



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND CASE NO.34 OF 2011
ANN MUMBI HINGA PLAINTIFF

VERSUS

WILLIAM MWANGI DEFENDANT

RULING

The dispute between the Plaintiff and the Defendant, who has also filed a counterclaim in this matter, is over a property known described as **LR No. 26578** situated in Karen, Nairobi. The parties entered into an agreement for sale dated 2nd May, 2003, at an agreed price of KShs.3.5 million. The sale was supposed to be completed within ninety [90] days. Several things were to be done. The Defendant was to pay the purchase price and it is undisputed that a sum of KShs.2,850,000/-, being about 67% of the purchase price was paid and acknowledged by the Plaintiff.

The Plaintiff was supposed to provide completion documents on or around 2nd August, 2003. However, the Plaintiff did not present the completion documents. It would appear the defendants took possession of the plot and started effecting some developments. There are several correspondences on record between the parties' advocates that demonstrates indeed there was inordinate delay on the part of the Plaintiff to complete the subdivision of the portion of land and to provide the completion documents.

While the Defendants were waiting for the Plaintiff to provide the completion documents, there was quite a protracted back and forth communication with the advocates, but over the years there is no indication that the plaintiff demanded to rescind the sale. However on 24th January, 2011, the Plaintiff through her Advocates issued a letter which was served on the defendant's employee on the same date purporting to rescind the Agreement and also enclosed a cheque of KShs.2,815,000/- being the purchase price. Following that letter, on 30th January, 2011, the Plaintiff employed a squad of several people who entered the suit premises and pulled down the Defendant's structures.

After the Plaintiff entered the suit premises, the following day, that is 1st February, 2011, this suit was instituted. Simultaneously with the filing of the suit, the plaintiff also filed a notice of motion under **Order 40 the Civil Procedure Rules**, seeking for injunction orders against the Defendant. The matter was certified as urgent but the Plaintiff's application in which she sought for interim orders of injunction was dismissed on 30th March, 2011 by **Muchelule, J.**

Meanwhile the Defendants had also filed a suit against the plaintiff being **HC ELC NO. 40 of 2011**, in which they were seeking for similar orders as the Plaintiff. The Defendants withdrew that suit and filed a counterclaim in this suit. The balance of the purchase price of KShs.685,000/- was deposited in court on 20th April, 2011, as a precondition for the issuance of an order of injunction against the plaintiff.

The matter that is before me for determination is the Defendant's application dated 4th April, 2011. It seeks for orders to restrain the Plaintiff from interfering or doing any act that is in breach of the

Agreement dated 2nd May, 2003.

This application is supported by the affidavit of William Mwangi Gathuma and Stephen Nduati Maina. Briefly summarized, the Defendants seek for protection from the Plaintiff who attempted to evict them from the suit premises.

The application was opposed by the Plaintiff; reliance was placed on the written submission. It is argued that the Plaintiff rescinded the sale Agreement and took possession of the suit premises.

I have gone through the written submissions and the pleadings in this matter. It is not disputed that the parties entered into a sale agreement. The Defendants paid about 67% of the purchase price and they took possession of the premises in 2003. The Defendants have been waiting for the Plaintiff to provide the completion documents as evidenced by the amount of correspondences exchanged between the parties. While that was pending, the Plaintiff issued a rescission notice and purported to refund the purchase price. I find the Defendant's application discloses a *prima facie* case and the issue of whether the Plaintiff could rescind the contract of sale and refund the purchase price is a serious issue for trial.

For now, the application by the Defendant meets the threshold of the principles enunciated in the oft cited case of **GIELLA VS CASSMAN BROWN SHOE LTD {1973} EA 358**.

Accordingly I hereby grant an interim order of injunction in terms of prayer number three [3] as follows:

*3. THAT the Honourable Court be pleased to grant a temporary injunction restraining the plaintiff/respondent by herself, her servants, agents, representatives and or employees or anyone claiming under her howsoever from breaching the sale agreement dated 2nd May, 2003, re-entering, taking possession, remaining thereon, erecting or continuity, to erect any building or structures upon the suit property being the one acre piece of land to be subdivided and excised from LR No. 26578 Nairobi (as defined and demarcated in the sale agreement) or in any way interfering with the defendant's quiet possession of the suit property pending the **inter parties** hearing and determination of this suit.*

This order shall remain in force for a period of one year within which time the parties should prosecute the suit.

Costs of the application shall abide the outcome of the suit.

Ruling read and signed this 17th day of February, 2012.

MARTHA KOOME
JUDGE OF APPEAL

Note:

This application was heard and concluded on 29th November, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.