



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL DIVISION
ELC NO. CASE NO. 203 OF 2011

SUSAN WANJIRU CHEGEPLAINTIFF

VERSUS

PATRICK KURIA KABATA1ST DEFENDANT

LIKAM OLE KIAMBU2ND DEFENDANT

JOSEPH MACHUNGO3RD DEFENDANT

RULING

The plaintiff/applicant hereinafter referred to as the applicant has filed a Notice of Motion dated 20/5/2011 brought under section 1, 1A, 3A 63 (c) and (e) of the Civil procedure Act, Order 40 rule 1 (a), 2 and 4 of the Civil Procedure Rules, and all other enabling provisions of the law seeking the following orders:-

1. That this Honorable Court be pleased to issue an order of temporary injunction restraining the Defendants whether by themselves, their appointed agents, servants, auctioneers or any of them from doing any of the following acts, that is to say, from advertising for sale, selling by private treaty or public auction, leasing, subleasing, charging disposing of, subdividing, or otherwise howsoever or completing any conveyance or transfer of any sale conducted by auction or private treaty, occupying and erecting structures thereon or otherwise howsoever interfering with the ownership of title to and/or interest in ALL THAT parcel of land known as plot No. B43 on Tassia Resettlement Scheme pending hearing and determination of this suit.
2. That this Honorable court be pleased to issue a permanent injunction restraining the 1st and 3rd Defendant whether by themselves, their appointed agents, servants, from construction, further construction, excavation, building, putting up any other structure or attempting to commit acts of waste over Plot No. B43 on Tassia Resettlement Scheme pending hearing and determination of this application and this suit.
3. That costs of this application be borne by the Defendant.

The application is supported by the affidavit of Susan Wanjiru Chege and is based on the following grounds.

1. That in August 2001 , the plaintiff and the 1st Defendant began cohabiting as husband and wife in Maralal. Over the years, they made several investments jointly.
2. That in 2007, they decided to buy a piece of land in Nairobi to build their matrimonial family home. They identified plot no. B43 on Tassia Resettlement Scheme and negotiated with the 2nd Defendant who had presented himself as the owner of the property.
3. That the parties executed the Agreement for sale dated 24th January 2008 in which the plaintiff and the 1st defendant were named as the buyer for the property. The salient terms of the Agreement for sale were as follows:

Subject Matter: Plot No. B43 on Tassia Resettlement Scheme off Outer Ring Road, Nairobi

Purchase Price: Kshs. 150,000

Mode of Payment Cash

1. That being the sole bread winner for the family at the time, and with the consent of the 1st Defendant, the Plaintiff financed the transaction and paid one hundred and fifty thousand Kenya Shillings (kshs.150,000/=) only to the 2nd Defendant in cash whose receipt was duly acknowledged by the 2nd Defendant.
2. That the plaintiff and the 1st Defendant decided to construct their family home immediately. The plaintiff bought the building materials while the 1st Defendant supervised the construction of the house.
3. That the plaintiff and the 1st Defendant were well known in the community and were regarded as husband and wife as they had cohabited there together for two years. During the same period, the 1st and 2nd defendant forged a strong friendship and the 2nd defendant introduced the 1st defendant to the property business.
4. That the 1st Defendant became cruel towards the plaintiff and her daughter in the course of her cohabitation with the 1st defendant thereby prompting her to leave the matrimonial home and its surrounding fearing for her life, and moved to southern Sudan seeking employment.
5. That on 7th April 2011 the Plaintiff returned to Kenya to visit her family, as well as to inspect her various investments, and on visiting the suit property, she found that the roof of the house was missing. The doors had also been removed. All her personal belongings were nowhere to be seen. Further, there was an iron-sheet structure constructed besides the stone house.
6. That the plaintiff made a complaint at the Embakasi Police Station that there was an unknown person erecting a structure on her land. The complaint was recorded as OB 58/20/04/2011.
7. That the plaintiff also reported the matter to the local Chief. The Chief issued a Summon to attend addressed to whomever was developing the land, copies of which the Plaintiff placed all over the property.
8. That on 27th April 2011 the plaintiff was summoned by the Chief and found the 1st and 3rd Defendants there. The plaintiff presented the Certificate of ownership in favor of the 2nd Defendant and the Agreement for Sale in favor of both herself and the 1st Defendant. The 1st Defendant presented another certificate of ownership in favor of the 2nd defendant and an agreement for sale purporting to sell plot No. B43 on Tassia Resettlement Scheme to the 1st Defendant.
9. That the 1st Defendant claimed that the land belonged to him alone, having acquired it from the 2nd

Defendant and was at liberty to deal with the same as he wished including leasing and selling it to the 3rd defendant.

10. That the 2nd defendant has failed to explain the basis of the agreement for sale and the certificate of ownership in his favor held by the 1st defendant in view of the previous sale of the plaintiff and the 1st defendant jointly.

11. That the plaintiff has since then received threatening phone calls from the 1st Defendant advising her to stay away from the suit property, which calls infer a conspiracy between the defendants to deprive her of her property.

12. That the plaintiff wishes to resettle her daughter and herself on the suit property, but the 3rd defendant has declined to give vacant possession despite constant reminder hence this application.

13. That unless the defendants are restrained by this court from selling, leasing, subleasing, charging, disposing of, subdividing, or otherwise howsoever or completing any conveyance or transfer of any sale, occupying and erecting structures thereon or otherwise howsoever interfering with the ownership of the title to and/or interest in plot No. B43 on Tassia Resettlement scheme, the defendants will continue to deprive the plaintiff of property she legally acquired and financed through great difficulty.

14. That the plaintiff has a prima facie and sustainable case against the defendants and should an injunction not be granted as prayed, this suit shall be rendered nugatory.

15. That it is in the interest of justice that this application be allowed.

The applicant case is that in August 2001 she began cohabiting with the 1st defendant / 1st respondent. During their cohabitation they purchased property and other investments together. Amongst the property they purchased was the suit plot, Plot B43 at Tassia Resettlement scheme. They bought the said plot from the 2nd defendant in January 2008- see agreement for sale dated the 24th January 2008, SWC2. She paid Kshs. 150,000/- to the 2nd defendant for the said plot. After some time she had problems with the 1st defendant and she moved out and went to work in South Sudan. She came back in April 2011 and found that the 1st defendant had disposed off the plot by selling it to the 3rd defendant. She reported the matter to the police and even the local chief. When they met at the chief's office the 1st defendant presented a sale agreement he had with the 2nd defendant and another with the 3rd defendant. On realizing the closeness of the defendants with the local chief she decided to come to Court seeking the orders in her application. She states that she has a prima facie and sustainable case against the defendants that the defendants will continue to deprive her of a plot she legally acquired and financed and if the orders are not granted then the suit shall be rendered nugatory.

The 1st defendant filed a replying affidavit dated the 6th June 2011. He does not deny that he knows the plaintiff. He states that at no time did he cohabit with the applicant as alleged but that she was a mere acquaintance. On the suit plot he states that the applicant did not buy it. That he bought the said plot from the 2nd defendant he paid Kshs. 70000/- for it and later sold it to the 3rd defendant. He claims further that the signature in the sale agreement the applicant has attached in SWC2 is a forgery. In his affidavit he has annexed the agreement he had with the 2nd defendant the transfer receipts and also a deed plan PKK2 of the said plot. He has asked this court to dismiss the applicant's application

The 2nd defendant filed an affidavit dated the 6th June 2010. In his affidavit he states that he did own a plot No. B43 on Tassia Resettlement Scheme, LOKI is a copy of the certificate of ownership. He sold the said plot to Patrick Kuria Kabata on the 1st of March 2007 LOK 2 is a copy of the said agreement. That no time did he execute any sale agreement with the applicant and that all dealing with the subject plot were done with the 1st applicant and all payments were done by him to me. That the purported signature on annexure SWC -2 to the applicant affidavit is a forgery and does not belong to him. That after the sale

of the said plot to the 1st defendant he had no other dealings with him on the said plot.

The 3rd defendant filed a replying affidavit dated 3rd June 2011. In brief he states that he bought the suit plot from the 1st defendant and paid a sum of 590,000/- and he was issued with a certificate of ownership No. 43B from Tassia Resettlement Scheme self-help group on 29th September 2010. That he is a purchaser for value and without Notice as the Certificate of ownership by the vendor, the 1st defendant was solely in his name. That he resides in the property and he is currently construction is going on renovation of the house.

Counsels for the parties made oral submissions in the Court which I have carefully considered together with the affidavits and annexures attached. The applicant in this case is seeking an injunctive order. To succeed in her application she has to establish that her case falls within the principles in the case of Geilla Vs. Cassaman Brown & Co. LTD 1973 page 358 that;

(i) She has a prima facie case with probability of success

(ii) she is likely to suffer irreparable loss if the injunction is not granted

(iii) If the court is in doubt it will decide the application on the balance of convenience/the balance of convenience tilts in her favor

That applicant claims to be a joint owner with the 1st defendant of the suit plot. The 1st defendant denies this and claims that he is the one who bought the suit plot himself and has sold it to the 3rd defendant. The 2nd defendant the previous owner of the plot denies having sold the plot to the applicant as shown in the agreement for sale SWC2 and claims that the signature purported to be his is a forgery. It is evident that the applicant and the 1st defendant had a relation but that is not the issue here. The issue is that does she have a prima facie case? The 1st defendant has annexed documents to show that he bought the said plot from the 2nd defendant who confirms it. To support his case further he has annexed a deed plan and transfer receipts from Tassia Resettlement Scheme. The documents the defendants have attached have not been controverted by the plaintiff as she did not file any supplementary affidavit to show that that the said documents were not of Tassia Resettlement Scheme. I therefore find that the applicant has failed to establish on the documents filed that she has a prima facie case. I also find that she has failed to show the irreparable loss she is likely to suffer. If indeed she paid for the plot and she can claim damages for the sums she paid. I note further that the suit plot has been sold to the 3rd defendant who is currently in occupation and is currently constructing. The balance of convenience tilts in the favor of the 3rd defendant. I therefore find no merit in the applicant's application dated 10th May 2011. I dismiss the application but due to the relationship between the plaintiff and the 1st defendant each party shall bear its own costs.

Dated and delivered this 28th Day of March 2012

R. OUGO

JUDGE

In the Presence of:-

For the Applicant

For the 1st Respondent

For the 2nd Respondent

For the 3rd Respondent

Court Clerk