



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 624 OF 2011

HELLEN JEPKOSGEI KIPLAGAT.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

TITUS BARASA KHISA.....2ND DEFENDANT

RULING

The application before the Court is dated 10th November 2011, wherein the Plaintiff is seeking two substantive orders:

1. That the Court be pleased to restrain the 1st or 2nd Defendants, either by themselves, or through any of their servants and or agents or howsoever from, selling, charging, taking possession of, disposing of or in any other way dealing with the parcel of number Nairobi/Block 99/121, pending the hearing and determination of this suit.
2. That the Court be pleased to cancel the transfer of land parcel number Nairobi/Block 99/121 to the 2nd Defendant's name and revert the entry made on the 2nd September 2005 and register the said Nairobi/Block 99/121 (hereinafter referred to as the suit property) in the Plaintiff's name, pending the hearing and determination of this suit.

The main grounds for the application are that the plaintiff is proprietor of land parcel No. Nairobi/Block 99/121, which at all material times was charged to the Equatorial Commercial Bank Ltd, and that the 1st Defendant has in collusion with the 2nd Defendant fraudulently transferred the said parcel of land to the 2nd Defendant. The Plaintiff is apprehensive that the Defendants might dispose of the said parcel or take up possession thereof unless restrained by this court. These grounds are elaborated upon in the Plaintiff's Supporting Affidavit sworn on 10th November 2011, to which the Plaintiff has attached a Certificate of Lease issued on 16th March 1998 showing she is the registered proprietor of the leasehold interest in the suit property. She has also attached a charge made on 13th May 1998 in favour of the Equatorial Commercial Bank Ltd. to secure a loan of Kshs.2,200,000.00. The Plaintiff states in the said affidavit that she is still servicing the said loan, and that the said bank has never threatened to sell the property and has the original title deed in its custody.

The Plaintiff further states that in June 2011, she offered to provide the suit property as security for a mortgage to be granted to her company Nile Hauliers Ltd, and has annexed the letter of offer from Equatorial Commercial Bank Ltd. Further, that when she undertook a search to enable the bank create a further charge, she found that the said property was on the 2nd September, 2005 transferred to the 2nd Defendant. She has attached a copy of the application for a search and payment receipt. The Plaintiff denies knowing the 2nd Defendant or ever having had any dealings with him. The Plaintiff also states that she has severally demanded that the said illegal transfer be cancelled but without any success, and has attached letters of demand sent to the 1st Defendant dated 21st July 2011 and 25th June 2011. The Plaintiff is apprehensive that if the Court does not intervene in this matter, the suit property, on which she has built her family home and where she resides, will be lost.

The Plaintiff's Advocate filed written submissions dated 17th February 2011 wherein the above-stated facts were reiterated, and it was argued that this court has the jurisdiction to grant the injunctions sought by virtue of Order 40 Rules 1 and 2 of the Civil Procedure Act, Sections 3A and 63(a) and (e) of the Civil Procedure Act, and the decision in **Belle Maisons Ltd v Yaya Towers Ltd H.C.C.C No. 2225 of 1992**, with regard to the power of the court to grant a mandatory injunction at an interlocutory stage. The Advocate also submitted that they have fulfilled the conditions in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** particularly as the Plaintiff's dispositions have not been controverted, and by the fact that she will not only have to repay the loan but lose her home were the bank to recall its loan as a result of the property being registered in the 2nd Defendant's name.

The Defendants were served with the application and hearing notice and none of them filed a response to the application. The 1st Defendant's Advocate however at the hearing of the application on 21st February 2012 submitted that he was not opposed to the application save for prayer 4 of the same, which cannot be granted at this stage.

I have read and carefully considered the pleadings, evidence and submissions made in this application. At this stage what I need to decide is whether the injunctions sought can be granted. For the temporary injunction sought in prayer 3 of the application to issue, the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** must be met. The main issue therefore is whether the Plaintiff has shown a *prima facie* case to entitle her to the injunction sought. The evidence produced by the Plaintiff is the certificate of lease and charge entered into with respect to the suit property, which is sufficient evidence of ownership of the same. In addition the said prayer is not opposed. This Court cannot however grant the said injunction as against the 1st Defendant as to the suit property is not within its control, and in my view the proper course of action would be for the Plaintiff to notify the 1st Defendant of any injunction granted by having the same noted or registered against the title of the suit property.

The only issue left to determine is whether the Plaintiff has established special circumstances to warrant the grant of a mandatory injunction. The Court of Appeal has held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. There are no special circumstances pleaded or shown by the Plaintiff to justify the grant of the mandatory injunction, and this is definitely not a clear case as we have not heard the Defendants side of the case. This court cannot therefore grant the mandatory injunction sought.

For the foregoing reasons, the orders of the Court are as follows:

1. The 2nd Defendant, either by himself, or through any of his servants and/or agents or howsoever, is restrained from, selling, charging, taking possession of, disposing of or in any other way dealing with the parcel of number Nairobi/Block 99/121, pending the hearing and determination of this suit.
2. Prayer 4 of the Plaintiff's application dated 10th November 2011 is denied.
3. The costs of the said application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____April____, 2012.

P. NYAMWEYA

JUDGE