



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 201 of 2009

MENELIK K. MAKONNEN PLAINTIFF/APPLICANT

VS.

BALOZI HOUSING CO-OPERATIVE SOCIETY ..1ST DEFENDANT/RESPONDENT

THE COMPANY FOR HABITAK & HOUSING IN

AFRICA (SHELTER AFRIQUE) 2ND DEFENDANT/RESPONDENT

HUMBERTO PAZ INTERESTED PARTY

RULING

The plaintiff brought this action against the defendants for orders that a mandatory injunction be issued against the 1st defendant to restrain it, its servants or agents from transferring, selling, altering or interfering or in any way dealing with LR. No.12422/431 commonly known as House No.B140 Muthaiga North Gardens Estate, Nairobi.

There is also a prayer for mandatory injunction to restrain the 2nd defendant, their servants and/or agents from transferring, selling, altering or interfering or in any way dealing with the said property and/or in any way interfering with the plaintiff's quiet possession of the same. An order is also sought to compel the 1st defendant to deliver the completion documents to the 2nd defendant to enable HFCK to finalise funding and enable the plaintiff to fully purchase the suit premises.

Alongside the plaint, the plaintiff filed an application by way of Chamber Summons under Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Laws of Kenya, praying for injunction orders aforesaid pending the hearing and determination of the suit.

On 30th April, 2009, Osiemo J certified the application urgent, ordered service of the same and that the status quo be maintained. Subsequently, both learned counsel for the parties elected to file written submissions. Somewhere

along the way, an interested party who is the tenant in the said premises was joined in these proceedings. Written submissions have also been filed on his behalf.

For the plaintiff to be entitled to the orders sought, he must establish that he has a prima facie case with a probability of success and that if the order is not granted he will suffer injury that may not be adequately compensated by an award of damages and, if the court is in doubt, it shall decide the matter on a balance of convenience.

It would appear from the pleadings which are confirmed by the several documents on record that, the plaintiff was a member of the 1st defendant and at one time the Chairman thereof. A development was undertaken by the 2nd defendant on behalf of the 1st defendant whereupon its members were allocated several housing units. From the material before me, any such member allocated a unit would be provided with a certificate of ownership. I get this evidence from annexures to the affidavit of one Dr. Mary Wambui Kimani sworn on 13th May, 2009. Annexures MK.2 and MK.22 confirms that position. The plaintiff has annexed some agreements, one dated 6th July, 2000 and the other dated 1st September, 2008, both purporting to transfer the interest in the subject matter herein by the 1st defendant to himself.

Annexure MK.22 aforesaid however, is a certificate of ownership in the names of Susan Njoki Lomari/Menelik K. Makonnen to confirm that the two individuals were allocated house No.341A on LR. 12422/341.

Annexure MK.2 shows that one Jael Oyoo was allocated House No.140 on LR.12422/431. This is the subject matter in these proceedings. If the certificate of ownership is the foundation of a member's claim on any of the properties herein, then Jael Oyoo is the rightful owner of the suit premises herein. On the other hand, if the plaintiff is the owner of any such property, his property is secured in the annexure No.22 mentioned above.

If it is true that he purchased the property by virtue of the agreement dated 6th July, 2000, then the annexure MK.21 which is a sale agreement dated 1st September, 2008 does not make any sense whatsoever.

It is instructive to note that, annexure MK.2 was signed by the plaintiff herein, in favour of Jael Oyoo among other signatories. It defeats logic therefore, how the same person can turn around and claim ownership of a property he officially conveyed to an identified party in these proceedings. In my ruling therefore, taking into considering all the material before me, I find that the plaintiff has not made out any prima facie case with a probability of success. On that ground alone, his application must be dismissed and it is so ordered.

There is a 3rd party, Mr. Humberto Paz who is now an interested party in these proceedings and who I have observed is a tenant in the said premises. This is a party who I observe has been caught in the cross fire between the plaintiff and the respondents. I say so because, he may have taken up tenancy on the understanding that the plaintiff is the owner of the said property. I know that the conveyance of such a tenancy by the plaintiff should, by extension, fall with the same strength as the interest of the plaintiff. However, I am inclined to make an order that the interested party shall remain a tenant in the said premises subject to the tenancy agreement entered in between him and the plaintiff upto

its expiry or final determination of this suit whichever is earlier.

In the meantime, he shall deposit the monthly rental in court and obtain receipts from the registrar of this court. The costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 29th day of January, 2010.

A. MBOGHOLI MSAGHA
JUDGE