



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL CASE NO 138 OF 2011

WINNIE WANJIKU MWENDIA.....PLAINTIFF

VERSUS

CATHERINE WANGARI MWENDIA.....1ST .DEFENDANT

GEOSOS HOLDINGS LIMITED.....2ND DEFENDANT

RULING

The application before me is a Chamber Summons dated 30th March 2011 brought under order XXXIX Rule 1 of the Civil Procedure Rules Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya .The applicant is seeking for orders that:-

1. This honourable court be pleased to issue an order for injunction restraining the defendants their agent servants or any person acting on their behalf from transferring interfering charging selling or doing any act that jeopardise the interest of the plaintiff in Plot No LR No.14070/8 situated in Runda Estate Nairobi pending the hearing an determination of this suit.
2. That the honourable court do issue an order that the 2nd and 3rd defendant do vacate the suit property which was transferred to them in a fraudulent transaction which they were involved.
3. That the plaintiff be allowed possession and quiet enjoyment of the suit property pending the hearing and determination of this suit.
4. That costs be provided for.

This application is supported by the grounds and the affidavit of the plaintiff /applicant. In her supporting affidavit sworn on 31st March 2011 she avers that the 1st Defendant and herself are joint owners of LR No 14970/8 situate in Nairobi. That she left the country sometimes in January 2002 to work in the United States of America and came back permanently in the year 2007. That while in America, she together with her late father bought two plots in Runda estate namely L.R NO.14970/118 and 14970/8 in Nairobi which plots were registered in the joint names of her mother the first Defendant and herself. It is her averment that together with her father they commenced construction on the plot number 14970/118 and the house was complete when she came for holiday in the year 2006 and it was her plan to develop the second plot after she had settled down. That after her father's demise, the plots were left under the care of her mother and she was aware that the said plots were in good hands. However when she checked the second plot she found out that there was constructing going on and on enquiring she was told that it was her mother who was constructing. When she visited the second plot the third and second Defendants either refused to talk to her or gave her contradicting statements and even at some stage suggesting that they were tenants a fact that had made her conclude that all the defendants were aware of the fraud .That these made her conclude that all the defendants were aware of the fraud and were acting in the concert to take away my plot. That the second defendant (my mother) refused to cooperate and made sure that she would not get any money from the plot and for nearly two years That she has tried to resolve this matter with her but she has ignored all my efforts to resolve the same. She states that she later found out that on or about the month of August 2008, in absence of and without her knowledge or consent, the first Defendant entered into a sale agreement with the second defendant for the sale of the suit plot. She honestly knows that the purported sale agreement wherein the first Defendant purported to sell the entire suit property to the second and the third defendants was illegal and fraudulent, because the suit property was jointly owned by the applicant and the first Defendant. Her contention is that all the defendants acted in bad faith and were aware and participated in this fraudulent transaction to defeat and defraud her interest in the suit property since they were aware that the suit property was jointly owned by herself and the first defendant. She further states that the second Defendant must have negotiated the price of the properties with the owners and was therefore under a legal duty to deal with the joint owners and failure to do so clearly established that they were well aware of the fraud and or illegality. That all the parties to the fraudulent transfer were represented by their respective Advocates and must have been advised that the sale by the first defendant was fraudulent, illegal and therefore null and void. She also states that the purported signature on the agreement was a forgery a look at the signatures clearly shows that it was forged by the first Defendant. That since her returning to the country in the year 2007, she has not been able to get any employment and she has been surviving on friends and since the first Defendant has avoided any discussion on her Plots and this situation has literally reduced her into a beggar.

There was no response from the first defendant .This application is opposed by George Mwangi Macheru who deponed a replying affidavit .In In his affidavit he stated that he was that director of the 2nd defendant company and that that the 2nd Defendant is the registered proprietor of LR No. 14970/8 situate at Runda having been transferred of the same by the plaintiff and the 1st defendant vide an instrument of transfer dated 29th May 2008.He states that the purported alleged transfer by the applicant is far-fetched and baseless as the applicant was represented by the firm of P.K Njoroge & Co. Advocates .He avers that the issues raised by the applicant are purely family issues and the plaintiff should sort out the issue with her mother. He further avers that the construction of the suit premises was not done by the plaintiff as deponed but by himself. He states that the transfer of the suit property was done when the plaintiff was in the country and that the plaintiff signed the document of transfer on 29th May 2008.He believes that the application is incurably defective as the prayers sought are against the 2nd and 3rd Defendants whereas there is no 3rd Defendant in this suit; the prayers sought are of mandatory nature and cannot be granted at the interlocutory stage and that the applicant cannot cry fraud and illegality when she was party to the suit sale with her mother.

The applicant later swore and filed a supplementary affidavit on 24th May 2012.She states that the averments of George Mwangi Macheru are a complete distortion of facts to try to mislead this court .That

she does not dispute the proprietorship of the suit land but the means within which the proprietorship was acquired since she did not transfer the suit and to the 2nd defendant or any other person neither did she instruct an advocate to act on her behalf in the sale transaction. She further states that she does not dispute the fact as to when the transfer was done as she may have been in the country but her main issues still remains that she was not notified and she did not approve of the sale as she did not give her consent. She also pointed out the fact that the PIN certificate annexed to the affidavit of George Mwangi Macheru as annexure GMM5 is a forgery and has produced what she terms as the genuine PIN certificate as WWM1.

Parties appeared before me on 7th November 2012 and made their submissions the applicants advocate reiterated the contents of her pleadings and added that the 2nd Defendant was in possession of the suit premises and asked this court to restrain it from charging or transferring the property until the hearing of this suit. The advocate also asked court to issue summons for the 1st Defendant to appear in person in court. The 2nd Defendant's advocate also reiterated the contents of his pleadings filed in court and added that section 323 of Cap 281 Laws of Kenya stated that possession of title is exclusive right and asked court not to grant the prayers sought by the applicant and instead asked that this matter be set for hearing so that counsel summoned to state that the applicant indeed signed the transfer in the presence of counsel.

I have carefully looked at the pleadings, the evidence and also given consideration to the submissions made in court. The issue arising is whether the Plaintiff has established the necessary conditions for the injunction sought to issue. The principles for the grant of an injunction are settled and were set out in the case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358**. They are that first, the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly that if the court is in doubt it should decide the application on a balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a prima facie case. The Plaintiff in her amended plaint dated 17th October 2012 claims that she and the 1st Defendant are joint owners of the suit property, and is seeking a permanent injunction against the 1st and 2nd Defendants. She has averred that there was fraud in the suit property and that the sale agreement she purportedly entered into with the 1st and 2nd Defendants is a forgery. She also claims that she was not notified of the sale neither did she give her consent to the sale. It is not disputed by all the parties that transfer has already been done and that the 2nd Defendant is in possession of the suit property. The 2nd Defendant however states that the applicant was present during the whole transaction as she was in the country at that particular time of the transaction which the applicant agrees she was in the country but was not aware of the transactions going on. Lastly, the 2nd Defendant has been issued with a title of ownership with regard to the suit property. The Plaintiff's claim to the suit property is therefore highly contested. The property has been transferred to the 2nd defendant therefore prayer (b) would be granting an order in vain. The plaintiff can at the main hearing challenge the title that was passed to the 2nd defendant by the 1st defendant. Prayer (c) is a mandatory order which cannot be granted at this stage unless it's a clear case to justify the order at this interlocutory stage. I therefore decline to grant the prayers sought. I order that this matter goes to trial, let parties comply with the provisions of Order 11 of the Civil Procedure Rules and take dates on priority basis. Costs shall be in the cause.

Orders accordingly.

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

R. OUGO

JUDGE

In the Presence of:-

.....Plaintiff/Applicant

.....1st Defendant/Respondent

.....2nd Defendant/Respondent

.....Court clerk