



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 17 OF 2012

MOSES CHEGE NGANGA PLAINTIFF

- VERSUS -

LUCY MUTHONI KIMANI DEFENDANT

RULING

1. This is a contest between parties who were close friends. But there is now no love lost between the plaintiff and the defendant. The plaintiff claims that on 9th November 2011 he executed a transfer over his house known as D 140 Umoja estate Nairobi in favour of the defendant. He says that the defendant was a close friend of 2 years. The transfer, he avers, was to facilitate the defendant to obtain some finance and refund him the purchase price he had paid in September 2011. The credit facility was to be sourced from Equity Bank. It was not forthcoming. In the meantime the relationship between the parties deteriorated and came to an end.
2. The plaintiff has thus filed a notice of motion dated 17th January 2012 to restrain the defendant from disposing or dealing with the property. The plaintiff is now apprehensive that his former acquaintance is a deceitful and dishonest person who may use the instrument of transfer to defraud him of the suit property. All that is deponed to in his affidavit sworn on 17th January 2012. It has one annexure: a transfer agreement dated 7th November 2011 from the plaintiff to the defendant. The consideration is not stated. Learned counsel for the defendant submitted that the consideration was love and affection.
3. The motion is contested. The respondent has filed a replying affidavit sworn on 6th February 2012. She says the plaintiff was her lover. Annexure “**LMK 1**” is a set of photographs of the couple in happier times. The respondent’s case is that the plaintiff bought her the suit house. She is living there. She denies that the transfer agreement was executed to support a financing application. She takes up cudgels on the label of a dishonest or deceitful person who would harm the plaintiff. She accuses the plaintiff of material nondisclosure: that he was her lover and the transfer of the house was voluntary. It was submitted that the plaintiff has not reached the threshold for grant of interlocutory injunction.
4. I have formed the following view of the matter. When one party such as the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant

must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

5. The plaintiff claims the transfer agreement over the suit property was superficial and only meant to secure finance for the defendant. There is no documentary evidence that the defendant was pursuing such funding. It is the plaintiff's word against the defendant's. I form the conclusion that one of them is untruthful. That will perhaps be resolved at the trial upon tested evidence on cross-examination. There is no evidence that the plaintiff was coerced to execute the sale agreement. The plaintiff was not forthright on the true nature of the relationship with the defendant. The photographs I referred to betray him. I have formed the further conclusion that the plaintiff may have executed the transfer either for the reasons contested by both parties or other reasons. Again that is for the trial court.

6. I have taken into consideration that the sale agreement styled transfer agreement was drawn by an advocate, Kabue Thumi, who attested to the signatures of the parties. I have stated there is no evidence of coercion. The agreement does not state the consideration. Is it void for want of consideration? Was consideration love and affection? Or was it to dupe Equity Bank to fund the defendant to pay the plaintiff? Was the plaintiff naïve or has a fraud taken place? Is the plaintiff backtracking to recall a genuine gift? Those questions are the true province of the trial court. It is not clear whether the plaintiff surrendered the documents listed in the transfer agreement at clause 4 (a) to (h) to aid the transfer. I harbour serious doubts that in their absence and considering the form of transfer, the defendant would be in a position to dispose of the suit property.

7. I am thus of the considered opinion that the plaintiff has not made out a strong *prima facie* case. The property has a value. It is not stated in the agreement. There is no evidence of how much the plaintiff bought it for in September 2011 or how much the defendant was allegedly borrowing. Granted that paucity of evidence, I cannot say that the defendant would be in a position to compensate the plaintiff in damages. The loss would be quantifiable but the court has been deliberately left in a blind spot. Having then raised doubt about the *prima facie* case or suitability of damages, I must then deal with the balance of convenience.

8. I am faced with an agreement of sale by the plaintiff to the defendant. The validity of that agreement is under contest in the suit. The unique circumstances of this case and the past relationship between the parties make it difficult, at this stage, to form a firm conclusion on the *bona fides* of the parties. If it is true, as the defendant says, that she is an honest person who received a gift from the plaintiff for her love and care, the plaintiff cannot resile from it. But she could also have made misrepresentations about the alleged finance scheme. The balance of convenience in this case thus tilts towards maintaining the *status quo ante* until the suit is heard and determined. As the defendant is in possession, she would suffer no prejudice by being restrained from transferring it. The constitution, in article 159 as read together with sections 1A and 1B of the Civil Procedure Act enjoin this court to do substantial justice to the parties.

9. For all the above reasons, I order that the defendant be and is hereby restrained by injunction from disposing, transferring or parting with possession of House No D 140 Umoja Estate, Nairobi, until the determination of the suit. I further order that the main suit be heard and determined within 1 year in default of which the order of injunction shall lapse. Costs shall abide the judgment.

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Mutua for the Plaintiff.

Mr. Maina for Kabue for the Defendant.