



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 231 of 2010

FRANCIS KALOKI MAINGI.....PLAINTIFF

VERSUS

STRATEGIC PROPERTY MANAGEMENT

COMPANY LTD.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

MORIS MULI NZAVI

T/A NZAVI & COMPANY ADVOCATES.....3RD DEFENDANT

R U L I N G

1. Francis Kaloki Maingi is the plaintiff in this suit. He has sued Strategic Property management Ltd, The Chief Land Registrar, and Moris Muli Nzavi t/a Nzavi & Company Advocates (hereinafter referred to as the 1st, 2nd and 3rd defendants). The plaintiff's claim is based on a sale agreement entered into between himself and the 1st defendant, for sale of the plaintiff's property known as 12715/188 (hereinafter referred to as the suit property).

2. The plaintiff claims that the 1st defendant failed to honour the terms of the sale agreement, but fraudulently caused the property to be transferred to him. The 2nd and the 3rd defendant allegedly colluded with the 1st defendant to register the transfer in favour of the 1st defendant. The plaintiff further claims that the 3rd defendant was professionally negligent. In his plaint the plaintiff claims a declaration that the 1st defendant was in breach of the sale agreement. The plaintiff also claims general damages for breach of contract, fraud and misrepresentation from the three defendants. The plaintiff also seeks an order cancelling the transfer in favour of the 1st defendant.

3. Filed simultaneously with the plaintiff's suit, was an application under certificate of urgency for an interim injunction restraining the defendants from selling, alienating, transferring, disposing of, or developing the suit property, pending the hearing of the suit. The plaintiff is apprehensive that unless the order of interlocutory injunction is given, the defendants may undertake dealings in the suit property, which will cause the plaintiff loss and damage.

4. The application is opposed by the defendants. A replying affidavit has been sworn by Robert Johnson Kimanzi a director of the 1st defendant. A replying affidavit and further affidavit has also been sworn by the 3rd defendant. The 1st defendant contends that the transfer of the suit property to the 1st defendant, was done by the plaintiff of his own free will and without any undue influence. The 3rd defendant explains that he drew up the agreement of sale in accordance with the instructions given to him. In accordance with the agreement, the transaction was to be completed within 90 days which were to lapse on 7th July, 2009. On 22nd July, 2009 after the agreement had expired, the plaintiff and the 1st defendant instructed him to prepare a supplementary agreement for altering the terms of the earlier agreement. The plaintiff also instructed the 3rd defendant to release the documents to the 1st defendant for the purposes of carrying out the registration process.

5. The 3rd defendant explained that when it became apparent that the 1st defendant was not paying the purchase price as agreed in the supplementary agreement, the 3rd defendant advised the plaintiff to seek independent legal representation as 3rd defendant had been appearing for both parties in the sale transaction. The 3rd defendant maintained that he faithfully carried out the instructions given to him.

6. Ms Nungo who appeared for the applicant urged the court to grant the orders sought maintaining that the 1st defendant

failed to honour his obligation under the agreement of sale and the supplementary agreement. Ms Nungo pointed out that the transfer documents were registered fraudulently. Ms Nungo pointed out that the agreement was subject to the LSK condition of sale which provides for the suit property to be rendered vacant upon completion of the agreement.

7. For the 1st defendant, it was submitted that the application was not maintainable in law as no injunction has been sought in the main prayers in the plaint. It was pointed out that Clause 2B of the sale agreement provided for the transfer of the property to be done before the completion date. It was argued that the plaintiff lost his right of rescission as he did not serve the mandatory completion notice, but continued receiving the balance of the purchase price even after the completion date. It was argued that the property having been registered in the name of the 1st defendant under Section 23 of the Registered Land Act, the title is indefeasible and the plaintiff's remedy if any lies in damages.

8. For the 3rd defendant, it was also maintained that the application was incompetent as the relief sought was not grounded in the plaint. It was argued that no prima facie case had been made out against the 1st defendant. It was submitted that the 3rd defendant released the document of transfer for registration purposes in accordance with instructions given to him by the plaintiff. The court was therefore urged to dismiss the application.

9. I have carefully considered the application, the affidavits in support and in reply, as well as the submissions made by counsel. It is evident from the plaint that the plaintiff's claim is for damages for breach of agreement, fraud, misrepresentation, negligence and breach of duty. The plaintiff has not sought any order of injunction against the 1st defendant who is the current registered owner of the suit property. Therefore, the interlocutory order of injunction sought by the plaintiff in the chamber summons dated 17th May, 2010, is not anchored on any specific prayer in the main suit.

10. Secondly, the plaintiff has not denied the agreement between him and the 1st defendant for sale of the suit property nor has the plaintiff denied having signed the transfer documents. All that the plaintiff is alleging is that the 1st defendant is in breach of the agreement of sale, as the 1st defendant has failed to pay the full purchase price. Further, that the 1st defendant has fraudulently secured the transfer of the suit property in his name without paying the full consideration.

11. Prima facie, the plaintiff has demonstrated that he has a claim against the 1st defendant, however, the plaintiff has not demonstrated that he will suffer irreparable loss if an order of injunction is not granted. This is because the plaintiff's claim is quantifiable and is recoverable by way of damages. Thus, the plaintiff has not established the circumstances under which an interlocutory injunction can be granted as restated in the case of *Giella vs Casman Brown & Company Ltd [1973] EA 358*.

12. As regards the 2nd and 3rd defendants the plaintiff has not established any prima facie case against them as to justify the order of injunction sought. For these reasons, I find that the chamber summons dated 17th May, 2010 has no merit. It is accordingly dismissed. Costs shall be in the cause.

Dated and delivered this 30th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Nungo for the plaintiff/applicant

Gathogo H/B for Njoroge for the 1st defendant

Ngumbi H/B for Nates for 2nd defendant

Kosgey - Court clerk