



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS AND TAX DIVISION
CIVIL CASE NO. 525 OF 2003

MURAD EBRAHIM MURAD.....1ST
PLAINTIFF

HAMIDA MURAD2ND
PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST
DEFENDANT

ANNE WANGUI MWACHIRO.....2ND
DEFENDANT

R U L I N G

1. The Chamber Summons application dated 13th November 2009 was taken out by Anne W. Mwachiro the 2nd Defendant (hereinafter referred to as the Applicant) The Applicant claimed that she purchased LR No. 209/7725 through a public auction on 2nd December 2004 from the 1st Defendant. This suit was originally filed by the Plaintiff against the 1st Defendant. The Applicant sought to be enjoined in the suit and by the order of **Azangalala, J** made on 22nd October 2007, she was enjoined in this suit as the 2nd Defendant. The Applicant is now seeking for an order that the 1st and 2nd Plaintiffs through their respective advocates on record or any other agents be restrained by a court order from interfering with or laying any claim and/or selling transferring or interfering in any way with land Ref. No. 209/7725 until the hearing and determination of this suit.
2. This application is premised on the grounds that the Applicant is the registered proprietor of the suit premises, she has annexed a copy of the title. The transfer was registered in her favor on 30th November 2006. The applicant has not been able to take possession of the suit premises because the Plaintiffs have resisted her attempt to take vacant possession. The Plaintiffs have not also filed any replying affidavit to the issues raised by the Applicant.
3. It is contended that there is a likelihood that the Plaintiffs’ will interfere with the suit premises either damaging it, or transferring it to third parties or they might act in any other prejudicial manner to the interests of the Applicant. The Applicant also claim that she paid a sum of Kshs. 7.5 million towards the purchase price of the suit premises but continues to suffer loss because the Plaintiffs are in occupation. It was also argued by Mrs. Guserwa, learned counsel for the Applicant that although the Applicant’s application dated 19th November 2007 was disallowed by Kimaru, J. The applicant was given liberty to file another application which can be determined on merit.
4. This application was opposed; Mrs. Mwenesi, Learned counsel for the Respondent relied on grounds of opposition on points of law. Firstly this application was faulted because there is no valid

counterclaim before the court and, the counterclaim that is on record was filed before the 2nd Defendant was made a party to this suit. Thus the application for restraining orders cannot be granted and this was what **Kimaru J.** held in an earlier application.

5. Moreover, the order sought is vague as it seeks to restrain advocates M/s Musharia Mwenesi & Co. Advocates who are not parties to this suit. It also seeks to restrain the Plaintiffs from laying a claim from the suit premises which in essence would stop them from even accessing the court to seek their fundamental rights. Finally it was submitted that the issues raised in this application are *res judicata* as nothing new is raised after the ruling of **Kimaru J.** Furthermore, the title is registered under the registration of the Titles Act especially **Section 52** of the **ITPA** which provides that while the property is in dispute there should be no transfer. Therefore the Applicant does not face any danger and there is no point of issuing an order of injunction.

6. This is a protracted matter as the record reveals that the suit was filed on 27th August 2003 against the 1st Defendant, however seven years down the line the suit itself has not been set down for hearing. Several interlocutory applications have been determined by several Judges as I see several rulings on record. In particular on 28th October 2009, **Kimaru J** determined an application dated 19th October 2007 which was filed by the Applicants. The applicant was seeking for orders to restrain the Plaintiffs either by themselves or through their agents from interfering with laying any claim selling transferring or in any way dealing with LR. No. 209/7725 pending and determination of this suit, (similar orders as in this application). What is not clear to me and even after going through the voluminous pile of papers is whether the 2nd Defendant filed a counterclaim after that ruling of **Kimaru J.**, dated 28th October 2009.

7. In that ruling, the Judge held as follows:-

***“The 2nd Defendant’s application dated 19th October 2007 essentially seeks interlocutory orders of injunction pending the hearing and determination of the suit. The 2nd Defendant, upon being enjoined in the suit, filed her defence to the plaintiff’s claim and counterclaim against the plaintiffs on 8th January 2008. It is therefore clear that the 2nd defendant’s application was made in vacuo. The application lacked a substratum in the nature of a pending suit. The 2nd Defendant had no pending suit before this court upon which to base her application for the said interlocutory orders of injunction. The 2nd defendant can only seek such restraining orders after filing her counterclaim against the plaintiffs. Her application seeking to restrain the plaintiffs from dealing with the suit property was therefore a non-starter. The application had no legs on which to stand on. It had no foundation and if it did, its foundation was quicksand. I proceed to strike out the said application with costs to the plaintiffs.*”**

The 2nd defendant shall however be at liberty to file another application if she so wishes so that the same may be determined on its merits”

8. I have also come across a ruling by **Lesiit J.**, which was delivered on 24th July 2009. The Judge directed as follows:-

“In the meantime, I direct that parties do maintain and preserve the status quo to the extent that unless otherwise ordered by this or other court or unless all parties to the suit agree, the suit property should not be alienated, dealt with in any manner, sold or transferred, charged or mortgaged as to alter the title to any party whatsoever until the pending applications are heard and determined or the court otherwise directs.”

9. In view of the above order which has not been set aside or varied, there is no point of granting another order of injunction. The property is well preserved and that is all the applicant is seeking. What the parties should do is to fix this matter for hearing once and for all. These interlocutory applications which are filed over and over on the same issue only add to make this matter more protracted. There is no shortcut but the issues to be determined by way of oral evidence when the property is preserved as it is indeed the case here.

Accordingly the application is disallowed. Costs will be in the cause.

RULING READ AND SIGNED ON THE 24TH SEPTEMBER 2010.

M. K. KOOME

JUDGE