



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 115 of 2012

STEPHEN NJOROGE GICHUHA.....PLAINTIFF

VERSUS

FRED NYAGAKA ONGARORA..... DEFENDANT

AND

FRED NYAGAKA ONGARORA.....PLAINTIFF

VERSUS

STEPHEN NJOROGE GICHUHA.....1ST DEFENDANT

CHARLES AYAKO NYACHA.....2ND DEFENDANT

RULING

By a plaint dated 3rd April, 2012, the Plaintiff, Stephen Njoroge Gichuha, instituted this suit against the defendant, Fred Nyagaka Ongarora seeking, among other orders, a permanent injunction to restrain the defendant from entering into or in any way interfering with his possession and use of the parcel of land known as Nakuru Municipality Block 18/105 (“the suit property”).

Simultaneously with the plaint the plaintiff brought the Chamber Summons dated 3rd April, 2012 seeking, among other orders, a temporary injunction to restrain the defendant by himself, his servants and/or agents from entering into, fencing or in any way interfering with the suit property pending the hearing and determination of the suit.

Upon being served with the summons to enter appearance, the defendant entered appearance and filed a statement of defence and Counter-claim seeking, among other reliefs, a declaration to the effect that the 2nd defendant holds the suit property in trust for him; an order directing the 2nd defendant to transfer the suit property to him; and a permanent injunction restraining the defendants (in the Counter-claim) either acting by themselves, their agents, servants, employees, or any other manner howsoever from entering, wasting, trespassing onto or interfering with his peaceful and quiet occupation and possession of the suit property.

Alongside the defence and counter-claim the defendant brought the notice of motion dated 28th May, 2012 seeking, among other orders, a temporary injunction to restrain the defendants (in the counter-claim) from entering, wasting, trespassing onto, or interfering with his peaceful and quiet occupation and

possession of the suit property pending the hearing and determination of the suit.

Upon hearing and considering the defendant's application, in the absence of the defendants, the court issued interim orders in favour of the defendant pending the hearing and determination of the application.

Upon being served with the defendant's pleadings (defence and counter-claim plus notice of motion) the plaintiff filed a reply to defence and defence to counter-claim. He also brought the notice of motion dated 11th June, 2012 seeking, among other orders, the defence and counter-claim filed by the defendant be struck out; that the interim orders issued in favour of the defendant be vacated; and summary judgment be entered in favour of the plaintiff as prayed for in the plaint.

When the matter came up for hearing on 13th June, 2012 the parties agreed that the three pending applications be heard together. They also agreed to file and highlight written submissions in respect of their respective applications.

From the pleadings filed, it is common ground that the plaintiff and the defendant entered into an oral agreement for sale of the suit property. Pursuant to that agreement the defendant paid the plaintiff some money, in part payment of the purchase price and took possession of the suit property. It is also common ground that at the time of the alleged agreement for sale the plaintiff was just a beneficial owner of the suit property, the registered owner thereof being the 2nd defendant.

The defendant contends that it was agreed between the plaintiff and him that after he finished paying for the suit property a written agreement would be executed between him and the plaintiff and that the suit property would be directly transferred from the 2nd defendant to him.

It is the defendant's case that he took possession of the suit property with full knowledge and blessing of the plaintiff; that after he took possession of the suit property he began developing it by fencing and planting trees there on; and that after he had made substantial payment of the purchase price, the plaintiff started renegeing on his promise and purported to return the purchase price which he refused.

While admitting that there was an oral agreement for the sale of the suit property, the plaintiff argues that the said oral agreement can neither constitute a cause of action against him nor afford the defendant a defence to his suit. He, therefore, urges this court to vacate the orders issued in favour of the defendant, strike out the defence and counter-claim filed by the defendant and enter summary judgment in his favour.

Counsels for the respective parties filed well researched submissions which I have read and considered.

The issues for determination are:-

1. Whether the interim orders issues in favour of the defendant should be vacated or confirmed?
2. Whether the defence and counter-claim filed by the defendant should be struck out?
3. Whether summary judgment should be entered in favour of the plaintiff and against the defendant?

Starting with the second issue, Order 15(1) of the Civil Procedure Rules provides:-

“At any stage of the proceedings a court may order to be struck out or amended any pleading on the ground that-

(a) it discloses no reasonable cause of action; or

(b) it is scandalous, frivolous, or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Rule 2 thereof provides-

“No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.”

In the application dated 11th June, 2011 the applicant claims that the defence filed by the defendant does not raise a single triable issue (which I take to mean “the defence discloses no reasonable cause of defence). To succeed on this ground the applicant need not tender any evidence. All what he needs to do is to state concisely the grounds on which the allegation is made, in accordance with the provisions of Order 15(2). Also see **DT Dobie & Company (Kenya) Ltd V. Muchina** (1982) KLR 1 in which the Court of Appeal held:-

“The application was incompetent as it sought for the suit to be struck out on the ground that it 'disclosed no cause of action', whereas the rules provided for striking out on the ground that it discloses 'no reasonable cause of action'. The application was further incompetent for failure to comply with the requirements of sub-rule (2) by not stating concisely the grounds upon which it is made.”

The application herein is premised on the following grounds:-

1. That the action is for recovery and ownership of the suit property;
2. That the agreement between the parties was oral ;
3. That under the Law of Contract Act, an action cannot be brought for transfer of land unless the same is reduced in writing and executed by the parties to that agreement;
4. That under the Registration of Documents Act, documents for disposition of an interest in land must be registered for such transaction to be effective;
5. That under the Advocates Act, conveyancing of land ought to be prepared by a duly qualified person under the Act and the name of the person preparing the document must endorse his name in that document; and
6. That in view of all the above legislative provisions which were not complied with the counter-claim for possession and right to the land does not lie and the right action is an action for money had and received.

The parties having admitted that the agreement entered into was oral, the only ground which is material to the application is ground 3 which is to the effect that under the Law of Contract Act, an action cannot be brought for transfer of land unless the same is reduced in writing and executed by the parties to that agreement.

Section 3 (3) of the Law of Contract Act provides:

“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 to by a witness who was present when the contract was signed by such party.

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting trust, implied or constructive trust.

(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting trust, implied or constructive trust.”

Under the proviso to Section 3 (3) of the Law of the Contract Act (supra), it is clear that a claim for deposition of land will not automatically fail on account of it been based on an oral contract if the claimant can prove existence of a trust relationship.

In the dispute that is the subject of this suit the defendant claims that the 2nd defendant holds the suit property in trust for him.

The defendant's claim is based on the fact that the beneficial owner thereof (the plaintiff) has already received the purchase price and put him in possession; and that all what remains is execution of an agreement and transfer of the property to him.

The question which arises is whether given the above set of circumstances, and without going to the merits of the case, the defendants defence and counter-claim has no chance of success.

In DT Dobie & Company (Kenya) Ltd V. Muchina (supra) the Court of Appeal held:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

From the affidavit evidence presented before this court, it is clear that the plaintiff voluntarily offered to sell the suit property to the defendant; that the defendant accepted the offer and began paying for the property; that pursuant to that agreement the defendant was put in possession. Before the defendant could make the final payment the plaintiff resiled from his promise and sought to refund the money received and had.

In one of the authorities presented by the plaintiff, Bannister V. Bannister (1984) All E.R 133 the Court of Appeal held that:-

“It was fraudulent conduct on the plaintiff's part to insist on the absolute nature of the conveyance so as to defeat the defendant's beneficial interests. Accordingly, he was a constructive trustee of the property for the defendant on the trust of the oral agreement.”

The court further held:-

“The test....is whether the owner of the property has so conducted himself that it would be inequitable to allow him to deny the claimant an interest in the property. The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected, the mere fact that he has notice of another's contractual rights does not necessarily imply that his conscience is affected. But if his conscience is affected it would be utterly inequitable to allow him to rely on the absence of writing or indeed on legal rights conferred on him by an Act of Parliament. A statute

should not be used as an instrument of fraud.”

It is common ground that the parties herein entered into the impugned agreement voluntarily; that the defendant paid considerable amount of the purchase price and took over possession. Although there was no written agreement executed between the parties, given the peculiar circumstances of this case (particularly that the plaintiff was only selling his beneficial interest in the suit property) I find and hold that the defendant has sufficient interest in the suit property and that the plaintiff has not made up a case for striking out the defence and counter-claim filed by the defendant.

The plaintiff has also applied for summary judgment against the defendant, under Order 36 Rule 1 of the Civil Procedure Rules.

Order 36 Rule1 (1) aforesaid provides:-

“(1.) In all suits where a plaintiff seeks a judgment for:-(a)a liquidated demand with or without interest; or

(b) recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed defence the plaintiff may apply for judgment for the amount claimed or part thereof and interest, or for the recovery of the land and rent or mesne profits.” (emphasis mine).

From the foregoing, summary judgment can only issue where the defendant has appeared but not filed defence. The defendant herein having filed defence, Order 36 Rule 1 cannot avail the plaintiff the orders sought.

As the plaintiff has not succeeded in his bid to strike out the defendant's defence and counter-claim, I now turn to the last issue, namely whether the orders issued in favour of the defendant should be confirmed.

For the orders issued in favour of the defendant to be confirmed the defendant has to satisfy the conditions set down in ***Giella v Cassman Brown & Co. Ltd. (1973) EA 358***, namely that he has a *prima facie* case with a probability of success, that unless an injunction is granted, he might otherwise suffer injury which cannot adequately be compensated by an award of damages; but should the court be in doubt, it will determine the matter on a balance of convenience.

From the affidavit evidence presented before this court, there is no doubt that the defendant is in possession of the suit property. Although the plaintiff claims that the defendant is a trespasser on the suit property, the affidavit evidence does not support that claim. It is also noteworthy, that despite the plaintiff's claim that he is the registered and/or beneficial owner of the suit property, he adduced no evidence to prove those assertions.

Failure to adduce evidence to prove such assertions is clearly in contravention of Section 107 of the Evidence Act (Cap 80) laws of Kenya which provides:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.”

Whereas the Defendant has not adduced any evidence of ownership, there is evidence that he is in possession. From the affidavit evidence, it is clear that he took possession when Section 30 of the Registered Land Act (now repealed) was in force.

Under Section 30(g) of the Registered Land Act, the rights of a person in possession or actual occupation of land to which the person is entitled in right only of such possession or occupation are

protected.

The upshot of the foregoing is that the defendant has established a prima facie case with a probability of success. The subject matter of this suit being land, and given the fact that the registered owner thereof has not controverted the allegations that he holds the same in trust for the defendant, I hold and find that the defendant might otherwise suffer irreparable injury if the orders sought are denied. The balance of convenience also tilts in favour of the person in possession (the defendant).

The upshot of the foregoing is that the applications by the plaintiff dated 3rd April, 2012 and 11th June, 2012 are dismissed. As the defendant's application dated 28th May, 2012 has succeeded, the interim orders issued in respect thereof are confirmed pending the hearing and determination of this suit.

Dated signed and delivered this 17th Day of May 2013.

**L N WAITHAKA
JUDGE.**

PRESENT

Ms Chege holding brief for Mr Githui
Ms Ayuna holding brief for Mr Konori
Stephen Mwangi : Court Clerk

**L N WAITHAKA
JUDGE**