



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC. NO. 390 OF 2010

MARY SAFARI MUGENYA 1ST PLAINTIFF

ERIC MUBWEKA MUGENYA 2ND PLAINTIFF

- VERSUS -

1. CORNELIUS KAGUI THUKU

2. SWIFTWAY ENTERPRISES

3. CFC STANBIC BANK

4. THAARA AUCTIONEERS

5. COMMISSIONER OF LANDS

6. THE REGISTRAR OF TITLES, MOMBASA

7. THE ATTORNEY GENERAL DEFENDANTS

RULING

[1] This application prays for orders against the 1st, 2nd, 3rd and 4th defendants only. It is alleged that plaintiff approached the 1st and 2nd defendants for a loan advance. That the second defendant had represented himself as a financial advisor through its' directors. That the 1st and 2nd defendant told the plaintiff that they could arrange a loan for the plaintiff to be granted by CFC bank. She was asked for various documents. It is also alleged that the 1st and 2nd defendant asked the plaintiff whether they could use her title as collateral for their own loans in the same bank. The plaintiff is alleged to have accepted that arrangement in good faith. The breakdown for the loans is on paragraph 19 of the affidavit. The total loan was Kshs. 12 million. The Plaintiff signed for the loan and got a cheque for Kshs. 12 million. It is said that the plaintiff cashed the cheque and she gave the 1st and 2nd defendants their shares as agreed. She was given an account in which she would deposit her monthly instalments.

She says later in 2010 she saw Thaara Auctioneers who had come to proclaim her property. This is the time the plaintiff learned that she had been duped of her property. She later learnt that the property was in name of the 1st defendant. The plaintiff said she had satisfied the requirements for injunction as set in ***Giella -vs- Casman Brown***¹ and went on to enumerate how that was so. She asked for her motion dated 2nd October 2010 to be allowed.

[2] The first defendant denied the allegations. It argued that it was the applicant who had approached them to look for a buyer after a warrant of attachment had issued against the applicant. The 2nd defendant negotiated for purchase price at Kshs. 13 million. The 2nd defendant introduced the applicant to CFC bank after giving the applicant Kshs. 1 million. The 2nd defendant says he used the applicant's title as security. The 2nd defendant says the applicant was given Kshs. 12 million by CFC bank through their advocates as purchase of the property. The property was transferred from the applicant to the defendant and the transaction was completed on 12th October 2007. The property had been valued at Kshs. 15,000,000.00. After the sale the applicant requested the 2nd defendant to lease the school on the premises and the lease for the same was agreed for 2 years at Kshs. 70,000 per month which the applicant then paid for sometime and then stopped. She then went to court. It argues there was no fraud but willing buyer willing seller.

[4] The 3rd and 4th defendants opposed the application. They associated themselves with the 1st and 2nd defendants submissions. They said the applicant sold the land to 1st defendant who charged it to 3rd defendant. The issues raised herein whether the suit property was legally sold to the 1st defendant, or whether the school on the premises is leased out to the applicant, or whether the applicant was defrauded of her property by the 1st and 2nd defendant are issues that this court cannot determine at this preliminary stage. These are issues that are fundamental in this case. They will be canvassed and tested during the hearing of the case. The property is registered in the name of the 1st defendant. The applicant lives and runs a school on the suit premises. It is alleged she ought to pay the agreed rent. This issue is contested. The issue shall come out during the hearing. I order that *status quo* shall be maintained. Parties shall urgently fix this case for hearing when all the issues shall be canvassed. No case has been made out to me at this stage for security for costs and none shall be ordered.

Costs of this application shall be in the cause.

Dated and delivered in open court at Mombasa this 18th day of October, 2013.

S.N. MUKUNYA

JUDGE

18.10.2013