



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Civil Suit 201 of 2008 & 142 OF 2007

JANE MARETE.....PLAINTIFF

VERSUS

1. JOSEPH WAITIKI NDEGWA.....1ST DEFENDANT

2. IRINE JULIET OTINGA2ND DEFENDANT

3. THE REGISTRAR OF TITLES.....3RD DEFENDANT

RULING

1. This is a Notice of Motion brought by the 2nd Defendant/Applicant Irene Julie Otinga under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Orders L Rule 1, XXXIX Rule 7 and XL of the old Civil Procedure Rules. The Applicant seeks, essentials, order:

Pending the hearing and determination of the suit, that:

“ a) The suit property herein be valued by a Valuer appointed by the Court and determine its state and market rental income if let

b) Issue a mandatory order compelling the Plaintiff to deposit into a joint interest earning account in the names of counsel for the parties:

i) The mesne profits assessed as per (a) above from July, 2007 to 30th October, 2010

ii) The mesne profit assessed as per (a) above from 1st November, 2010 until determination of this suit.

c) If the Plaintiff is not able to comply with the term set out in (b) above, the Court do issue a mandatory order compelling the Plaintiff to vacate the suit property and appoint a receiver to manage the suit property pending the hearing and determination of this suit.”

2. The dispute concerns a piece of land in Nyali area, namely, Plot Sub-Division Number 5608 (original Number 5203/22) Section I Mainland North (the “suit property”). The present application is supported by

the affidavit of the 2nd Defendant. In it, she asserts that the Plaintiff is laying a claim of ownership to the Suit Property, by virtue of a Sale Agreement dated 5th October, 2006 between Plaintiff as purchaser and the 1st Defendant as vendor. She, the 2nd Defendant, on the other hand, is laying claim to the suit property by virtue of a Sale Agreement dated 22nd August, 2007 between herself, that is 2nd Defendant, as purchaser and 1st Defendant as vendor and transferor.

3. The Plaintiff filed a Replying Affidavit sworn on 10th December, 2010. In essence the Plaintiff deposes that:

- She is in possession of the suit property as of right, pursuant to the Court's ruling in this suit dated 2nd December 2008; the Court found she had a valid purchase agreement with the 1st Defendant protected under a caveat which had been illegally lifted; and that she was in possession of the suit property pursuant to the purchase agreement.
- The present application is intended to circumvent the injunctive orders issued by the Court.

4. The 1st Defendant, Joseph Ndegwa, also filed a Replying Affidavit deposed on 2nd December, 2010. He supports the Applicant's application and asserts that:

- When he was still the registered proprietor of the suit property the monthly rent was Kshs.50,000/=
- The Plaintiff obtained possession of the suit property under a sale agreement with him dated 5th October, 2007, but failed to complete performance of her obligations under that agreement.
- He instituted a suit HCC Number 142 of 2007 seeking termination of the said agreement, but the Plaintiff instead instituted the present suit wherein she obtained the orders upon which she is now riding.
- He always been ready and willing to **refund** to the Plaintiff her down payment for the aborted sale.

5. The Applicant and the Plaintiff filed skeletal written submissions on 7th March and 30th March, 2012 respectively. They highlighted the same on 30th March, 2012. Mr. Munyithya submitted for the 2nd Defendant/Applicant, whilst Mr. Mogaka submitted for the Plaintiff/Respondent.

6. Essentially, the Applicant argues that despite having formally taken a transfer of the Suit Property from the 1st Defendant in consideration of payment of Kshs. 5,000,000/-, the Plaintiff remains in actual possession. The Plaintiff's rival claim is pursuant to an agreement, and has been pending since 2008. The Applicant is apprehensive that if the Plaintiff loses the suit, the question of payment of mesne profits will arise for the period of occupation.

7. The Applicant relies on the following authorities:

a) Civil Application Number NAI 71 of 1998 **Nasir Ibrahim Ali and 2 Other vs Kamlesh Mansukhalal Damji Pattni and Another** In that case, the Court ordered that the receiver managers of the Kenya Duty Free Complex should regularly account for its management control and operations where an executed, but not fully paid for, sale and purchase agreement had been entered into prior to receivership.

b) **Continental Credit Finance Limited vs Isaac Gathungi Wanjohi and 2 Others** [2006] e KLR where the High Court granted an injunction stopping the 1st and 2nd Defendant from collecting rent from the suit property, and appointed a third party to collect rent. In that case, the application was brought under order XLI Rule 4.

c) **Hussein Haji Issa vs Anwrali K. Ismail and Another** HCCA Number of 2003 where it was not in dispute that the Appellant was the owner of the suit property, but was involved in a dispute with the Respondents who were in occupation and were collecting rent in respect of stalls erected thereon. The Court held that this was a special case requiring careful balance as all parties were members of the same family. Justice Visram directed that all income be deposited into an interest earning account.

8. The Plaintiff's submissions are, *inter alia*, as follows:

- That the application is an abuse of the Court process
- That the Plaintiff remains in possession, and the Court found that the transfer to the 2nd Defendant was registered on a date before it was executed
- That the Plaintiff was ready to perform her part of the sale agreement when the property was transferred to the 2nd Defendant.
- The order now sought will interfere with and defeat the injunction already granted by the Court
- The title exhibited to the 2nd Defendant's Notice of Motion does not reflect endorsement of the transfer in favour of the 2nd Defendant
- The stamp duty on the transfer was not paid.

9. I have carefully considered the application, affidavits and supporting documents and the parties' submissions. The first observation I must make is that in the Re-amended Plaint, the Plaintiff has made serious allegations against the 2nd Defendant of fraudulent, illegal, unlawful, and wrongful actions. These are geared toward forcing the Plaintiff out of her rightful property (see paragraphs 12, 13, 14, 14A, 14B, 14C, 14D, and 17).

10. The second observation is that in its Ruling of 2nd December, 2008, the Court found that the 1st Defendant admitted having transferred the suit property, and no longer had any proprietary interest in it. The contest of proprietorship therefore remains between the 2nd Defendant/ Applicant to whom the transfer has allegedly been given, and the Plaintiff who has been and still is in possession. The Court also found that the 2nd Defendant did not seek vacant possession until 31st July, 2008, despite the property being registered in her name a year earlier. There was also a discrepancy in the registration of the transfer to the Defendant before its execution, which assumed significance to the Court when the allegations of fraud are considered.

11. Thirdly, the Plaintiff has asserted in the Plaint that upon taking possession, she did expend money in substantially improving the premises.

12. Fourthly, the Plaintiff/Respondents also argued that the application for mesne profits should fail because there is no landlord – tenant relationship between the parties, and the 2nd Defendant has not filed a counterclaim.

13. I have taken the above observations into account to enable me to consider whether to exercise discretion in favour of or against the application. Given the above observations, the only prayer I consider safe and appropriate to grant, if at all, is prayer 2(a). I do not think there is any basis as argued under prayer 2b to compel the Plaintiff to deposit any money as mesne profits into a joint account. Nor is there any basis for an order compelling the Plaintiff to vacate the suit property and appoint a receiver to manage the suit property as urged under payer 2(c).

Issuance of any of the orders prayed for in 2(b) or 2(c) would tend to suggest that the court is satisfied on a *prima facie* basis, that the 2nd Defendant's cause of action had such probative force as to

entitle them, **now**, to the benefits sought if the outcome of the suit was in their favour.

Accordingly, I decline to grant prayers 2(b) or 2(c).

14. With regard to prayer 2(a), my view is that a valuation of the suit property could be done without harming the *status quo*, pending determination of the suit. However, I am not persuaded that that would be a useful exercise at this time unless such order were coupled with an order in terms of prayer 2(b). I consider that a valuation would be essential if, upon determination of the suit, the 2nd Defendant emerges successful. In such case, there would be need for a valuation to determine, not only the value for rental purposes, but the value of improvement, if any, allegedly done by the Plaintiff.

15. In the result, as no order for any of the prayers commends itself to me, I dismiss the application in its entirety with costs to the Plaintiff. I further direct that the parties do expeditiously prepare the groundwork and necessary pre-trial documentation to enable a hearing date for the suit to be taken within the next forty five (45) days.

Orders accordingly.

Dated, signed and delivered this 24TH Day of MAY, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....