



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 564 of 2008

FRANCIS NDICHU THAIYA.....1ST PLAINTIFF

NANCY NJERI NDICHU.....2ND PLAINTIFF

VERSUS

ROSE MBITHE.....1ST DEFENDANT

PAUL M. WAMBUA.....2ND DEFENDANT

GITAARI BOORE KITHINJI.....3RD DEFENDANT

LYDIA WANJA.....4TH DEFENDANT

RULING

Three substantive orders are sought in the Plaintiffs' application dated 19th August 2010. The first is that the Plaintiffs/Applicants enjoin Gitaari Boore Kithinji and Lydia Wanja to this suit as the 3rd and 4th Defendants respectively. The second is that leave be granted to the Plaintiffs/Applicants to amend their Plaint in terms of a draft annexed to the application, and that the amended Plaint be deemed to be duly filed. Finally that the 3rd and 4th Defendants/Respondents either by themselves or through their agents and/or servants be restrained from further alienating, selling, transferring and/or disposing off the suit property pending the hearing and determination of the suit filed herein. The main ground for the application is that the parcel of land known as number 2 being the subdivision of L. R. No. 7793/39 and currently known as L. R. No. 7793/61 (hereinafter referred to as the suit property) has been transferred by the 1st and 2nd Defendants to the intended 3rd and 4th Defendants in breach of orders given by this Court on 9th March 2009.

The Plaintiffs' Counsel filed written submission dated 13th May 2011 and made oral submission at the hearing of the application on 29th November 2011. The Counsel submitted that on or about the 7th day of November 2006, they entered into an agreement for sale with the 1st and 2nd Defendants/Respondents for the sale of the suit property, and the 1st Plaintiff then filed a Caveat on the 6th of June, 2008 on the suit property as a party interested in purchasing the land. The orders of the court alleged to have been breached are in relation to this caveat, which was sought to be removed by the Registrar of Titles prompting the Plaintiffs' Advocates to file an application dated 4th March 2009, seeking an order to extend the notice period to withdraw the Caveat given by the Registrar of Titles beyond the stipulated 45

days.

Honourable Mr. Justice Osiemo on the 9th March 2009 extended the notice period for a further 30 days pending the hearing and determination of the said application. It is averred by the Plaintiffs that the 2nd Defendant/Respondent then proceeded to enter into a transfer agreement with the intended 3rd and 4th Defendants to transfer the suit property, and that the instrument of transfer was lodged with the Registrar of Titles on 24th June 2009 by the intended 3rd and 4th Defendant for registration. The Plaintiffs' submission is that suit property has been transferred to the intended 3rd and 4th Defendants during the currency of the caveat, and in breach of the court order issued on 9th March 2009.

The 1st and 2nd Defendants in Replying Affidavits sworn on 7th September 2010 and 5th October 2010 and submissions filed by their Counsel dated 22nd November 2010 and 15th September 2011 respectively, oppose the application. The 1st and 2nd Defendants state that the Plaintiffs are the ones who breached the terms of the sale of the suit premises by defaulting on payment as stipulated in the sale agreement, and as a consequence of which the said sale agreement was terminated in accordance with the law. The 2nd Defendant in his Replying Affidavit and in submissions made by his Counsel at the hearing of the application, gave a detailed account of the terms of the said sale agreement as to completion and the payment of the purchase price, and a chronological sequence of the payments made and defaults by the Plaintiffs in this regard.

The 1st and 2nd Defendants also state that the 45 days notice given by the Registrar of Titles ended on or about the 3rd April 2009, and the 30 days extension given on the 5th March 2009 started running on the 4th April 2009 and lapsed on or about the 5th May 2009. Further, as there was no further extension of the orders beyond the 30 days, and the application of 4th March 2009 has never been prosecuted, the transfer to the intended 3rd and 4th Defendants on 24th June 2009 was not undertaken in breach of any court order, as no order was in force on that date. The 1st Defendant also states that she has to-date not been served with the application dated 4th March 2009 seeking to extend the notice, and with the order given on 5th March 2009 extending the notice by 30 days.

The intended 3rd and 4th Defendants, in an undated replying Affidavit sworn by the 4th Defendant, and submissions filed by their Counsel dated 31st May 2011 state that they entered into an agreement for sale with the 1st and 2nd Defendants on the 2nd February, 2009, to purchase the suit property. Further that having paid the full purchase price in accordance with the terms and conditions of the sale agreement, the vendors' advocates prepared a transfer instrument dated the 9th March, 2009 which was duly executed, the requisite duties paid and the transfer registered on 24th June, 2009 as No. L.R 106268/2. The Intended 3rd and 4th Defendants also state that the certificate of title in their joint names of was issued on the 24th day of June, 2009 clear of any entry or entries evidencing registration of a caveat or any other encumbrance, and they are in possession of the suit property and have completed extensive improvement works thereon to suit our own tastes and specifications.

The intended 3rd and 4th Defendants aver that they we do not know the Plaintiffs and have had no interaction with them at all, neither did they have prior notice or knowledge of a pending conveyance process involving the Plaintiffs and the 1st and 2nd Defendants. They further aver that they are strangers to the facts alleged by the Plaintiffs', and are *bona fide* purchasers for value without notice.

After consideration of the pleadings, evidence, and submissions made by the parties, I will proceed with an examination of the substantive issues raised for determination. The first issue is the one raised by the Counsel for 1st Defendant in the written submissions dated 22nd November 2011, wherein he contends that the application is defective in that it is in the nature of an omnibus application in which six substantive orders are sought. My opinion on this issue is that section 1A and 1B of the Civil Procedure Act (Cap 21) obliges this Court to expeditiously, proportionately and affordably resolve the civil disputes brought before it, and in so doing to make efficient use of the available judicial and administrative

resources, and dispose of proceedings timely and at a cost affordable by the respective parties. . In my view so long as the orders sought if granted will not be in conflict or otherwise incapable of enforcement, then courts should strive not to expend time hearing numerous applications that can be collapsed into and determined as one.

The second issue before the court is whether the 3rd and 4th Defendants can be joined as proper and/or necessary parties to this suit. The distinction between a proper party and a necessary party is found in Order 1 Rule 3 and in Order 1 Rule 10(2) of the Civil Procedure Rules. A proper party is one joined because there is a cause of action against it as envisaged in Order 1 Rule 3. In addition one can be joined as a party under Order 1 Rule 10(2) by the Court either upon application or of its own motion even if he/she is are not a proper party, if the Court considers the person to be are a necessary party for the effectual and complete determination of all the issues in the suit.

Orders sought by the Plaintiffs in the draft Amended Plaintiff include injunctions against the Defendants, and an order cancelling the transfer of the suit property to the intended 3rd and 4th Defendant on account of the alleged fraud, which the Plaintiffs' counsel submitted the said Defendants ought to have been aware of.. The 3rd and 4th Defendants have argued that both the Draft Amended Plaintiff does not show the case the Plaintiffs intend to argue against them, or instances of fraud or irregularity in the manner in which they purchased the suit property to justify an order that they be enjoined. The Plaintiffs have presented evidence on the allegations made in terms of the caveat lodged and the order of this court extending the notice period to withdraw the Caveat. This are however issues that can only be determined if the Plaintiffs are allowed to present their case at the full trial of the suit, which is the proper forum for the intended 3rd and 4th Defendants to present their defence.

In addition, the subject matter of the suit filed by the Plaintiff is the suit property, and as the registered owners of the said suit property, any orders sought by, or granted to the Plaintiff in the suit herein are likely to affect the intended 3rd and 4th Defendants legal interests. My finding is that the 3rd and 4th Defendants are both proper and necessary parties for the foregoing reasons and I accordingly grant prayer 3 of the application dated 19th August 2010.

Having so joined the 3rd and 4th Defendants as parties to the suit herein, I will grant Prayers 4 and 7 of the said application, as they are consequential to prayer 3 having been granted and allowed under Order 1 Rule 10(4) and Order 8 Rule 3(1) and (5) of the Civil Procedure Rules 2010.

The outstanding issue left to determine is whether the Plaintiffs have established a *prima facie* case to warrant the issue of an against the 3rd and 4th Defendants in line with the requirements in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. The Plaintiffs, claim of a *prima facie* case is based on the sale agreement entered into with the 1st and 2nd Defendant, which agreement is not denied by either party. One of the issues that will have to be decided at the trial of the suit filed herein is which party, if any, was in breach of the said agreement. The 1st and 2nd Defendants have in the meantime however transferred the suit property to the 3rd and 4th Defendants, who have produce a copy of a title to the suit property in their names, in annexure "LW-4" to the undated Replying Affidavit sworn by the 4th Defendant. I admit the said affidavit under Order 19 Rule 7 of the Civil Procedure Rules 2010, which gives this court discretion to receive any affidavit notwithstanding any irregularity in its form or any technicality. The fact that the said affidavit is not dated does not in my opinion alter or affect its substance.

My finding on this issue is that the Plaintiffs have not established a *prima facie* case, because the effect of the 1st and 2nd Defendants certificate of title is clear under section 23 of the Registration of Titles Act (Cap 281) under which the suit property is registered. The section states as follows:

“ The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that

proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The Plaintiffs have alleged that there was fraudulent dealing with the land, and that it was transferred and registered when there was a caveat in place forbidding such transfer and registration. This is an issue that can only be finally determined at full trial of the suit herein. Nevertheless, even if such fraud was to be proved, the effect is clear in section 24 of the Registration of Titles Act:-

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription: ...”

Damages are therefore the allowed remedy for the Plaintiffs as against the 3rd and 4th Defendants if they succeed in their suit, and will have to be the adequate remedy for purposes of this application. Prayer 5 of the Plaintiffs’ application dated 19th August 2010 is therefore denied.

The costs of the application shall be costs in the cause.

Dated, signed and delivered in open court at Nairobi this 26th day of January, 2012.

P. NYAMWEYA

JUDGE