November 2010, the 1st Defendant as the vendor and he as the purchaser entered into an agreement for the purchase of the Suit Property for a total purchase price of Kshs. 4 million. He further averred that the title documents of the Suit Property are currently held by the 3rd Defendant. He further stated that he paid the total purchase price of Kshs. 4 million to the 1st Defendant as follows: Kshs. 200,000/- by cash and Kshs. 3,800,000/- by bank transfer. He further indicated that he notified the 3rd Defendant of his interest in the Suit Property through his advocate’s letter dated 7th January 2013. He further stated that it was an express term of the agreement that the 1st Defendant would hand over possession of the Suit Property to the Plaintiff with effect from 1st December 2010 but that this was never done as there was a subsisting tenancy which he was to take over. He however stated that he opened a bank account into which rental proceeds from the Suit Property were to be remitted and notified the 1st and 2nd Defendants accordingly. He then stated that despite this arrangement, the Defendants failed to effect the transfer of the Suit Property into his name and continue to receive rent out of the Suit Property.

The Application is contested. The 1st Defendant, Walter Onchwari, filed his Replying Affidavit sworn on 30th January 2013 in which he stated that the Plaintiff is his brother-in-law married to his younger sister Grace. He further averred that during the year 2010, he had a project in Westlands and that he was short of money. He further stated that he decided to ask the Plaintiff to lend him some money by way of a friendly loan to enable them to complete their project. He further stated that the Plaintiff readily agreed to extend the money to both he and his wife and that purely for comfort, they agreed to the Plaintiff's suggestion that they execute an agreement drawn by him to show that they had sold the Suit Property to him, then worth Kshs. 9 million. He further stated that he is ready and willing to refund the Plaintiff the sums loaned to him and his wife by reasonable installments.

In response thereto, the 1st Defendant filed his Further Affidavit sworn on 6th March 2013 in which he admitted the relationship between him and the 1st Defendant. He further stated that the agreement for sale executed by the 1st Defendant on 30th November 2010 was an agreement for the sale of the Suit Property and not for comfort for lending as alleged by the 1st Defendant. He further averred that the sum of Kshs. 4 million was the purchase price of the Suit Property and not a loan advance as alleged by the 1st Defendant.

The Plaintiff/Applicant filed his written submissions dated 17th May 2013 and the 1st and 2nd Defendants also filed their written submissions dated 2nd October 2013, both of which have been read and taken into account in this ruling.

In deciding whether 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/Applicant 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 determining whether the Plaintiff/Applicant has established a prima facie case, I must consider whether he has shown that he has a right to specific performance of the agreement for sale dated 30th November 2010 between him and the 1st Defendant which attests to his having paid Kshs. 4 million to the 1st Defendant being the purchase price of the Suit Property. Hence the issue to determine on a prima facie basis is whether the full performance of a party to a sale agreement for land entitles such party to specific performance of the agreement. Being an equitable remedy, specific performance would ordinarily be enunciated in case law. My study of the relevant case law has not unearthed any specific precedent which sets out this entitlement. Accordingly, I am forced to find that no such entitlement exists.

Further, there was strong opposition to the Plaintiff/Applicant being allowed to rely on the agreement for sale as the same is not stamped with Stamp Duty as is required in section 19 of the Stamp Duty Act. There is no question that that legal provision does actually exist and must be applied in this case. It is true that the Plaintiff/Applicant is seeking to rely on an agreement for sale which has not been stamped. This

cannot be allowed. It is true that the Plaintiff/Applicant shall not be able to produce that agreement for sale in evidence before stamping it.

Arising from the foregoing, my finding is that the Plaintiff/Applicant has not shown that he has a *prima facie* case with chances of success at the main trial. Having made this finding, I see no need to further interrogate whether the other factors set out in the *Giella* Case cited above have been met. Accordingly, I hereby dismiss this application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 14th DAY OF FEBRUARY, 2014

MARY M. GITUMBI

JUDGE