



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 23 of 2012

MANAN JAYENDRA CHUNIBHAI.....1ST PLAINTIFF

ANERI JAYENDRA CHUNIBHAI.....2ND PLAINTIFF

(Suing as guardians of PANNABEN JAYENDRA PATEL)

VERSUS

JITENDAKUMAR C. PATEL.....1ST DEFENDANT

JAISHRI JITENDRAKUMARPATEL.....2ND DEFENDANT

RULING

The Plaintiffs filed an application dated 17/1/2012 seeking orders that there be a temporary injunction restraining the Defendants from evicting, being a nuisance, interfering with the peaceful enjoyment by Pannaben Jayendra Patel (hereinafter referred to “Mrs. Patel”) of Nairobi L.R. No. 1870/11/300 General Mathenge Drive (hereinafter referred to as “the suit property”), and all services therein pending the hearing and determination of the application *inter-partes* and the suit. The application is premised on the grounds that Mrs. Patel faces eviction from the suit property, pursuant to an alleged sale purportedly covenanted with the Defendants who were her long time tenants. The Plaintiffs allege that the said sale was fraudulent, illegal and void, as Mrs. Patel is a widow who suffers from severe degenerative disease of both temporomandibular joints and related severe illnesses which impair her mobility. Further, that she also suffers from osteoporosis and rheumatoid arthritis and clinical depression, and that the said conditions have degenerated her mental well-being.

The application is supported by an affidavit sworn on 17/1/2012 by the 2nd Plaintiff who deponed that she and the 1st Plaintiff are the daughter and son of Mrs. Patel, and also her guardians pursuant to the leave of Court granted on 23/12/2011. The 2nd Plaintiff deponed that Mrs. Patel was the registered proprietor of the suit property, and that the 1st Defendant was a tenant of the main house of the suit property since sometimes in 2000 to date. Further, that Mrs Patel occupied the extension of the said house. The 2nd Plaintiff stated that they have been informed that sometimes in October 2005 the 1st Defendant negotiated to purchase the suit property for a purchase price of Kshs. 17 million, and that the purported sell and transfer was effected sometime in 2006. The 2nd Plaintiff further deponed that there was no possibility that Mrs. Patel negotiated the contract as purported by the 1st Defendant in view of her illness.

The 2nd Plaintiff averred that the 1st Defendant descended on the frail and ailing Mrs. Patel and coerced her to sign a purported sale agreement for the suit property for half its market value, which is between Kshs 36 – 40 million. It was her disposition that the purported sale amounted to fraud and taking advantage of Mrs. Patel's mental condition, and a violation of her rights in view of the eviction notice as she will be rendered destitute. The 2nd Plaintiff also stated that the claim by the Defendants that she and her brother renegotiated the purchase price upwards from 15 Million to 17 Million is false, they were not in the country at the time of the alleged renegotiation. The 2nd Plaintiff further stated the 1st Defendant has frustrated Mrs. Patel by disconnecting electricity and water in an effort to constructively evict her from the suit property, and that it would be in the interest of justice that this Court intervenes by granting injunctive orders.

In support of their application, the Plaintiffs annexed *inter-alia*, a copy of the court orders issued on 11/11/2012 in **High Court Misc. Cause No. 133 of 2011** appointing the Plaintiffs as guardians of Mrs Patel,, various Doctors reports on Mrs. Patel's state of health, a valuation report of the suit property dated 16th September 2011, excerpts of the 1st and 2nd Plaintiffs' passports, and a Proclamation Notice issued by the Defendants Advocates dated 10/01/2012.

The application was opposed by the Defendants, and the 1st Defendant swore a Replying Affidavit on 31/1/2012 on his behalf and on behalf of the 2nd Defendant who is his wife. The 1st Defendant deponed that he has known the Plaintiffs' family for over 10 years, and he had been their tenant from the year 2000. Further, that sometimes in June – July 2005, Mrs. Patel informed the 1st Defendant that she was looking for a buyer for the suit property. The 1st Defendant stated Mrs. Patel tried to sell the house in vain for reasons that the potential buyers were developers who wanted to bring the structure down and construct new buildings, whereas Mrs. Patel wanted to occupy the extension for such a time until when her son who has relocated to the United States of America was settled after which she would join him. The 1st Defendant stated that Mrs. Patel was unable to find such a buyer, and that she then sold the suit property to him on this condition.

The 1st Defendant deponed that a purchase price of Kshs. 15 Million was agreed, but this amount was enhanced by the 1st Plaintiff to Kshs. 17 Million. It is the 1st Defendant's disposition that Mrs. Patel was of sound mind at the time of executing the agreement, and that she fully understood and consented to the terms of the sale agreement. The 1st Defendant deponed that he deposited a sum of Kshs. 17 Million in accordance with clause 3 of the sale agreement. He stated further that they approached an advocate who prepared a sale agreement and a transfer which were executed by all parties. The said transfer was subsequently registered on 28/7/2006 and the title endorsed accordingly. The 1st Defendant deponed that they are innocent purchasers for value without notice, and their registered interest in the suit property is indefeasible. In support of the Defendants' claim the 1st Defendant annexed a copy of the agreement for sale entered into dated 19th October 2005, copies of bank receipts, a copy of the transfer registered on 28th July 2009, and of the title to the suit property.

The Plaintiffs filed a Further Affidavit sworn on 24/4/2012 by the 2nd Plaintiff wherein she denied the 1st Defendants averments. The 1st Defendant in turn also swore a Further Replying Affidavit on 14/6/2012 wherein he *inter alia* stated that in light of the false allegations made by the Plaintiffs he had requested Mr. Mohamed Farouk Adam, the Advocate who had acted for him and Mrs. Patel in the sale transaction, to swear an explanatory affidavit. The said Advocate swore an affidavit on 15/6/2012 wherein he deponed that he was instructed to act for both the Defendants and Mrs. Patel in the conveyance transaction whereof Mrs. Patel sold the suit property to the Defendants. The advocate swore that he exercised due diligence, drafted the agreement for sale dated 19/10/2005, a transfer dated 17/5/2006 and effected the registration at the Lands Titles Registry on 28/7/2006.

The Advocate deponed further that upon Mrs. Patel's request, he drove to her residence to have her execute the sale agreement for convenience of all the parties and that he succinctly explained the contents of the agreement to Mrs. Patel before she executed it. Further, that Mrs. Patel confirmed to the advocate

that the terms in the agreement were those that she agreed with the purchasers, and that he had no reason whatsoever to doubt or fail to take instructions as he was fully convinced that he was dealing with a person of sound mind. It was his disposition that at no time did Mrs. Patel exhibit mental deficiency that would have hindered her comprehension of the contents of the sale agreement or the consequences of her decision.

This application was canvassed by way of written submissions. The Plaintiffs' Counsel filed submissions dated 18/10/2012 wherein they reiterated the contents of their application and affidavits in support of the said application. It was their submission that the sale and transfer is heavily tainted with illegality and therefore voidable, for reasons that the Defendants arm-twisted into Mrs. Patel into signing the sale and transfer documents, by taking advantage of her ill health and poor mental status. Thereby such action amounted to defrauding her of the suit premises. The Plaintiffs submitted that they had demonstrated that they had a *prima facie* case with high chances of success in line with the decision of **Giella vs Cassman Brown, (1973) EA 358** and further, that Mrs. Patel would suffer irreparable harm and loss and that damages would not be an adequate remedy. They further submitted that it would be in Mrs. Patel's best interest if the suit property were to be preserved pending the hearing and determination of the suit.

The Defendants' Counsel filed submissions dated 22/10/2012. He too reiterated the contents of their affidavits in opposition to this application. It was the Defendants' submission that the Plaintiffs' case relied on allegations of mental incapacity of Mrs. Patel and that these allegations were not proved. They maintained that there was nothing before the Court to show that Mrs. Patel lacked mental capacity to enter into the sale transaction. The Defendants relied on the Court of Appeal decision in the case of **Grace Wanjiru & Another v Gideon Waweru Githunguri & 5 Others, Civil Appeal No. 202/2005**, that if there is nothing unreasonable in the conduct of the person of unsound mind and the party with whom he contracts has no knowledge or suspicion of his mental disorder, the contract will be binding on the person of unsound mind and his representatives. The Defendants also submitted that Mrs. Patel seeks not to avoid a contract entered into without capacity but rather seeks to undo the consequences of poor judgment. The Defendants referred to a report by Dr. Kitazi dated 6/9/2011 in which, they submitted, the doctor only addressed depression and that it did not in any way point to mental incapacity.

The Defendants further submitted that the Plaintiffs had failed to establish a *prima facie* case. They averred that the Plaintiffs' claim was designed to dispossess the Defendants of their property which they acquired on a willing buyer willing seller basis and at the market rate. The Defendants contended that there was nothing to show that the Plaintiffs were likely to suffer irreparable loss which could not be compensated by way of damages. The Defendants maintained that an award of damages could suffice. With respect to balance of convenience, the Defendants submitted that it favoured the Defendants as they were the ones who were being prevented from enjoying the fruits of their labour. The Defendants also averred that the Plaintiffs' case was statute barred having been filed seven (7) years from the date of the cause of action, consequently the Plaintiffs did not have a reasonable cause of action. The Defendants referred the Court to section 4 of the Limitations of Actions Act and urged the Court to dismiss the application with costs.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. What I am required to do is to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These requirements are that firstly, an applicant must show a *prima facie* case with the probability of success. Secondly, 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. Lastly, if the court is in doubt it will decide the application on a balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff's claim in the Plaint filed herein dated 17th January 2012 is for nullification of the transfer and cancellation of the title issued pursuant to the sale between Mrs. Patel and the Defendants, and a permanent injunction restraining the Defendants from interfering with the title of the suit property. The main ground for this claim is that at the time of the purported sale and transfer Mrs. Patel was unwell, immobile and mentally

unable to covenant such an agreement or transfer.

The Plaintiffs have produced various doctors' reports as to the poor state of Mrs Patel's health. There is also an order of this Court (Honourable Majanja J.) granted in **High Court Misc. Cause No. 133 of 2011** on 23/12/2011 wherein the Court adjudged Mrs. Patel as someone suffering from a mental disorder under section 26 of the Mental Health Act, and appointed the Plaintiffs to be guardians jointly and severally in respect of Mrs. Patel's estate. These facts notwithstanding, the exact state of Mrs. Patel's mental health at the time of signing of the sale agreement and transfer will only be established after examination of all the evidence at full trial, and this court cannot at this stage make a definitive finding as to whether Mrs Patel had capacity to contract at the time or not.

This Court will therefore decide the Plaintiffs' application on the basis of a balance of convenience. It is my view that the Plaintiffs are likely to suffer irreparable loss in view of the possible eviction that Mrs. Patel faces, and the balance of convenience therefore tilts in her favour. The Plaintiffs however do not dispute that Mrs. Patel was paid the purchase price of Kshs 17,000,000/=, and the Defendants will also thereby be prejudiced given that they have not only paid the said full amount, but are also the registered proprietors of the suit property. This court therefore orders as follows:

1. The Defendants are hereby restrained from evicting and/or interfering with the quiet and peaceful enjoyment by Pannaben Jayendra Patel of the portion of and /or the premises she currently occupies in Nairobi L.R. No. 1870/11/300, General Mathenge Drive, pending the hearing and determination of the suit herein or further orders.
2. The Plaintiffs shall deposit in Court within 30 days of the date of this ruling the sum of Kshs 1,500,000/= as security for any rent that may be found to be due to the Defendants, and in default thereof the injunction orders granted herein shall lapse.
3. The costs of the application dated 17th January 2012 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____11th____ day of ____December____, 2012.

P. NYAMWEYA

JUDGE