



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 180 of 2005

NASIR ALI ABDALLA 1ST PLAINTIFF

AISHA OMAR ABDALLA 2ND PLAINTIFF

=VERSUS=

JAMES KANYOTU 1ST DEFENDANT

MEENA PATEL 2ND DEFENDANT

RULING

Before court is the Notice of Motion brought by way of Certificate of Urgency dated 24th August 2011 by which the 2nd Defendant/Applicant seeks inter alia the following orders:

- “2. THAT the Plaintiffs herein be ordered to forthwith deposit the original title to Plot No. LR No. MN/1/3239 with the court pending the hearing and determination of this application.**
- 3. THAT the Plaintiffs herein be ordered to forthwith return the original title to Plot No. LR. No. MN/1/3239 to the possession of MEENA PATEL.**
- 4. THAT there be an order for costs”**

The Respondent opposed the application by way of his replying

affidavit dated 22nd November 2011. The application was by consent argued by way of written submissions. **MS. UMARA** Advocate acted for the Applicant whilst **MR. WASWA** appeared on behalf of the Respondent.

At the centre of this dispute is the property known as Plot No. LR MN/1/3239, which was initially registered to **MUWA HOLDINGS LIMITED**. On 4th June the property was transferred to **JAMES KANYOTU** (the 1st Defendant herein who is now deceased). The 1st Defendant sold the property to **MEENA PATEL** the 2nd Defendant at a price of Kshs.5.0 million. The Plaintiffs who are man and wife now claim to have purchased the suit property from the 2nd Defendant and claim to have paid a total of Kshs.6.7 million out of the total consideration of Kshs.7.0 million.

In her supporting affidavit dated 24th August 2011 the Applicant avers that the Respondent **NASIR ALI ABDALLA** approached her and requested to be given the original title deed in order to make a

photocopy. When she handed the said title to him the Applicant alleges that the Respondent fled with the same and has refused to return it to her to date. On his part the Respondent concedes that he is in actual possession of the title deed to the suit property. However he denies having grabbed it away from the Applicant as alleged. The Respondent avers that the Applicant voluntarily handed to him the Title Deed as security pending the transfer of the property by the Applicant to himself. He claims that due to the refusal and/or reluctance by the Applicant to effect a transfer of the suit property to himself he kept possession of the Title. The Respondent further claims to be in possession of the suit property.

I have carefully read and considered the submissions filed by both parties. I harbour serious doubts about the claim by the Applicant that the Respondent forcibly took the title from her. If indeed this occurred why did the Applicant not report the matter to the police or to any other lawful authority? This is a case where there is clearly a dispute between buyer and seller over amounts due and payable as consideration for the suit property. In seeking to have the Respondent return the title deed to her custody or in the alternative deposit the same in court, the Applicant is seeking orders for a mandatory injunction. The courts have always held that a mandatory injunction ought not to be granted on an interlocutory injunction unless special circumstances warrant this. The principles for the grant of an interlocutory mandatory injunction as well as for other interlocutory injunction were well settled in the case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD [1973] EA 358**. These are:

- 1) An Applicant must show a **prima facie** case with a probability of success.
- 2) An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer **irreparable injury which would not adequately be compensated by an award of damages**.
- 3) If the court is in doubt, it will decide an application on a **balance of convenience**.

At this stage it is not the duty of this court to delve into the merits or otherwise of the Plaintiff's case. Suffice to say that the Respondent has already paid out a sum of Kshs.6.7 million yet the suit property remains in the name of another individual (the late 1st Defendant). The Applicant did place a caveat on the title preventing any transfer or dealings with the title without reference to herself. To this end her interest in the suit property is safeguarded. The Respondents have had possession of said title since 2004 a period of about 8 years. No disturbance has been reported to the title during that time. Since the title is in the name of the 1st Defendant now deceased, it is improbable that any disturbance to the title will occur until the question of ownership is settled at a full hearing of the suit.

Having considered the submissions made on behalf of both parties I reject the claim that the Respondent tricked the Applicant and made off with the title without any colour or right. Why would the Applicant have sat placidly only rousing to action eight (8) years after the fact? In my view it is more probable that the Applicant handed over the title to the Respondent and gave him possession of the suit property. From the accusations and counter-accusations being exchanged by the parties, the sooner this suit is determined the better. In the meantime the status quo will in my view best serve the interests of justice. As such I decline to grant the mandatory interlocutory orders sought. I hereby dismiss this application in its entirety. Costs in the cause.

Dated and Delivered in Mombasa this 31st day of October 2012.

M. ODERO
JUDGE

In the presence of:

Ms. Sudi holding brief for Mrs. Umara for Plaintiff/Respondent

Mr. Waswa for 2nd Defendant/Applicant