



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 397 of 2012

ALICE WAMBUI NGUNJU.....PLAINTIFF

VERSUS

GREENSPAN INVESTMENTS LIMITED.....1ST DEFENDANT

JOHN KARIUKI GAITA.....2ND DEFENDANT

RULING

1. Before me are 2 applications filed by the plaintiff/applicant dated the 11/10/12 and 16/10/12. Both applications are brought under Order 40 Rules 1 & 2 of the Civil Procedure Rule, Section 1A, 1B and 3 A of the Civil procedure Act, 2010 and all other enabling provisions of the Law.

In the application dated 11/10/12 the plaintiff seeks the following prayers:-

i. Spent

ii. That the Court grants a temporary injunction restraining the 2nd defendant, his servants and/or agents from paying the sum of kshs. 6,965,000/- being the balance of the purchase price of the suit property being Maisonette No. 15 registered on L.R. No. NRB/BLOCK/82/8759 located in Greenspan Estate, Nairobi to the 3rd defendant, Prime Bank Limited, pending the hearing and determination of the application and the application dated 25/9/12.

iii. That this Honourable Court do grant a temporary injunction restraining the 2nd defendant, his servants and/or agents from entering, taking possession, occupying, renovating, selling, transferring or in any other way alienating the suit property being maisonette No. 15 registered on L.R. No. NRB/BLOCK/82/8759 located at green-span Estate, Nairobi pending the hearing and determination of the application and the application dated 25/9/12.

iv. That this Honourable Court do grant a temporary injunction restraining the 2nd defendant, his servants and or agents from paying the 1st defendant the sum of Kshs.6,965,000/- being the balance of the purchase price of the suit property being Maisonette No. 15 registered on L.R. No. NRB/BLOCK/82/8759 located in Green-span Estate Nairobi pending the hearing and determination of the suit.

v. That this Honourable Court do grant a temporary injunction restraining the 2nd defendant, his servants or agents from entering taking possession, occupying, renovating, selling, transferring or in any other way alienating the suit property being Maisonette No. 15 registered on L.R. No. NRB/BLOCK/82/8759 located at Green span Estate, Nairobi pending the hearing and determination of the suit.

vi. That costs of the application be provided for.

2. The application is premised on grounds (a) to (g) stated on the face of the application.

In the application dated the 16/10/12 the plaintiff/applicant sought to enjoin Prima Bank Limited as the 3rd defendant to the suit at prayer No. 2 and at prayer No. 3 the plaintiff sought to amend the plaint annexed to be deemed as filed upon payment of the requisite fees.

Prayers 4, 5 and 6 are similar to prayers 2, 3, 4, 5 and 6 of the application dated 11/10/12 only that in the application dated 16/10/12 prayers 4, 5 and 6 are pending the hearing and determination of the suit. The grounds in the application dated 16/11/12 are the same as the ones in the application dated 11/10/12.

3. Both applications are supported by the affidavits of Alice Wambui Ngunju. The plaintiffs' her case is that on the 23/6/09 she agreed to buy the suit premises maisonette No. 15 registered on L.R. No. NRB/BLOCK/82/8759 located at Green Span estate from the 1st defendant at an agreed price of 6,700,000/-. She paid the 10% deposit on the 24/6/09. The 1st defendant changed the sale price for the said maisonette and prepared a another amended letter of offer dated the 21/8/2009. On the same day 21/8/09 she received a letter from the 1st defendant confirming its acceptance and willingness to sale maisonette No. 15 and subsequently they executed a sale agreement on the 14/9/10. That she has honoured her part of the agreement and paid all the sums stipulated. She even obtained financing from HFCK for the balance of the purchase price Kshs. 3 Million. That the 1st defendant issued her with a completion notice dated 1/4/11 demanding a sum of Kshs. 252,817.50. That by the said date she had paid the 1st defendant Kshs.2,351,000/- on the 22/8/09. She paid a further Kshs. 156.700/- on the 12/1/12, she paid the sum of Kshs.2,52817/50 to the 1st defendant on the 3/5/11. That thereafter the 1st defendant returned her cheque of Ksh.252, 817/50 on the 11/5/10 and cancelled the sale. That she moved to Court to obtain an interim injunction and despite being aware of this move the 1st defendant went ahead and transferred the suit property to the 2nd defendant so as to render nugatory her application.

4. The 1st respondent filed replying affidavits . There are also grounds of opposition field by the 2nd defendant.

In brief the response by the defendants is that the plaintiff has failed to demonstrate that the sale agreement between the 1st and 2nd defendant dated 26/4/12 is tainted with illegality, malafides and is company to public policy. In the affidavit filed by Mr. Gakuru an advocate from the firm of Njoroge Regeru Advocates who has the personal conduct of the matter he depones that the plaintiff applications are not brought in good faith as if the orders are granted they will affect 3rd parties who are not parties to this suit that is their firm, HFCK and Prime Bank. That the orders as sought by the plaintiff are in vain as the transaction between the defendants was completed when the transfer and the balance of the purchase price and an undertaking to pay the balance of the purchase price were exchanged in satisfaction of the terms of contract of sale. That the transfer of Maisonette No. 15 was done and the house was registered in favour of the 2nd defendant on the 26/9/12 and there is a charge over the house registered in favour of HFCK. That the 2nd defendant was issued with a certificate of lease and a charge too against the 2nd defendant's title was registered. That the implication of the aforesaid registration is that the 1st defendant can only claim the balance of the purchase price from HFCK and not the 2nd defendant. That the plaintiff has no case against the 1st defendant as it terminated the transaction with the plaintiff and advised the plaintiff to collect the refund of the money paid towards the purchase of the maisonette in their letters dated 28/11/11 and 27/2/12. Counsel gave a detailed account of their transactions and correspondence with HFCK and Prima Bank and deponed further that the plaintiff has not substantiated the allegations of fraud or collusion to defraud her of the maisonette and that the plaintiff's application should be demised.

5. There is a lengthy affidavit filed by Mr. Shinsh H. Shah the director of the 1st defendant. In it he details the transactions it had with the plaintiff from the time the plaintiff took an interest in purchasing a property they were developing at Greenspan Estate. The gist of his affidavit is that after the plaintiff failed to honour the agreement they had the 1st defendant company decided to terminate the sale agreement through their Counsel's letter dated 27/2/12. He avers further that the suit property has been

sold to a 3rd party and that the action the plaintiff seeks has been over taken by events.

6. Counsels made oral submissions on both applications. The plaintiff has the tasks of demonstrating to this Court that she has a prima facie case with a probability of success. That she will suffer irreparable loss and damages and that the balance of convenience tilts in her favour (see **Geilla Vs. Cassman Brown 1973 E.A**). Her Counsel has put upon spirited fight in his matter. The dispute is over maisonette No. 15. Does it belong to the plaintiff? From what is deponed it is evident that the 1st defendant offered to sell the suit premises to the plaintiff. She paid some monies. According to the 1st defendant they terminated the sale. It is evident from Mr. Gakuru's affidavit that this property has been sold to the 2nd defendant who has charged it to the bank. Is the respondent entitled to the orders sought? I find she is not and as correctly submitted there are 3rd parties involved who are not parties to this suit. The 2nd defendant has title. The plaintiff alleges fraud and collusion but no such allegation is pleaded in the amended plaintiff. In my view the plaintiff has failed to demonstrate that she has a prima facie case with a probability of success as the property she was interested is now owned by the 2nd defendant. In her amended plaint she has sued the bank. She does not allege fraud or collusion between the 1st and 2nd defendant. Merely stating that they acted with speed is not sufficient, the particulars of fraud and collusion needed to have been demonstrated or pleaded. In my view the plaintiff can sue the 1st defendant for the sums paid as it was a contract between the parties. Granting the orders sought in these 2 applications would be in my view issuing orders in vain.

7. I therefore find no merit in the 2 applications. I discharge the orders, as I cannot restrain the defendants as sought. I therefore dismiss the said application. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this day of 13th December 2012.

R. OUGO
JUDGE

In the presence of:-

.....Plaintiff/Applicant

.....1st Defendant/Respondent

.....2nd Defendant/Respondent

.....Court Clerk.