



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 776 OF 2012

JULIUS IRUNGU KIHORO..... PLAINTIFF

VERSUS

ESTHER NJAMBI KANGETHE..... DEFENDANT

RULING

The Defendant herein filed a Notice of Motion dated 18th March 2013 seeking orders for a temporary injunction restraining the Plaintiff from effecting a transfer, sale, assignment, lease or conveyance of any kind of all that parcel of land known as New Roysambu Housing Company Limited Plot No. 22 (now Nairobi Block 116/276) (hereinafter referred to as the “suit property”), or dealing with it in any other manner whatsoever pending the hearing and determination of this suit.

The Defendant in her supporting affidavit sworn on 18th March 2013 claims that she bought the suit property from the Defendant, and she has attached a copy of one of the sale agreements she claimed they entered into dated 16th December 2009. She also attached copies of the completion documents including the Plaintiff’s letter of allotment, a copy of his identity card, an executed transfer of lease dated 16th June 2010, and evidence of payment by way of a funds transfer of Kshs 1,875,000/= to the Plaintiff’s Advocates account made on 16th December 2009.

The Defendant’s Notice of Motion was filed subsequent to an earlier Notice of Motion that had been filed by the Plaintiff dated 31st October 2012, in which he was seeking a temporary injunction restraining the Defendant from trespassing on, and/or interfering with the suit property. The Plaintiff in his Notice of Motion claimed to be the registered owner of the suit property, and that the Defendant had unlawfully entered on the suit property and commenced to develop the same. The Plaintiff was granted interim injunctive orders by the court on 31st October 2012 pending *inter partes* hearing of his Notice of Motion. The said interim orders were however not extended and lapsed, as the Notice of Motion has not been set for *inter partes* hearing since then.

The Plaintiff filed a replying affidavit to the Defendant’s Notice of Motion sworn on 7th June 2013 in which he reiterated that he was the registered owner of the suit property having purchased the same in 1976, and having been issued with a certificate of lease for the suit property on 18th December 2012, a copy of which he attached. He denied having entered into any agreement for sale with the Defendant, or having received any purchase money or executed a transfer with respect to the suit property. He also attached a copy of his Identity Card as evidence that the Identity card of the alleged seller of the suit property was a forgery.

The parties were directed to file written submissions. The Plaintiff’s counsel filed submissions dated 9th

July 2013 and argued that the Defendant had not shown a *prima facie* case as the wording and description of the vendor in the sale agreement produced as evidence by the Defendant showed that the alleged vendor had no interest in the suit property at the time it was sold. Further, that the Plaintiff had shown that the identity card used in the said transaction was not his, neither had the Defendant shown that he received the purchase money. Lastly, that the Plaintiff as registered owner has a superior interest in the suit property, and the Defendant can be adequately compensated by way of damages. The counsel relied on the decision in **Peter Kinuthia Waithaka vs Tom Ochieng T/A M'Oketchy Auctioneers & 3 Others (2005) e KLR** in this regard.

The Defendant did not file submissions within the time limits set by the court or at all, and her Notice of Motion was reserved for ruling.

I have read and carefully considered the pleadings, annexed evidence and submissions made. I will proceed to determine the Defendant's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The first question I must answer is whether the Defendant has established a *prima facie* case. The Defendant has produced evidence of a sale agreement she entered into with a person she claims was the Plaintiff, of payments she made in this regard and an executed transfer of lease.

It is not disputed that the Plaintiff is the registered owner of the suit property, and the allegations of fraud in the said agreement and transfer of the suit property will have to be proved at the full trial and not at this stage. This is therefore a case where both an equitable and legal interest on the suit property is claimed, and has been shown to exist by the Defendant and Plaintiff respectively, and it is my opinion that the Defendant's Notice of Motion will have to be decided on the basis of a balance of convenience.

It is in this regard not disputed that the Plaintiff is the legal owner and entitled to possession of the suit property. It is also not disputed that the Defendant had deposited some building materials on the suit property and had initially been restrained from undertaking any developments on the suit property. In light of these facts and circumstances, I direct and order as follows:

1. That pending the hearing and determination of the suit filed herein or until further orders, the *status quo* with regard to the property known as New Roysambu Housing Company Limited Plot No. 22 and/or Nairobi Block 116/276 shall be maintained as follows:
 - a. Both the Plaintiff and Defendant by themselves or through their representatives, agents or servants are restrained from selling, transferring, leasing, charging or in any other manner alienating or disposing of the said property and from undertaking further construction and/or developments thereon.
 - b. The Defendant either by herself or through her representatives, agents or servants is restrained from entering into and from interfering with the possession and occupation by the Plaintiff of the said property, save for purposes of removing any building materials she deposited on the said property within 30 days of the date of this ruling.
2. The Plaintiff's Notice of Motion dated 31st October 2012 is hereby dispensed with in light of the orders given hereinabove.
3. The suit herein shall proceed to full trial and the parties herein shall comply with the provisions of Order 11 of the Civil Procedure Rules and shall set the suit for pre-trial conference within 6 months of the date of this ruling. In default the *status quo* orders herein shall lapse.
4. The costs of the Plaintiff's Notice of Motion dated 31st October 2012 and the Defendant's Notice of Motion dated 18th March 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____15th ____ day of ____October____, 2013.

P. NYAMWEYA

JUDGE