



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.491 OF 2010

IMTIAZ MOHAMED YUSUF.....PLAINTIFF/APPLICANT

VERSUS

MOHAMED SALEH MOHAMED HUSSEIN.....1ST RESPONDENT
FATUMA MURSAL MOHAMED.....2ND RESPONDENT

R U L I N G

1. Imtiaz Mohamed Yusuf (hereinafter referred to as the applicant) has come to this court by way of a chamber summons. He is seeking orders restraining Mohamed Saleh Mohamed Hussein and Fatuma Mursal Mohamed (hereinafter referred to as the 1st and 2nd respondents respectively), by themselves their servants, employees or agents from interfering with the applicant's quiet enjoyment and possession of an apartment on the 1st floor of Title Number 209/11067/5 (hereinafter referred to as the disputed apartment), pending the hearing of a suit which the applicant has filed against the respondents.
2. In his suit the applicant seeks inter alia a declaration that he is the rightful owner of the disputed apartment whilst the 2nd respondent is the rightful owner of the apartment on the 1st floor of Title No. 209/11067/4 which she currently occupies. The applicant contends that he is the registered owner of the parcel of land known as LR. No. 209/11067/5 upon which is a fully developed two storied building with 3 apartments. The applicant states that he has been in occupation of the disputed apartment for a period of over 5 years and that it is the only place he knows as home. The 2nd respondent is now claiming the disputed apartment and has threatened to evict the applicant from the disputed apartment.
3. The applicant maintains that the intended eviction is illegal. He explains that the property actually sold to the 2nd respondent was the apartment on 1st floor of the building on LR No.209/11067/4 which was subject of a partnership agreement between the applicant and the 1st defendant. The partnership agreement was however erroneously registered against Title Number 209/11067/5 instead of 209/11067/4. The 2nd respondent was given vacant possession of the apartment on the 1st floor of LR No.209/11067/4 and continues to occupy the same. The applicant therefore urges the court to issue the injunctive orders as he would otherwise suffer substantial loss if evicted from the suit property.
4. The Respondents have objected to the application through a replying affidavit sworn by the 2nd respondent. She swears that she entered into an agreement of sale with the applicant in respect of the

disputed apartment and that she has paid the agreed purchase price of KShs.5.1 million. Subsequently, the 2nd respondent had the disputed apartment transferred into the name of her nominee Yasmin Hassan Warsame. She denies having purchased the apartment on LR. No.209/11067/4. The 2nd respondent maintains that the plaintiff has no reason at all for denying her vacant possession, and that the suit is only intended to frustrate her. The court was thus urged to dismiss the application.

5. Following an agreement by the parties counsel, written submissions were duly filed, and this court is now called upon to adjudicate on the matter. It was reiterated on behalf of the applicant that the apartment sold to the 2nd respondent was the one on 1st floor of LR No.209/11067/4 which is the property that the 2nd respondent continues to occupy. It was submitted that the applicant had met the parameters set out in the case of ***Giella Vs Cassman Brown & Co. Ltd. (1973) EA 358*** and therefore the orders sought should be granted.

6. For the 1st respondent it was submitted that the 1st respondent did not have any interest in the disputed apartment, nor had he threatened the applicant nor issued any notice in regard to that property. It was submitted that the plaintiff had failed to make full disclosure to the court regarding the matters surrounding the transaction. It was argued that the applicant was not coming to equity with clean hands.

7. It was submitted that the plaintiff had failed to prove a prima facie case, and that in any case the balance of convenience tilts heavily in favour of the respondents. It was submitted that the applicant's suit was muddled with controversies and therefore the application was not only premature but would also adversely affect the rights of the respondents. Relying on ***Nderu vs Kenya National Chamber of Commerce & Industry & Another HCCC 26 of 2003 KLR 160***, it was argued that at this interim stage, it would be premature to issue a mandatory order, nor were there special circumstances to justify such an action. The following cases were further relied upon:-

- ***Locobail International Finance Ltd Vs Agro export and Others the Sea Hawk (1986) All ER 901***
- ***Wanjiku Gathoronjo vs. Ann Njeri Karanja (2006) eKLR***

8. For the 2nd respondent it was submitted that the applicant was deliberately misleading the court as he could not purport to have sold to the 2nd respondent the apartment on 1st floor of LR No.209/11067/4 which he admits does not belong to him. It was submitted the disputed apartment having been sold and transferred to the 2nd respondent section 23(1) of the Registration of titles Act Cap 281 took full effect. Thus the property was now owned by the 2nd respondent. In that regard ***Central Kenya United vs Trust Bank Ltd & Others*** (supra) was relied upon as well as ***Muchendu vs Waita [2003] 1 KLR 419***. It was argued that the applicant had failed to establish a prima facie case with a probability of success to warrant the equitable remedy of an injunction. It was submitted that the applicant's suit was an abuse of the court process as the 2nd respondent was entitled to enforce her right to evict any trespasser on her property. The court was therefore urged to dismiss the application.

9. I have given due consideration to this application, the submissions made and the authorities cited. The applicant is seeking an interlocutory injunction order restraining the respondents from interfering with his quiet enjoyment of the disputed apartment. The order sought is not an order of mandatory injunction and therefore the submissions made in that regard were misconceived.

10. As submitted by counsel the principles upon which an order of interlocutory injunction is made are clear. That is, that the applicant must establish a prima facie case with a probability of success, and that an injunction order will not normally be granted unless the applicant has demonstrated that he will suffer irreparable injury if the order is not given, and where the court is in doubt it may decide the application on a balance of convenience.

11. In this case, the applicant's case is hinged on an alleged mistake regarding the registration of his

partnership agreement with the 1st respondent. The alleged mistake is that the agreement was registered against Title Number 209/11067/5 instead of Title Number 209/11067/4. However it is evident from the agreement of the sale exhibit that the disputed apartment was sold to the 2nd respondent by the applicant as the owner of the disputed apartment. The agreement of sale makes no reference to the partnership agreement nor is the 1st respondent party to the agreement of sale. The 2nd respondent has demonstrated that pursuant to the agreement the disputed apartment has been transferred to her assignor Yasmin Hassan Warsame.

12. The applicant signed the sale agreement in respect to the disputed apartment. The transfer has been duly registered and property transferred. The applicant has not demonstrated that 2nd respondent was party to the partnership agreement or party to any mistake or error arising from the partnership agreement. It has not been denied that the disputed apartment is now duly registered in the name of a 3rd party. To that extent the title is indefeasible and can only be defeated on the grounds of fraud or misrepresentation to which it is demonstrated that the 2nd respondent is a party. In its plaint, and even the affidavits sworn in support of the application, the applicant is rather vague concerning how the alleged mistake occurred and how the 2nd respondent participated in the mistake.

13. I find that on the facts availed to this court the applicant has failed to demonstrate the infringement or threatened infringement of any right such as would justify the granting of the order of interlocutory injunction. The applicant has further not satisfied this court that he would suffer irreparable loss if the order of injunction is not granted. The applicant voluntarily signed an agreement of sale and transfer regarding the disputed apartment. Therefore the issue of irreparable loss does not arise as the applicant can be compensated by way of value of the disputed apartment. Indeed the applicant does not deny having received the purchase price.

14. Finally on the balance of convenience although the applicant is in possession of the disputed apartment, the same is now registered in the name of a 3rd party. There is no valid reason why the 3rd party should be denied possession of the disputed apartment subject to vacant possession being pursued in accordance with the law.

15. For the above reasons I find no merit in the application dated 14th October 2010. It is accordingly dismissed with costs. The interim order issued on 14th October 2010 is hereby discharged.

Dated and delivered this 11th day of February, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff/applicant absent
Gathara H/B for Mubeya for the 2nd defendant/respondent
B. Kosgei - Court clerk