



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 288 OF 2011

KENT LIBISO AND ANOTHER.....PLAINTIFF

VERSUS

CIRKON TRUST CO. LTD & 2 OTHERS.....DEFENDANTS

RULING

The Plaintiff vide a notice of motion application dated 22nd January 2013 stated to be brought under Order **40 Rules 1, 4, 10 and 11** of the Civil Procedure Rules and section **3A** of the Civil Procedure Act seeks inter alia the following orders;

1. That the 4th Defendant by himself, his agents, servants and/or employees be restrained by way of an injunction from selling, disposing, transferring, alienating, leasing, developing, changing/mortgaging, disposing and/or encumber the same pending the hearing and final determination of the suit herein.
2. That the 1st Defendant to be ordered to deposit the sum of Kenya shillings **11 million** paid to it by the Plaintiffs as part purchase price of the suit property (**L.R NO. 1/811 Kilimani Nairobi**) in a joint interest earning bank account in the joint names of the Advocates on record for both the Plaintiff's

(**M/s J.M.Njenga & Co Advocates**) and the said 1st Defendant's Advocates **M/s Munga Kibanga & Co. Advocates**, pending the hearing and final determination of the suit hearing.

The Plaintiffs state that they paid to the 1st Defendant a sum of **Kshs. 11 million** being part of the purchase price of the suit property which property the 1st Defendant sold to the 3rd Defendant who in turn sold and transferred the property to the 4th Defendant. The Plaintiffs seek an order for specific performance against the 1st Defendant and thus want the court to injunct the 4th defendant from in any manner dealing with the suit property **LR. No. 1/811 Kilimani Nairobi**. The Plaintiffs allege that the 4th Defendant is in the process of disposing the said property and /or dealing with the same in a manner that will affect the Plaintiff's claim and hence the justification for the injunction sought.

The Plaintiff's application is supported on the grounds set out in the supporting affidavit of **Kent Libiso** sworn on 22nd January 2013 and the supplementary affidavit sworn on 6th May 2013. The Plaintiff's counsel also filed written submissions on 8th May 2013 and replying submissions to the 4th Defendant's

submissions on 23rd May 2013.

The Defendant, **Samuel Njuguna Kimani** filed a replying affidavit sworn on 1st February 2013 in opposition to the Plaintiffs application for injunction and further filed written submissions dated 16th May 2013. The 4th Defendant in the filed replying affidavit states that he is the registered proprietor of Land Reference Number 1/811 pursuant to a sale agreement dated 27th May 2011 between the 4th Defendant and Beanfort Investments Ltd, the 2nd Defendant herein and that he paid the full purchase price of **Kshs. 47,500,00**. The 4th Defendant avers that he purchased the property in good faith and without any notice of any defect in the title and /or any third party interests and thus he was a bonafide purchaser for value without notice. The 4th Defendant contends the Plaintiff cannot have any rights of injunction against him and that he having been put into possession the balance of convenience would definitely be against granting the injunction sought. The 4th Defendant further contends he has been wrongly enjoined in the suit as he legally purchased the suit property that at the time of purchase had no third party claims and/or interests registered against it.

The Plaintiffs case is that the Plaintiffs pursuant to the Agreement for sale dated 14th August 2007 had on diverse dates paid to the 1st Defendant a total of **Kshs. 11 million** towards the purchase price of the suit property. The Agreement for sale between the 1st Plaintiff and the 1st Defendant under clause 3 provided for the payment of the purchase price of **Kshs. 25 million** in monthly installments and the last installment of **Kshs. 10 million** was payable on or before 30th November 2007. Under clause 5 of the Agreement for sale the completion date is stated to be after the payment of last installment as above upon which the vendor was to release all the completion documents to the purchaser. In the premises and going by the Agreement for sale the completion date was to be 30th November 2007 which was the date when the last installment was to have been paid. Nonetheless having regard to the various correspondences exchanged between the parties it does appear the parties had agreed to extend the completion date of the agreement for sale to 30th May 2008. Be it as it may be, the Agreement was however not completed by the 30th My 2008. The 1st Defendant by a letter dated 3rd June 2008 addressed to the Plaintiff's Advocates notified the Plaintiffs that they had failed to complete the sale transaction by 30th May 2008 and that consequently that the sale agreement dated 14th August 2007 was no longer in force having ended through effluxion of time. Although the Plaintiff's Advocates responded to the letter by the 1st Defendant's Advocates vide their letter of 9th June 2008 contesting the purported cancellation of the agreement there was no tender of the balance of the purchase price as contemplated under the agreement of sale.

From the material placed before the court the court notes that pursuant to a conveyance dated 13th July 2009 the suit property was transferred to the 2nd Defendant and that conveyance was registered at the **Lands Registry on 28th July 2009 in Vol. 84 Folio 172/6**. The 2nd Defendant Beanfort Investments Limited subsequently on 27th May 2011 entered into a sale agreement to sell the suit property to the 4th Defendant for the agreed purchase price of **Kshs. 47,500,000**. The conveyance from the 2nd Defendant to the 4th Defendant dated 21st September 2011 was registered on 3rd November 2011 and mortgage dated 21st September 2011 in favour of Standard Chartered Bank Kenya ltd for **Kshs. 20,000,000** was equally registered against the title as per the copy of postal search and conveyance annexed and marked "**K1**" in the supporting affidavit of the 1ST Plaintiffs dated 2nd February 2012.

The 4th Defendant contends that before he completed the purchase of the property he carried the necessary due diligence which included carrying out a search on the suit property and as per the certificate of postal search carried out on 24th June 2011 annexed to the 4th Defendants replying affidavit and marked "**SNK2**" the suit property was registered in the name of **Beanfort Investments Limited** and the same had no encumbrances and hence there was nothing to hinder the 4th Defendant from proceeding with the transaction and on that basis the 4th Defendant proceeded to complete the transaction where upon the conveyance in his favour was registered and he was granted possession.

The Defendant contends that as a bonafide purchaser of the suit property and as the registered owner, he has rights to enjoy all the interests that attach to ownership including right to enjoy quiet possession and rights of usage. The 4th Defendant further avers that he has conveyed the property by way of mortgage to standard Chartered Bank Limited to whom he is required to make substantial monthly installments to service the mortgage.

The Plaintiff for their part contend that the 4th Defendant was not a bonafide purchaser as he purchased the property from the 2nd Defendant who in turn had purchased the property from the 1st Defendant in breach of an injunctive order that had barred the 1st Defendant from dealing with the suit property in any manner. The Plaintiffs contend that the 4th Defendant was privy to the goings on between the Plaintiffs and the 1st and 2nd Defendant and the 4th Defendant could not have obtained a good title and the transfer to him and the transfer to the 2nd Defendant ought to be nullified and/or cancelled. The Plaintiffs seek an order of injunction to bar the 4th Defendant from leasing, mortgage or charging, disposing, transferring and/or in any manner dealing with the suit property.

The principles upon which the court will grant injunctions are well settled and the **GIELLA-VS-CASSMAN BROWN LTD (1973) EA 358** remains the leading case on the subject where the court laid the principles thus;

- i. *An applicant has to establish a prima facie case with a probability of success;*
- ii. *There has to be demonstration that damages would not be an adequate in case the injunction is denied;*
- iii. *In case of any doubt on the above two considerations the court can consider balance of convenience having regard to the circumstances of the case.*

The Plaintiffs have tendered evidence that there was an agreement for sale with the 1st Defendant for the purchase of the suit property from the 1st Defendant and that a total deposit of **Kshs. 11 million** was paid by the Plaintiffs towards the purchase. It is however not in dispute that the Agreement for sale dated 14th August 2007 between the Plaintiffs and the 1st Defendant was not completed. The 1st Defendant on 4th June 2008 gave the Plaintiffs notice purportedly cancelling the Agreement for alleged breach and by letter of 9th June 2008 the Plaintiffs contested the fact that they were in breach.

However, consequent to this exchange of correspondence the 1st Defendant sold and transferred the suit property to the 2nd Defendant in July 2009 and the 2nd Defendant in turn sold and transferred the suit property to the 4th Defendant in November 2011. Thus at the present time the 4th Defendant is the registered owner of the suit property and he has in turn mortgaged the property in favour of the Standard Chartered Bank Ltd.

I have reviewed and considered the material and evidence placed before the court and the submissions made on behalf of the Plaintiffs and the 4th Defendant and I am not persuaded the Plaintiffs have demonstrated or established that they have a prima facie case with a probability of success as against the 4th Defendant. The 4th Defendant as at the time he contracted to purchase the suit property from the 2nd Defendant vide the Agreement for sale dated 27th May 2011 the 2nd Defendant was the registered proprietor of the suit property. The certificate of postal search dated 4th June 2011 attests to this fact and prima facie it constitutes conclusive evidence of the registration details of the owner of the suit property as at the date of the search. The Plaintiffs in my view have not furnished any evidence of fraud connecting the 4th Defendant with any fraudulent acts that the Plaintiffs claim the 1st and 2nd Defendants may have been involved in. The 1st Defendant was not a party to the Agreement for sale between the 2nd Defendant and the 4th Defendant. I am inclined to accept the averment by the 4th Defendant that he was an innocent purchaser for value without any notice of any defect in the title he contracted to purchase from the 2nd Defendant.

The 4th Defendant as the registered owner of the suit property in terms of section **26(1) of the Land Registration Act No. 3 of 2012**, his title is absolute and indefeasible and can only be challenged on the grounds set out under section **2(1) (a) and (b) of the Land Registration Act**.

Section **26(1)** of the Lands Registration Act provides:-

26(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge,

Except-

- a. **On the grounds of fraud or misrepresentation to which the person is proved to be a party, or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

As I have noted there is no evidence that the 4th Defendant was party to any alleged fraud and from the evidence tendered the 4th Defendant purchased and/or acquired the suit property legally and procedurally. There was an agreement for sale and a conveyance and stamp duty was duly paid and registration regularly effected. The 4th Defendant additionally obtained a mortgage with the Standard Chartered Bank Ltd which was duly registered against. As matters stand now the standard chartered bank limited has a legal interest on the suit property and is not a party to these proceedings. Indeed the bank is the party that would be required to reconvey the suit property being the mortgage holder. The orders sought by the Plaintiffs as against the 4th Defendant would adversely affect the interest of the bank as the mortgage were the same to be granted.

I am in view of the above not satisfied that the Plaintiffs have established a prima facie case against the 4th Defendant and I hold they have not. As I have held and found that the Plaintiffs have not satisfied the first condition for the grant of an injunction I need not consider the second condition whether or not the Plaintiffs would suffer irreparable damage that cannot be compensated in damages. However, I observe that this property has changed hands through sale at least twice and the Plaintiffs are not in occupation or possession. In the circumstances I do not think the Plaintiffs have demonstrated they would suffer any damages that cannot be compensated in damages. In my view, damages could be quantified and no damage would be suffered that would not be compensatable in damages.

In the circumstances of this case I have no hesitation in holding that the balance of convenience would tilt in favour of the 4th Defendant. The 4th Defendant is in possession and there is a mortgage in favour of Standard Chartered Bank Limited which the 4th Defendant is servicing. The defendant is the registered owner having fully paid the full purchase price of Kshs. 47,500,000/= and he is entitled to the benefits of ownership.

The joinder of the 4th Defendant as a party to the suit was made with the leave of the court and I wish not to make any finding at this stage as to whether or not the 4th Defendant is wrongly enjoined to the suit and I leave that issue to be determined at the trial or by way of a substantive application made in that regard.

As concerns the order for the deposit of the sum of **Kshs. 11 million** paid by the Plaintiffs to the 1st Defendant to be ordered to be deposited in a joint interest earning account in the joint names of the Plaintiffs Advocates and the 1st Defendants Advocates, I have noted that the said amount was paid directly to the 1st Defendant and was not paid to be held on stake pending completion of the transaction. Indeed the amount was paid in several installments. The essence of deposit moneys in sale transactions ordinarily being required to be paid to the vendor's Advocates to hold as stakeholders pending completion

of transaction is so that if the transaction is not completed as stipulated for any reason such money would be available to be refunded to the purchaser or in a case such as in the instant case be available for joint investment account pending the resolution of the dispute.

In the present case I do not have a basis upon which I can make an order for the deposit of the sum of Kshs. 11 million to be paid by the 1st Defendant into a joint account. The amount was paid to the 1ST Defendant pursuant to the terms of the agreement for sale and in my view the amount can only be dealt with in accordance with the agreement for sale. The option available to the Plaintiffs is perhaps to fast track the hearing of the suit with a view to having the suit finalized so that the rights and/or obligations of the parties are finally determined. In the circumstances I decline to make an order for the deposit paid to the 1st Defendant by the Plaintiffs to be paid into an interest bearing joint account as sought by the Plaintiffs.

In the premises and for all the above reasons, I find that the Plaintiffs application dated 22nd January 2013 lacks merit and I dismiss the same with costs to the 4th Defendant.

Orders accordingly.

Dated, Signed and Delivered this 31st day of October 2013

J. M. MUTUNGI

JUDGE

In presence of

.....Plaintiff

.....Defendant