



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Civil Case 377 of 2009

SUSAN WAMBUI NJENGA.....PLAINTIFF
VERSUS
1. JUSTINE JELAGAT BENJAMIN
2. ERNEST GRAHAM BENJAMIN.....DEFENDANTS

RULING

In her plaint filed on 30th October 2009, the plaintiff seeks the following main orders of the court:-

- (a) An order that the 1st and 2nd defendants be restrained by themselves, their servants, agents or anyone else claiming title under them from transferring, alienating, trespassing, damaging, disposing of or in any other way interfering with all that piece of land known as Title No. C.R. No. 29883 sub-division No. 9952 (Original No. 9617/6) section 4 Mainland North (hereinafter “the suit premises”).**
- (b) An order that the plaintiff be allowed access, reside and/or live in the suit premises.**
- (c) Damages and mesne profits.**

The foundation of the plaintiff’s claim as pleaded in the plaint is that the plaintiff purchased the suit premises from the defendants at the consideration of Kshs. 7,000,000/= which sum was paid by the plaintiffs in full and the defendants released to the plaintiff all the completion documents. However, the plaintiff did not complete the process of registration of a transfer in her favour because she was then residing in Ireland. The defendants took that opportunity to re-occupy the premises contrary to the agreement of sale they executed and hence the suit.

Simultaneously with the plaint, the plaintiff lodged the application now before me. The application has been brought under the provisions of Order XXXIX Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The application seeks the injunctions sought in the plaint on an interim basis and a further order that the defendants be ordered to execute all the necessary transfer documents over the suit premises in favour of the plaintiff who should now be registered as the absolute owner thereof.

The application is based on the main grounds that by a sale agreement dated 18th July 2008, the plaintiff purchased the suit premises as aforesaid and delayed to register a transfer in her favour since she was out of the country. When she returned to the country in 2009 she took possession of the suit property. However, on 23rd July 2009, the defendants by a letter of even date, demanded from her Kshs. 450,000/= as alleged rent and threatened to levy distress for the same in default of payment. Hence the application.

The application is supported by an affidavit sworn by the plaintiff. The affidavit, in the main, elaborates the above grounds. Annexed to the affidavit are copies of 7 documents including the sale agreement and the acknowledgment of the said consideration.

When the defendant was served, she filed a replying affidavit and a defence. She also raised a counter-claim. The gist of her response is that she is a victim of an illegal money making scheme perpetrated by the plaintiff and her husband in which scheme she (1st defendant) parted with her Title Deed and money. She imputes fraud upon the plaintiff and seeks nullification of the sale agreement and a declaration that she is the owner of the suit premises.

When the application came up before me for hearing inter partes on 18th February 2010, counsel agreed to file written submissions which submissions were duly in place by 22nd April 2010. Those submissions substantiate the parties' stand-points taken in their respective affidavits and pleadings.

I have considered the pleadings, the application, the affidavits filed both for and against the application. I have further given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. First the plaintiff's prayer for an order compelling the defendants to execute all the necessary transfer documents over the suit premises in her favour. That is substantially a prayer for a mandatory injunction which should have been sought by way of Notice of Motion under section 3A of the Civil Procedure Act and not by way of a Summons in Chambers as the plaintiff has done. Besides that procedural defect, the plaintiff makes no such claim in her plaint. It is settled that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thinks that the matter should be determined at once or the injunction is directed at a simple and summary act which can easily be remedied or where the defendant has attempted to steal a march on the plaintiff. (See **Locabail International Finance Limited – v – Agroexport and Others [1986] 1All ER 901**).

An order compelling the defendants to execute all the necessary documents over the suit premises in her favour is to my mind not a simple and summary act which if later found wrong, can easily be remedied. I am also not persuaded that the order should be made at once especially in view of the allegations of fraud and the demise of the 2nd defendant.

The prayer for the said order is therefore declined.

With regard to the prayer for a prohibitory injunction, the guiding principles were crystallized in the case of **Giella – v – Cassman Brown & Company Limited [1973] EA 358**. The principles are that: First an applicant must show a prima facie case with a probability of success at the trial. 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. In this case the plaintiff seeks an order restraining the defendants, among other people, from transferring, alienating, trespassing, damaging, disposing of or in any other way interfering with the suit premises. She has supported her claim over the suit premises, with an agreement which she avers was duly executed by the defendants. She has also exhibited a Transfer in respect of the suit premises which she avers was executed by the defendants. Both the agreement and the Transfer appear to have been executed before an advocate. I have also seen a copy of a document dated 18th July 2008 which, prima facie, is an acknowledgement of the purchase price of Kshs. 7,000,000/=. If those documents are accepted as valid by the trial court, the plaintiff will probably succeed in her claim. Given that the defendants were registered as joint tenants, the death of the 2nd defendant does not put the plaintiff's claim in jeopardy at all as the surviving tenant (the 1st defendant) becomes the sole proprietor of the suit premises. The challenge made by the 1st defendant against the plaintiff with respect to the documents relied upon by her has to await the trial. The issues of fraud and illegality cannot be determined at this interlocutory stage.

My conclusion is therefore that the plaintiff has demonstrated a prima facie case with a probability of success at the trial with respect to her prayer for an interlocutory prohibitory injunction as prayed in

paragraph 2 of her application. The subject matter is land which cannot be easily replaced. I have also accordingly found that unless the interlocutory injunction is granted, the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages. As I am in no doubt that the plaintiff has shown a prima facie case with a probability of success, I do not have to consider the balance of convenience.

I turn now to the prayer for an order allowing the plaintiff to access, reside and or live on the suit premises. The prayer in my view is for an interlocutory mandatory injunction. I have on a prima facie basis found that if the plaintiff will prove that the defendants validly sold her the suit property, she might probably be issued with the orders she seeks in the plaint. It is not in dispute that the plaintiff was in possession before the distress was levied at the behest of the 1st defendant. I am persuaded at this stage, that the plaintiff was not in possession of the suit premises pursuant to a lease arrangement with the defendants. Given that, she has, in her possession, an executed sale agreement and a Transfer in her favour over the suit premises, I find, prima facie, that she took possession pursuant to the said sale agreement. In my view, on the basis of those documents, she was entitled to the said possession until lawful dispossessed. In the premises, I am satisfied that the plaintiff's claim to possession is clear and plain. Her possession on the basis of those documents should be decided at once and can easily be reversed in the event that her claim is eventually dismissed. I have also found that the use of distress proceedings to effect the plaintiff's eviction in effect stole a march on her. It was also high handed on the part of the 1st defendant to achieve the eviction by unorthodox means. In the premises, I am persuaded that the plaintiff has demonstrated the circumstances discussed in the Locabail International case (supra). I will therefore allow the application in terms of prayer 4 of the same.

Before concluding this matter the plaintiff has not sought any order pending the hearing of the suit. The defendant has not raised any objection on that score. I assume therefore that any objection to the defect has been waived. I have therefore ignored the defect and considered the application on the basis that the orders are also sought pending the hearing of the suit.

In the end I allow the application as prayed in paragraphs 2 and 3 of the application pending the hearing of the suit. The plaintiff should file an undertaking as to damages within the next three (3) days from the date hereof.

Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MAY 2010.

F. AZANGALALA
JUDGE