



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT & LAND DIVISION
ELC NO. 240 OF 2012

E.N.W.....PLAINTIFF/APPLICANT

VERSUS

1. P.W.M
2. COL C.J. M
3. THE REGISTRAR OF TITLES
4. THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENTS

RULING

The plaintiff/Applicant by a Notice of Motion application dated 14th December, 2012 inter alia seeks orders that: -

- i. An injunction do issue restraining the 2nd Respondent whether by himself, his servants, his agents, and/or employees howsoever from levying any distress for rent against the plaintiff in respect of the property known as L.R. No. 75/962 BuruBuru II Nairobi pending the hearing and determination of the applicants intended appeal in the court of appeal.
- ii. An injunction do issue restraining the 1st and 2nd respondents whether by themselves, their servants, agents and/or employees howsoever from transferring, selling , alienating, disposing, charging or in the property known as LR. No. 75/962 Buru Buru II Nairobi pending in the applicants intended appeal in the Court of Appeal.

The plaintiff's application is stated to be based on the following grounds set out on the face of the application:-

- a. That the applicant's matrimonial home where she presently resides with her three children is in real danger of being disposed off by the 2nd respondent who has on two separate occasions brought prospective purchasers and/or valuers to view the house with a view of selling the same.
- b. That the plaintiff/applicant intends to file an appeal against the ruling of this Honourable Court delivered on 8th October, 2012 and has even filed a Notice of Appeal as well as a letter requesting for certified typed copies of the proceedings which she has only recently obtained from court.
- c. That this application has been brought without undue delay.
- d. That unless the orders sought are granted the suit property will be disposed off to third parties thus rendering the intended appeal nugatory if the applicant emerges successful in the appeal.
- e. That it is in the interest of justice and fairness that the applicant's matrimonial property be

safeguarded by an order of injunction pending the hearing and determination of the applicants appeal.

The plaintiff has further sworn an affidavit dated 14th December, 2012 and a supplementary affidavit dated 17th January, 2013 and a 2nd supplementary affidavit dated 15th May, 2013 and relies on the grounds contained in these affidavits as well. Counsel for the plaintiff/applicant has filed written submissions dated 29th April, 2013 and filed in court on the same date in support of the plaintiff's position.

For his part the 2nd defendant has filed an affidavit dated 24th December, 2012, a replying affidavit to the plaintiff's supplementary affidavit dated 31st January, 2013 and a further affidavit sworn on 6th May, 2013. Counsel for the 2nd defendant filed written submissions on 25th April, 2013 and a response to the applicants submissions on 8th May, 2013.

To contextualise the issues in this present application it is necessary to revisit the application by the plaintiff/applicant dated 4th May, 2012 where inter alia the plaintiff sought an order that:-

“Pending the hearing and determination of this suit an injunction do issue restraining the Defendants/Respondents whether by themselves their servants, employees or agents or otherwise howsoever from interfering, disposing off, alienating, disposing, transferring, leasing, or in any way or manner whatsoever dealing with the suit property namely L.R. No. 75/962 Buru Buru II Nairobi”.

Honourable Justice Kimondo heard the parties on merit and rendered a ruling on 8th October, 2012 dismissing the application by the plaintiff for injunction. I have had occasion to review the application that fell to be determined by Honourable Justice Kimondo and I have read the ruling rendered by Honourable Justice Kimondo with a view to determine whether or not the application now before me is res judicata as contended and submitted by the 2nd defendant/respondent. I will revert to that issue later in this ruling.

It is the plaintiff's case that she is not a tenant of the 2nd defendant in the suit premises and that the 2nd Defendant cannot purport to demand rent from her. The plaintiff claims that she is in occupation of the suit property as the spouse of the 1st Defendant who sold the property and that the same constitutes matrimonial property. On that basis the plaintiff contends that she has overriding interest which should be protected by the law.

Besides the plaintiff contends the 2nd defendant is not an innocent purchaser as he knew she and her children were in occupation of the suit premises even as he purported to purchase the property.

The plaintiff in an attempt to show and demonstrate that there were facts that were not before the court when Honourable Justice Kimondo considered the matter introduced the document attached to her supporting affidavit marked “ENW4” titled ***“Agreement for change of registered owner”*** said to be dated 17th April, 2005 but which document has been declared by a Document Examiner, Mr. Emmanuel Kenga in a report dated 28th January, 2013 annexed as “CIMI” to the replying affidavit of the 2nd defendant dated 31st January, 2013 to be a forgery.

The plaintiff both in supporting affidavit and the supplementary affidavits has faulted and contested the process through which the 2nd Defendant acquired the suit property including the process through which the property was charged to the Barclays Bank of Kenya Ltd by the 2nd Defendant. The plaintiff alleges fraud in the process and reiterates that as she was not consulted by the 1st Defendant she being a spouse and the property therefore being matrimonial property the purported transfer to the 2nd Defendant was invalid.

The 2ND Defendant contends that he properly purchased the suit property from the 1st defendant who was

the sole registered proprietor and denies that there was any fraud in the acquisition of the property by him. The 2nd defendant states that the plaintiff was not a joint owner of the suit property and thus there was no requirement that she executes any documents to enable the sale transaction to be concluded and neither to be consulted for the sale to go through.

The plaintiff has further contended that there was no signed agreement between the 1st and 2nd defendants upon which the sale to the 2nd defendant was founded but the 2nd defendant in response to this contention vide the further affidavit sworn on 6th May, 2013 annexed a copy of sale agreement dated 2nd November, 2004. The court notes that it is the plaintiff who is contesting the validity of the agreement and not the parties to the alleged agreement. The wording of the Law of Contract Act Cap 23 Section 3(3) is to the effect that no suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded is in writing and is signed by all the parties to the agreement and their signatures attested by a witness who was present at the time of signing.

My understanding of this provision is that the plaintiff would have to be relying on such a contract to found a suit. In the present case the transaction between the 1st and 2nd defendant was completed and neither of them is contesting the agreement that gave rise to the transfer and the registration of the title in favour of the 2nd Defendant.

As regards the operation of Section 93(2) and (3) of the Land Registration Act 2012 I would only observe that the subject Act came into operation in 2012 and it was not intended that it would have retrospective application. The transaction between the 1st and 2nd Defendant was executed in 2005 when there was no requirement for spousal consent to be obtained before a spouse could deal with any asset registered in their sole name. In the premises the 1st Defendant could properly deal and transact with the third parties in regard to the suit property without necessarily consulting with and/or obtaining the consent of the spouse as he was the sole registered proprietor of the suit property.

The 2nd Defendant has in his submissions contended that the instant application by the plaintiff is resjudicata as the issue of injunction had already been rejected by this court on its merits; and secondly that the subject matter is not a matrimonial property and thirdly that applicant has not established a prima facie case with a probability of success.

While I agree that a party may bring an application for injunction pending appeal in the court that dismissed the application for injunction that is appealed from, I would hasten to add that such an application cannot be based on the same facts, issues and circumstances that were before the court in the earlier application. In the present suit the parties before Hon. Justice Kimondo canvassed the same issues as in the instant application. The issues relating to the sale and transfer of the suit property by the 1st defendant to the 2nd defendant and whether or not the property was matrimonial property was in issue and the issue whether or not the sale was fraudulently carried out was also in issue. The Honourable Judge while rendering the ruling on the application considered all these issues and ultimately made a finding that the plaintiff had not demonstrated she had a prima facie case with a probability of success. The Honourable Judge further found that the plaintiff could be compensated by an award in damages in case she was successful at the trial.

I have carefully reviewed the instant application by the plaintiff for injunction and other than the Plaintiff stating that the 2nd defendant has demanded rent and that she has lodged an appeal against the ruling of Hon. Justice Kimondo there is nothing else that has changed. The Agreement that the plaintiff sought to introduce as "ENW4" to demonstrate possible fraud has been adjudged as a forgery and I will not consider it but will leave the parties to prove their respective cases at the trial.

On the issue of rent demand I would state that as the matter stands the 2nd defendant is the registered owner of the suit property and it is not in dispute that the property is charged to Barclays Bank of Kenya Ltd. The 2nd defendant has to service the mortgage and to do so it is expected that the suit property has to generate some income possibly by way of rent if he is not the person occupying the same. I would in the

premises not hold that a demand for rent would in the circumstances of this matter constitute a new matter that would entitle the court to issue an injunction in favour of the plaintiff. Likewise Hon. Justice Kimondo having properly held in my view that the plaintiff could be properly and adequately be compensated by an award of damages if she was successful at the trial I would hold that the intended appeal would not be rendered nugatory in the event the plaintiff was successful as she would be adequately compensated in damages in that eventuality.

As a further observation I would like to state that where a property that would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter, such property becomes a commercial commodity available in the market and liable to be sold by the chargee under the chargees statutory power of sale and the exercise of such power of sale cannot be defeated by a claim that such property constitutes matrimonial property. That indeed should be viewed as what informed the requirement in the new Land Registration Act of 2012 requiring spouses to give their consent to the charging of Matrimonial properties so that none of the spouses may be heard to say they were not aware or were not consulted when the charge was taken.

Charges taken before the enactment of the Land registration Act 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the enactment of the new Land Registration Act and therefore the plaintiff in the present case cannot have refuge under the new Land Act.

The 1st defendant had charged the property to Barclays Bank of Kenya Ltd and before he sold the property to the 2nd defendant he has deposed he was experiencing difficulties paying the mortgage and it was just a matter of time before the Bank foreclosed. In all probability this precipitated the sale to the 2nd defendant. The sale to the 2nd defendant was completed and prima facie he now being the registered proprietor of the suit property his title is in terms of sections 25 and 26 of the Land Registration Act of 2012 indefensible unless it is proved he acquired the title fraudulently. Fraud has not been established and as Honourable Justice Kimondo held the burden of proof rests on the person who alleges and the plaintiff has not discharged that burden.

In the premises and for all the above reasons I find and hold that the application by the plaintiff lacks any merit and I order the same to be dismissed with costs to the 2nd defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants