



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

ELC NO. 891 OF 2012 (EAST TRACK)

DIANA ROSE ATIENO.....PLAINTIFF

VERSUS

MACHARIA NJUKIRA.....DEFENDANT

RULING.

There are three applications (Notice of Motions) to be determined by the Court. The first Notice of Motion is dated 26th November, 2012 brought by the Plaintiff herein *Diana Rose Atieno*. The applicant in this Notice of Motion sought for orders that:-

The Defendant by itself, his agents and/or servants be restrained from selling, transferring, alienating or otherwise dealing with all that property known as **Apartment No. K2B, Loresho Springs on LR No. 23137**, pending the hearing and determination of the suit and also for costs of the application.

The second Notice of Motion is dated 10th December, 2012 brought by the Plaintiff herein seeking for orders that; A stay of execution of breaking in orders issued on 5/12/2012 in Milimani CMCC Misc Application No. 987 of 2012 by Hon. Andayi W.F (Mr) Senior Principal Magistrate in respect of **Apartment 2B of 'Block K' on LR No. 23137, Loresho Springs Nairobi** do issue pending determination of this Application; That the Court do set aside the breaking in order issued on 5/12/2012 in *Milimani CMCC Misc. Application No. 987 of 2012 by Hon.Andayi W F (Mr) Senior Principal Magistrate*. The applicant also prayed for costs.

The 3rd Notice of Motion is dated 17th December, 2012 and brought out by the Defendant herein **Macharia Njukira**, for orders that:- The Court do grant order of Temporary Mandatory Injunction compelling the Plaintiff whether by herself, her servants, agent, representatives and or employees or anyone claiming under him to immediately vacate the Defendant's property known as **Apartment No K2B on LR No. 23137, Loresho Springs** pending the inter parties hearing and determination of this suit.

The applicant prayed for cost of the application. The Defendant had also filed Notice of preliminary objection on 17/12/2012. The Defendant had stated that the suit does not disclose any or any reasonable cause of action and is bad in law, misconceived and incompetent for want of any or any adequate consideration:- That the Deed of Novation is invalid and enforceable for want of consideration that the application is bad in law, misconceived and incompetent and the Court has no jurisdiction under the cited provisions of the law to grant the orders sought and the suit an abuse of the Court process.

The three applications and the preliminary objections were canvassed together through written submissions. The court is called upon to make a finding on the three applications.

I have read and carefully considered the pleadings, the written submissions and the relevant law and I make the following findings.

There is no doubt that the Defendant herein is owner of the suit property **No. K2B on LR No. 23137, Loresho Springs**. There is no doubt that the Defendant herein through a Deed of Novation agreed to sell the suit property to the Plaintiff at a cost of **Kshs. 13,000,000/=** From the attached document it is evident that the Plaintiff was required to pay 20% of the purchase price upon execution of the agreement. Completion was to be within 30 days and the agreement is dated 18th October, 2012. It is also not in doubt that Plaintiff took possession on the basis of the said agreement. It is also not in doubt that by the time the applications were filed and written submissions filed, the plaintiff had not paid the purchase price but continuous to live on the suit premises without any consideration.

It was the Defendants, submissions that once it became apparent that the Plaintiff would not pay the agreed purchase price or perform the objection of the agreement, the parties agreed that the Plaintiff would vacate the premises on or before 30th November, 2012 and pay three months rent at the rate of **Ksh.70,000/=** per month. The plaintiff on her part admitted that she expressed her interest to purchase the Respondent's Apartment No. 2KB on LR 23137, Loresho Springs. She signed the Deed of Novation dated 18th October, 2012 and the purchase price was **Kshs.13,000,000/=**. The terms of the agreement were that the Plaintiff was to pay 20% of the purchase price being **Ksh.2,600,000/=** before execution of the sale agreement and the completion would be within 30 days. She alleged that after execution of the sale agreement, she encountered financial problems and could not pay the 20% and the purchase price. That despite the delay the applicant is still interested in the purchase of the apartment.

That further an effort to protect the property, the Plaintiff agreed to pay rent provided that the respondent recalled the auctioneer and a tenancy agreement was to be executed between the parties pending the conclusion of the sale process. She therefore, denied existence of landlord / Tenant relationship between herself and the respondent as no tenancy agreement had been entered. She averred that the distress for rent was illegal, null and void.

I will deal with first application first dated 26/11/2012 restraining the defendants herein from selling, transferring or alienating the suit property. There is no doubt that the defendant herein is the registered owner of the suit property. The Defendant and plaintiff entered into sale agreement dated 18/10/2012. One the terms of the Deed of Novation was for plaintiff to pay 20% of the purchase price i.e. **Kshs.**

2,600,000/= before execution of the Sale Agreement. It is evident that the Plaintiff did not pay the 20% and has not paid to date and is also not paying rent and therefore she is a **Gratuitous Tenant** and she cannot prevent the owner of the suit property from dealing with it yet she had broken the terms and conditions of the Sale Agreement. The Plaintiff relies on the Deed of Novation. However, the same is not binding as the plaintiff did not adhere to the terms of said deed of Novation. I will concur with the Defendant submissions that:-

*“Promisee must provide consideration. The rule that consideration must move from the promisee means that a person to whom a promise was made can enforce it **only** if he himself provided consideration for it”.*

The Plaintiff herein cannot enforce the Deed of Novation in the absence of any consideration. The applicant therefore has not proved that she has a prima – facie case with high chances of success as was held in the case of **Giella Vs Cassman Brown 1973 (EA) 358**. The applicant herein is not paying any rent and has breached the Deed of Novation. In fact in the instant case, it is the Defendant who is in the danger of loss and injury which cannot adequately be compensated by any damages. Taking into account, all the circumstances, the balance of convenience in the instant case will tilt in favour of the Defendant herein. For the above reasons, the Court finds that the applicant's application dated 26/11/2012 has no merit and the same is dismissed with costs to the Defendant.

On the second application by the Applicant/Plaintiff dated 10th December, 2012, the Court finds

that indeed on 5/12/2012, Hon. Anday W F (Mr) issued breaking in orders in civil case No. 987/2012 at Milimani Commercial Court.

The said suit is still in existence before the Court. In my humble view, the applicant herein should have filed this instant application before the said Court seeking the instant orders. The proceedings herein are therefore a duplication of what the subordinate Court is dealing with the same is an abuse of the Court's process. Order 6 of the Civil Procedure Rules bars any Court from proceeding with the trial of any suit or proceeding in which the issue is substantially in issue in another Court of competent jurisdiction. The upshot of the foregoing is that the Court finds the application dated 10th December, 2012 not merited. The same is an abuse of the Court process and the said application is dismissed with costs to the Defendant.

On the 3rd Application dated 17th December, 2012, the Defendant seeks a mandatory injunction compelling the Plaintiff to vacate the Defendant's suit property, **Apartment K2B on LR No. 23137, Loresho Springs.**

What is not in doubt is that the Defendant is the owner of the suit property. The Plaintiff did not adhere to the terms of the Deed of Novation as she did not pay the 20% of the purchase price. Therefore, no consideration was paid. The Plaintiff is not paying rent and so she is a *Gratuitous Tenant*. The Defendant has filed a counter-claim seeking declaration that the *Deed of Novation* upon which the Plaintiff suit is based on is invalid and unenforceable. If the Plaintiff has not paid any part of the purchase price nor is she paying rent, then the case herein is straight forward as the Defendant is undergoing loss which he may not be able to recover through damages.

The Defendant has therefore demonstrated reasonable probability of success and if the Mandatory Injunction is not granted, he will continue to suffer irreparable loss which cannot be compensated by damages. I will rely on the case of **Kenya Breweries Ltd and Another Vs Washington O Okeyo (2002) EA 109**, where the Court of Appeal held that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted”.

However, if the case is clear and one which the court thinks it ought to determine at once, or of the act done is simple and summary one which can easily be remedied, or if the Defendant attempted to steal a March on the Plaintiff, a Mandatory Injunction will be granted and/ or Interlocutory Injunction”.

The court finds that in the instant case, the Defendant has demonstrated the special circumstances, that he is the owner of the suit property. The Plaintiff has not paid the purchase price and not paying rent and it is therefore a clear case which the court thinks it ought to be decided at once. For the above reasons, the Court allows the Defendants application dated 17th December, 2012 with costs to the Defendant.

I have also considered the Preliminary Objection raised by the defendant. The Plaintiff's suit is hinged on the Deed of Novation which she has breached. The same is therefore not valid nor enforceable and it is not a legally binding agreement. I therefore find that the preliminary Objection has merit and the Plaintiff suit is an abuse of the court process. The same is struck out with costs to the Defendant. However, the Defendant counter claim discloses a reasonable cause of action and the same should proceed for hearing.

It is so ordered.

Dated, Signed and delivered this 12TH day of JULY 2013.

L.N. GACHERU

JUDGE.

12/7/2013

Coram Before Gacheru Judge

Court Clerk Anne

Maina holding brief for Kiingati for Defendant

L. N .

GACHERU

JUDGE

Court.

Ruling Read in open Court in the presence of Mr Maina holding brief for Kiingati for the defendant and no appearance for the Plaintiff

L .N. GACHERU

JUDGE.