



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 59 OF 2011

BEATRICE IMBWEYA ALUMASI..... PLAINTIFF

VERSUS

GERALD ALUMASI1ST DEFENDANT

CHARLES NGIRUBIU.....2ND DEFENDANT

ESTHER WAITHERA KARANJA.....3RD DEFENDANT

RULING

The 2nd and 3rd Defendants/Applicants filed an application dated 22nd February 2012 by way of notice of motion, wherein they are seeking the following two orders from this Court:

1. That the Plaintiff be compelled to deliver vacant possession of the suit premises being Nairobi/Block 73/328 BuruBuru Phase 1 Number 328 (hereinafter referred to as the suit property) to the 2nd and 3rd Defendants upon payment of a sum of Kshs 2,000,000 to the Plaintiff and Kshs 800,000/= to the 1st Defendant.
2. In the alternative the 1st Defendant be compelled to refund the purchase price of the suit property being amounting to Kshs 7,200,00/= together with any accrued interest thereon and stamp duty charges paid, and the Applicants thereafter do execute a transfer in favour of the 1st Defendant.

The grounds for the application are that the 2nd and 3rd Defendants are *bona fide* purchasers for value without notice and are currently servicing a mortgage in respect of the suit property. Further, that the Plaintiff who is the wife of the 1st Defendant is occupying the suit property and has refused to hand over possession, and has conceded to vacate the suit property only upon payment of Kshs 2,000,000/= being paid to her. These facts are deponed to in a supporting affidavit sworn on 22nd February 2012 by the 3rd Defendant, to which she has annexed various supporting documents.

The 1st Defendant’s Advocate filed a Notice of Preliminary Objection dated 1st March 2012, which this Court will consider first, as the outcome will determine if the Applicants application will proceed on the merits. The hearing of both the Preliminary Objection and application was held on 27th March 2012, and the Plaintiff’s Advocate associated himself with the 1st Defendant’s Advocate’s position, and relied on the Plaintiff’s Replying Affidavit sworn on 5th March 2012.

The 1st Defendant objected to the application firstly on the grounds that two annexures, namely “EWK

8” and “EWK 9” of the 3rd Defendants Supporting Affidavit, offend section 23 of the Evidence Act and should be struck out. The said annexures are a bundle of correspondence between the Plaintiff and 1st Defendants Advocates copied to the Applicants’ Advocate, and on a “Without Prejudice” basis. The 1st Defendants Advocate also relied on the decision in **Ronnie Rogers Malumbe v Erasto Muga (2005) eKLR**. Section 23(1) of the Evidence Act provides as follows:

“(1) In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.”

It is clear from the above provision that the Applicants cannot rely on the contents of the said annexures to show the Plaintiff’s alleged concession to vacating the suit property, unless if it is shown that there was a binding agreement arising from the communication, as held in **Ronnie Rogers Malumbe v Erasto Muga (2005) eKLR**. The finding of this Court is that no such agreement was reached as the last communication from the Plaintiff’s Advocate dated 27.10.2011 ends with the words “My client insists on Kshs 2,000,000. Let us hear from you”. The 1st Defendant’s first objection is therefore upheld and the two annexures namely “EWK 8” and “EWK 9” of the 3rd Defendants Supporting Affidavit are hereby struck out.

The second preliminary point of law raised by the 1st Defendant which is that prayer 2a of the application seeking vacant possession is *res judicata*. Indeed after striking out the two annexures, what is left of the said prayer and its grounds is substantially the same as that sought in an application filed by the same applicants dated 26th July 2011. Orders was sought in the said application that summary judgment be entered in favour of the 2nd and 3rd Defendants against the Plaintiff in terms for vacant possession and mesne profits. The application dated 26th July 2011 was considered on its merits and dismissed by this Court on 16th February 2012. It this Court’s finding that the present application is consequently *res judicata* with respect to prayer 2(a) seeking vacant possession.

As regards the outstanding alternative prayer for refund of the purchase price, the 1st Defendant has raised various objections. Firstly, that the sale agreement annexed to the 3rd Defendant’s supporting affidavit as “EWK1” is inadmissible as for want of stamping under the Stamp Duty Act. Secondly that even if found to be admissible the order sought has no basis in the said contract. Thirdly, that the order sought has no basis in the 2nd and 3rd Defendant’s Counterclaim and cannot issue, and is also substantive in nature and cannot be granted at an interlocutory stage. The Advocate relied on the decisions in **Stephen Kipkebu trading as Riverside Lodge and Rooms vs Naftali Ogola Civil Appeal No 146 of 2008** and **Samuel Kimani Wanaina vs Housing Finance Company of Kenya Ltd, (2006) eKLR** .

I am in agreement that the second prayer sought by the Applicants seeking a refund of the purchase price of Kshs 7,200,000/= cannot be given at this stage without the benefit of further evidence and argument, and Prayer 2(b) of the application is hereby denied.

The above findings notwithstanding, I reiterate my opinion that the appropriate course of action in the present case would be for the parties to prove their respective claims at a full trial, and in the ruling given by this Court on 16th February 2012, the Plaintiff was given the opportunity to present her case, and should proceed to do so without further delay. Pursuant to the provisions of section 1A, 1B, 3A and Order 11 of the Civil Procedure Rules, I hereby direct the Plaintiff to set the suit she has filed herein for hearing within 60 days of the date of this ruling, failing which the Plaintiff’s suit shall stand dismissed, and the 2nd and 3rd Defendants Counterclaim shall be allowed.

The 2nd and 3rd Defendant’s shall bear the costs of this application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____July____, 2012.

P. NYAMWEYA
JUDGE