



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 633 of 2011

MIRAFLOWERS APARTMENTS LIMITED.....PLAINTIFF

- VERSUS -

CALEB AKWERA (also known as

CALEB HABILSON AKWERA1ST DEFENDANT

CHARLES AMULI AKWERA.....2ND DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 11th November 2011. It seeks both prohibitive and mandatory injunctions against the 2nd defendant. The first is to restrain the 2nd defendant from alienating or dealing with the property known as LR No 2/344 (original No 2/45 b/2/3/3). The second is for a mandatory order to deliver up the indenture of conveyance to the Registrar of Government Lands for cancellation. The application is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B, 3A and 63 of the Civil Procedure Act.
2. The plaintiff claims to have been registered as absolute proprietor of the suit land by virtue of an indenture of conveyance dated 31st December 1990. That agreement was between the plaintiff and the 1st defendant for the consideration of Kshs 1,400,000. The 1st defendant flatly denies executing the conveyance. The plaintiff discovered in October 2011 that the property was transferred by the 1st defendant to his son, the 2nd defendant. That was by a further indenture of conveyance dated 22nd December 2010. The plaintiff's case is that the latter conveyance is a fraud. Hence the prayers for both prohibitive and mandatory injunctions.
3. The motion is contested. There are two replying affidavits by both defendants sworn on 21st February 2012. The plaintiff has replied to their averments in a further affidavit sworn by Hardev Singh on 14th March 2012. As I have stated, the 1st defendant denies ever executing a conveyance in favour of the plaintiff. He states that on 22nd December 2010, and for the consideration of love and affection, he transferred the suit property to his son, the 2nd defendant. The 2nd defendant's case is that the alleged conveyance from the 1st defendant to the plaintiff is at best a fraud. He asserts that as matters stand now, he is the lawful and registered proprietor.
4. I have heard the rival submissions. The principles for grant of prohibitive and mandatory injunctions are now well settled. I will deal first with the former. When a litigant approaches the court for prohibitive injunction, she 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 she 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 herself 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 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. A mandatory injunction on the other hand should be granted in exceptional and the clearest of cases. Mucuha Vs Ripples Limited [1990 – 94] E.A. 388 Kenya Railways Corporation Vs Thomas M. Nguti Civil Appeal No 210 of 2004 (unreported).

6. In granting such an order, the court must be completely clear in its mind that the plaintiff is nearly guaranteed the same prayers at the trial. Authorities in this area abound and they hold, primarily that a mandatory interlocutory injunction ought not to be granted save only in special circumstances. It cannot be better said than in the decision of Locabail International Finance Limited Vs Agro Export et al [1986] 1 ALL E.R. 901 where their lordships held;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction”.

See also the decision in Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited Nairobi HCCC 398 of 2005 (unreported). That position has been restated in Halsbury’s Laws of England 4th Edition Volume 24 paragraph 848.

7. When I mirror those authorities against the facts, I find as follows. The plaintiff was incorporated on 14th August 1990. One of its directors Hardev Singh Juttla is the deponent to the supporting affidavit and further affidavit. He avers that the 1st defendant transferred all his rights and interest in the suit land to the plaintiff by virtue of the indenture of conveyance dated 31st December 1990. Although the 1st defendant is categorical that he did not execute that instrument, I am troubled by a few matters. If he did not do so, then the court is staring at a serious fraud. The plaintiff insists no criminal proceedings or civil proceedings on fraud have ever been instituted by the 1st defendant. But the 1st defendant does not deny that on 19th June 1990 he entered into an agreement titled “statement of intent” confirming an irrevocable transfer of the suit title for the consideration of Kshs 1,400,000. The agreement was executed by the 1st defendant and Hardev Juttla. A sum of Kshs 400,000 was to be paid on 20th June 1990 and a similar amount on 4th July 1990. The balance of Kshs 600,000 was to “be used as part of the 1st defendant’s equity in a development company”. I am well alive that as at those dates, the plaintiff company had not been incorporated. There are thus live questions of its capacity in view of the decision in Salomon Vs Salomon [1897] AC 22. As the impugned indenture is in favour of the plaintiff company, it may partly explain why the 1st defendant takes up cudgels on it as a fraud. But I also note that the parties were using one firm of advocates in the conveyance. At paragraph 8 of the replying affidavit of the 1st defendant, there is tacit admission of the agreement of use of the balance as equity in the development. He depones as follows:

“8. THAT one of the partners with Covell Mathews Partnership one Dereck John Carter approached me with the idea that I allow him to develop L.R. No. 2/344 but I was to remain the registered owner with the further arrangements that at a later date the said Dereck John Carter was to offset the Loan on L.R. No. 3/343 with East African Building Society which by then stood at Kshs 800,000. (Annexed and marked as “CA3” is the copy of Letter by Dereck John Carter).

9. **THAT** Dereck John Carter offered to offset the loan I had with East African Building Society which was Kshs 800,000/- and on 19th June 1990 he sent me to Sharpley Barret & Co. Advocates for the purpose of the offset. The said law firm was acting for East African Building Society. The said Dereck John Carter asked for the deed plan of L.R 2/344 from me.

10. **THAT** on the said date and in the office of Sharpley Barret & Co. Advocates, I met Hardev Singh Juttla, the said plaintiff's director who was acting as Dereck John Carter's trustees and doubling as private contractor and who was to construct the buildings to be put up on L.R. No. 2/344.

11. **THAT** it was orally agreed between Dereck J. Carter and myself that the ownership of L.R. No. 2/344 was to be transferred to a Company that we were to incorporate. In meantime an agreement was executed. (Annexed and marked as "CA4" is the copy of the Sale Agreement dated 21st June 1990).

8. There is also no sufficient rebuttal that the 1st defendant's mortgage debt account number 1135 of Kshs 919,986.80 was redeemed through Jubilee Insurance Company Limited on 21st July 1990 from payments made by the joint lawyers of the 1st defendant and Hardev Juttla. There is further payment of Kshs 375,000 made on 6th August 1999 to the 1st defendant. The crux of the matter then remains whether the plaintiff was regularly or lawfully registered as proprietor under the conveyance dated 31st December 1990. Put more aptly, was there fraud in the amendment of documents or the records at the City Council of Nairobi? Those are matters best left in the province of the trial court. But by transferring the property to his son, the 2nd defendant, there is a perilous risk that the status of the property may change or it may be alienated before the trial court determines the dispute. As I have said, it is not plausible for the court to determine the veracity of the competing proprietary claims by the disputants at this interlocutory stage and in view of conflicting evidence. But this court is now enjoined by article 159 of the constitution as well as sections 1A, 1B, 3A and 63 of the Civil Procedure Act to do substantial justice to the parties. This overriding principle is a guiding beacon for the court:

"The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principal of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing".

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR.

9. I do not see any prejudice to the 2nd defendant if a temporary prohibitive injunction is granted to preserve the *status quo* pending the full hearing of the suit on merits. In the interests of justice, I am prepared to exercise my discretion and grant the plaintiff a relief. I am certain in my mind that the plaintiff, granted the evidence and circumstances, has established a *prima facie* case with a probability of success. Furthermore, the facts disclose a substantial and valuable property. In land matters, damages are not always a suitable remedy.

10. I have then looked at the plaint. Prayer (d) in the plaint is *pari materia* with prayer 3 in the notice of motion. If I were to grant a mandatory injunction as prayed now, it would naturally determine a key plank of the suit without tested evidence. I have said the facts and evidence are highly contested on both sides. The supporting affidavit by the plaintiff runs into 20 paragraphs and 22 pages of annexures. Its further affidavit has 61 paragraphs with over 20 annexures all in an attempt to capture the history and positions taken by the plaintiff. The replying affidavit of Caleb Akwera runs into 29 paragraphs with 11 annexures to assert the genuineness of the 2nd defendant's title and to expose the underlying fraud by the plaintiff. The shortest of those depositions is by the 2nd defendant who asserts that his father, the 1st defendant, donated to him a lawful title. The annexure marked "CAA" is a registered indenture dated 22nd December 2010 in favour of the 2nd defendant. That position is fortified by the certificate of postal search dated 1st July 2011. He states he has been paying rates and outgoings for the property. He expresses surprise that there exists a transfer of LR No 2/344 from the 1st defendant to the plaintiff. He

asserts that it can only have been procured by fraud. The truth can only be disentangled by the trial court. I would be groping in the dark to order that the title held by the 2nd defendant be delivered up to the Registrar of Government Lands for cancellation.

11. To succeed in an application for mandatory injunction at the interlocutory stage the standards go beyond a *prima facie* case in an ordinary prohibitory injunction. The court must be so clear in its mind that the plaintiff would, at the trial, almost be assured of getting the same relief that is sought by way of an interlocutory mandatory injunction. Given the highly contested positions on the suit property, I am afraid I cannot say that this is one such obvious or clear cut case that meets the threshold for grant of interlocutory mandatory injunction.

12. For all the above reasons, the plaintiff's notice of motion partly succeeds on the prayer for a prohibitive injunction. In the result I order as follows:

- a) **THAT** an injunction is granted restraining the 2nd defendant, his servants, employees, agents or howsoever from advertising for sale, alienating, transferring or dealing with the property known as LR No 2/344 (original No 2/45 b/2/3/3 or constructing upon, damaging or wasting it until the hearing and determination of this suit.
- b) **THAT** the plaintiff shall file and serve forthwith a suitable undertaking under its common seal for damages.
- c) **THAT** the main suit shall be determined within one year. In default, the order of injunction shall lapse automatically.
- d) **THAT** the plaintiff's prayer for a mandatory injunction for delivery of the suit title held by the 2nd defendant and for its cancellation lacks merit and is hereby dismissed.
- e) **THAT** since the question of the lawful owner of the suit land is still pending in court, and considering that both parties have partly succeeded and partly lost the motion, costs shall abide with the final judgment in the suit.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of November 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. A. Mburugu for the Plaintiff.

Mr. G.W. Mahugu for the Defendants.