



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1440 OF 2013

AMOS WANGEERA NJOROGE.....1ST PLAINTIFF
PERMINUS MUKURIA NJOROGE.....2ND PLAINTIFF
PRISCILAR MWIHAKI NJOROGE.....3RD PLAINTIFF
MONICAH WANJIRU.....4TH PLAINTIFF
JAMES KIRIKA NJOROGE.....5TH PLAINTIFF
EDDAH WAMBUI.....6TH PLAINTIFF
ALICE WAIRIMU NJOROGE.....7TH PLAINTIFF
NANCY NJERI NJOROGE.....8TH PLAINTIFF
MINNE NYAGUTHAIYA NJOROGE..... 9TH PLAINTIFF
CATHERINE WANJIKU NJOROGE 10TH PLAINTIFF

VERSUS

SERAH WAMUYU MURIUKI..... 1ST DEFENDANT
ALICE NYAMBURA MURIUKI2ND DEFENDANT

RULING

The plaintiffs by an application dated 27th November 2013 seek an order of temporary injunction against the Defendants restraining the Defendants by themselves or through their agents, servants or workmen from evicting, attempting to evict, levying distress, attaching, dispossessing or in any manner whatsoever dealing with or effecting transactions inconstant with the plaintiffs rights of entitlement or to their prejudice in all that parcel of land known as **KABETE/NYATHUNA/1888** pending the hearing and determination of this suit.

The plaintiffs base their application on the following grounds set out on the face of the application:-

- a. That the Defendants have without lawful justification breached the agreement for resale of the property to the prejudice of the plaintiffs.
- b. That the Defendants have now started issuing threats to the plaintiffs of intention to levy distress as against the plaintiffs who maintain the premises were unlawfully sold by the charge and they dropped their suit against the chargee and the buyer (Defendant's husband) in consideration for the repurchase of the property.
- c. That the Defendants have equally intimated that they intend to dispose off the property to another third party which eventuality would occasion irreparable loss and damage to the plaintiffs who are entitled to the same.

The plaintiffs application is additionally supported on the annexed affidavit of **AMOS WANGEERA NJOROGI** sworn on 27th November 2013. The Defendants oppose the application and the 1st Defendant **Serah Wamuyu Muriuki** has sworn a replying affidavit dated 9th December 2013 in opposition to the plaintiffs application for injunction.

The plaintiffs state that the land the subject matter of the suit was family land that was transferred by their late father to the 1st plaintiff to hold in trust for the family but the plaintiffs subsequently took a loan facility from Barclays Bank of Kenya on the security of the suit property and when they were unable to service the loan the Bank in exercise of its statutory power of sale had the property auctioned and the same was purchased by one **Crispus Muriuki Nderitu** (deceased) who was husband of the Defendants.

The plaintiffs aver that as they considered the sale to have been irregularly carried out they filed **HCCC NO. 389 of 2008** challenging the sale and obtained an injunction restraining the Bank from dealing with the property in any manner that was detrimental to their interests as per the court order annexed to the supporting affidavit and marked “**AWN1**”. The plaintiffs aver that as the earlier case was ongoing the said **Crispus Muriuki** who had purchased the property at the auction approached them and they agreed they would repurchase the property by refunding him the cost he had paid to Barclays Bank of Kenya and additionally pay him a further Kshs.10,000,000/- in consideration of dropping the case. The plaintiffs aver that the said **Crispus Muriuki** died as the negotiations were ongoing and before the transaction had been completed and when the defendants as the administrators came in they acknowledged and confirmed the agreement for the resale and they point to the Defendant's advocates letters of 18th July 2012 and 21st January 2013 annexed to the supporting affidavit and marked “**AWN2**” as proof of this position.

The plaintiffs aver that the Defendants have since reneged on the agreements for the resale and now want to sell the suit property to a third party which would lead to the eviction of the plaintiffs who have lived and occupied the suit property since their youth as their home and they therefore would suffer irreparable loss and harm if an interlocutory injunction is not granted.

The Defendants through the replying affidavit sworn by **Serah Wamuyu Muriuki** aver that the suit property **Kabete/Nyathuna/1888** is registered in the name of their late husband **Crispus Muriuki Nderitu** he having lawfully bought the property through a public auction.

The Defendants deny that there exists any agreement between the plaintiffs and the Defendants that the Defendants have breached and state that it is the plaintiffs who informed the Defendants that they had sought to repurchase the suit property back from their husband but no formal agreement had been entered into before the death of **Crispus Muriuki Nderitu** (the defendants husband). The Defendants aver that the plaintiffs have misled the court that there are orders of injunction existing in regard to **HCCC NO. 389 of 2010** when there are no such orders. The Defendants aver that the **Hon. Justice E.K. Ogola** in a ruling delivered in **HCCC NO. 389 of 2010** on 19th day of February 2012 disallowed an application on the part of the plaintiffs seeking to enjoin the said **Crispus Muriuki Nderitu** (deceased) as a defendant in that suit. The judge in the ruling and in considering the three principles a court needs to consider in granting an injunctive remedy as enunciated in **GIELLA –VS- CASSMAN BROWN**.

- Whether there is a prima facie case capable of succeeding,
- whether damages would be an adequate remedy, and
- if in doubt in whose favour the balance of convenience tilts.

The court observed thus:-

“I have looked at all these three principles and they do not favour the Applicants. That the applicants case will triumph against the 1st, 2nd and 3rd Defendants is in my view doubtful. However, even should they succeed their loss is capable of being compensated for by damages. The suit property is already sold and transferred to a third party who is an innocent purchaser for value and who purchased the same at an auction at the fall of the hammer. There is nowhere in the pleadings that it is pleaded the sale was irregular or unlawful. Infact the plaint simply states that the 1st Defendant sold the property at an auction when negotiations between the 1st Defendant and the plaintiff for a sale by private treaty.....”

The Judge in regard to the application to enjoin **Crispus Muriuki Nderitu** as a 3rd Defendant in the suit stated thus:-

“Lastly, and due to the foregoing paragraphs, I decline to allow the joining of Crispus Muriuki Nderitu as a 3rd Defendant. He has no business with this suit and he is at liberty to enjoy the property which he has lawfully acquired”.

The Judge further ruled that the applicants were at liberty to pursue any claim against the 1st Defendant and allowed the applicants leave to amend the plaint to suit the pursuit of any further interest against the 1st Defendant. The Judge allowed the interested parties to be enjoined in the suit as plaintiffs. The said interested parties are the plaintiffs in the present suit.

The plaintiffs in the present suit plead a contract/agreement with the late **Crispus Muriuki Nderitu** to repurchase the suit property. That contract/agreement was not reduced into writing and the plaintiffs submit the agreement/contract is evidenced in the various correspondences exchanged and points to the letters dated 17th May 2012, 18th July 2012 and 21st January 2013. The Defendants deny that there was indeed any such agreement to resell the land and contend that negotiations broke down and no agreement was reached by the parties capable of being performed.

Indeed one is left to speculate what the terms of any such agreement were or could have been, if indeed there was such an agreement. It is for reasons such as in the present case that contracts/agreements relating to dispositions in land are required to be in writing and the signatures of the parties to be bound by such agreement witnessed.

Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya requires such contracts to be in writing:-

Section 3(3) provides as follows:-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing

(ii) is signed by all the parties thereto, and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

The contract alluded to by the plaintiffs would constitute a contract for the disposition of an interest in land and in my view would have been required to comply with the above provisions of the Law of Contract Act and to the extent there was no compliance it is doubtful whether the plaintiffs can found an action on such an alleged contract.

The contention that the deceased persuaded the plaintiffs to drop their earlier suit on the condition that he would re sell to them the suit property is not borne out by the facts as it is clear from **Hon. Justice E.K. Ogola's** ruling that the court declined to enjoin the deceased to the proceedings on the basis that the court did not consider that he would be a necessary party to the proceedings having held that the deceased was an innocent purchaser for valuable consideration. The deceased therefore never became a party in the suit.

Where a property is sold by public auction pursuant to exercise of power of sale by a chargee the purchaser at the auction acquires a good and lawful title to the property such that even if the sale is consequently found to have been irregularly carried out, provided the purchaser at the auction was not party to any fraud and/irregularities he would be entitled to have the property lawfully vested in his name. The chargee however would be in cases where the realization is shown to have been irregularly or unlawfully executed be liable in damages to the chargor.

The Defendants in the present suit are not alleged to have acquired the suit property fraudulently and the court has already ruled that the deceased was an innocent purchaser for valuable consideration. The deceased by virtue of **section 25(1) of the Land Registration Act NO. 3 of 2012** by virtue of having been registered proprietor of the suit property has acquired the rights of a proprietor which are indefeasible save as is provided under section 26 (1)- where the title can be challenged on the following grounds:-

(a) On the ground of fraud or misrepresentation to which he is proved to be a party, or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The deceased is the absolute and indefeasible owner of the suit property and his title can only be challenged on the above two limited grounds set out under section 26 (1) of the Land Registration Act. The plaintiffs do not claim to challenge the title on any of the two grounds and as I have expressed the view that the contract/agreement that the plaintiff's rely on did not comply with the provisions of section 3(3) of the Law of Contract Act and the further holding by **Hon. Justice Ogola** in the earlier suit that the deceased was an innocent purchaser I am not persuaded that the plaintiffs have demonstrated or established that they have a prima facie case to warrant the grant of an interlocutory injunction.

Just like **Hon. Justice Ogola** in the earlier suit I hold the view that even if the plaintiffs were to succeed in the suit, damages would be an adequate remedy. I would further observe that particularly where a parcel of land is offered as collateral to the Bank such property cannot be said to be so peculiar such that damages would not be sufficient remedy. Once property is offered as security for a loan to a bank, such property becomes a commercial property which can be offered in the market for sale in case of default in the repayment of the loan and a chargor would be hardpressed to justify that damages would not be adequate remedy to compensate the chargor in the event of what would be considered and/or found to be an irregular and/or unlawful sale by way realization of the security by the chargee. In such cases an award of damages would be an adequate remedy.

The Defendants are the registered owners of the property and in my view the balance of convenience would favour them. As the registered owners they are entitled to enjoy the rights, benefits and interest of ownership as provided under the law.

In the premises and for the above reasons I find the application by way of Notice of Motion by the plaintiffs dated 27th November 2013 to lack merit and the same is ordered dismissed with costs to the Defendants.

The interim order of injunction granted on 27th November 2013 is hereby ordered vacated and set aside.

Orders accordingly.

Ruling dated signed and delivered at Nairobi this...27thday of...March.....2014.

J. M. MUTUNGI

JUDGE

In present of:

.....For the Plaintiffs

.....For the Defendants