



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION- MILIMANI
CIVIL SUIT NO. 930 OF 2009

OPA LIMITED.....PLAINTIFF

VERSUS

SPEEDWAY INVESTMENTS LTD.....1ST DEFENDANT

CFC STANBIC BANK LIMITED.....2ND DEFENDANT

RULING

On 23rd day of December, 2009 the Plaintiff filed chambers summons under orders XXXIX Rule 1, 2, and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law seeking orders for:

1. **THAT** due to the urgency of this application, service thereof in the first instance be dispensed with,
2. **THAT** this application be certified as urgent and be heard ex-parte in the first instance.
3. **THAT** the defendants, either by themselves, their servants, and/or agents be restrained from selling or entering into any agreement for sale, advertising, transferring, charging, alienating, wasting, damaging or in any other manner dealing with Apartment Number BD2 together with a Domestic Servant Quarter in Cedar Valley Apartments constructed on Land Reference Number 330/667 in Lavington, Nairobi pending the hearing and determination of this application.
4. **THAT** the defendants either by themselves, their servants, employees and/or agents be restrained from selling or entering into any agreement for sale, advertising, transferring, charging, alienating, wasting, damaging or in any other manner dealing with Apartment Number BD2 together with a Domestic Servant quarter in Cedar Valley apartments constructed on Land Referenced Number 330/667 in Lavington, Nairobi pending the hearing and determination of this suit.
5. **THAT** the costs of this application be provided for
6. **THAT** this Honourable court be pleased to grant such further or other relief as it may deem fit and just to grant.

During the hearing of the application the applicants Counsel, Mr. Machira submitted that Prayer No. 1 and No 2 had already been dispensed with and currently they are seeking prayer No. 4. Besides the above he also submitted that their application is supported by the eleven grounds on the face of the same and the affidavit of Mr. Peter Kanaiya. According to the learned counsel the plaintiff bought the suit premises for the sum of Kshs. 6.3 Million. Subsequently the plaintiff paid a deposit of Kshs.1.2 Million Shillings. Thereafter the plaintiff paid a balance of Ksh. 4.4 Million towards the purchase price. Apart from the above the learned counsel also submitted that there was no dispute that an agreement for sale was entered between the plaintiff and the 1st defendant. The agreement that was entered between the two parties stated that the conclusion date would be 28th February, 2008. After the execution of the lease the plaintiff paid the sum of Kshs. 383,810/= for stamp duty. Pending the registration of the lease and completion of the transaction, the plaintiff's advocate duly informed the 1st defendant's advocate that they were ready to complete the transactions by paying the balance of the purchase price. However, the 1st defendant's advocate informed the plaintiff's advocate that they were yet to receive the redemption

amount by the 2nd defendant. On 16 of July, 2009 the 2nd defendants counsel wrote to the 1st defendants advocate providing for several flats the redemption amounts. However the exception was the plaintiff's apartment. Apart from the above on 29th September, 2009 the 1st defendants advocates wrote to the 2nd defendant's advocates where they provided a partial re-conveyance in respect of the suit premises in execution by the 2nd defendant. However the 2nd defendant did not execute that partial reconvenes. Neither did the 2nd defendant provide the redemption amount as required. Instead, on 18th December, 2009 the 2nd defendant without any cover of right advertised the suit premises for sale. According to the plaintiff the 2nd defendant did not have any right to advertise the property for sale. The applicants counsel submitted by that its own conduct the 2nd defendant was at all time aware of its obligations to provide the redemption amount. Since the 2nd defendant has been unwilling to comply, the plaintiff concluded that both the defendants deliberately delayed the conclusion of the transactions so as to sell the apartment for Kshs. 11.5 Million. It was his contention that the above move was intended to deprive the plaintiff the property and also enable the 2 defendants to enrich themselves unjustly. According to the plaintiffs counsel there was a contract between his client and both defendants and that the contract between the plaintiff and the 2nd defendant was an implied one. It is his opinion that the only role to be played by the 2nd defendant is to give his consent which it has unlawfully withheld unless this court has the power any conclusion of this matter to force the said party to execute the consent and in default the deputy registrar to do so in the plaintiffs favour. In support of his submissions the applicants counsel quoted the following authorities **Central London Property Trust Ltd. Vs. High Trees House Ltd. 1947, 1K.B, 131** and **Robertson Vs. Minister of Pensions, 1949, 1KB, 227**. In his conclusion the plaintiffs counsel submitted that they have demonstrated a course of action by his client against the defendant. He was of the opinion that the plaintiff will suffer irreparable damage if the injunction is not granted.

On the other hand the 1st defendants counsel Mr. Kibet opposed the application while relying on the replying affidavit by Mr. Eric Mungai in addition to the above the 1st defendant has also filed submissions on 26th February, 2010 together with 2 authorities. According to Mr. Kibet he submitted that there is not is dispute that the plaintiff and the 1st defendant signed an agreement for sale in respect for apartment LR No. 330/667 (The suit premises). Further to the above he also submitted that there is no dispute that the said property is mortgaged to the 2nd defendant. He was of the view that the above fact was within the knowledge of the plaintiff on the date of execution of the agreement. He emphasized that the consent of CFC Stanbic was a necessary ingredient to that agreement. Though there was provision for the bank to sign the agreement the latter did not do so. Mr. Kibet is of the view that since the 2nd defendant has not signed the agreement that matter is beyond the 1st defendant. According to Mr. Kibet the plaintiff ah not demonstrated the right that his right has been breached by the 1st defendant. Though this suit was triggered by advertising for sale of the suit premises by the CFC Bank no mention has been mentioned by the 1st defendant. To support his submissions Mr. Kibet quoted the case of **Standard Goods Co-operation Ltd. Vs. Harakhchand Nathul and Company.**

Lastly Mr. Kibet took issue with the plaintiff for failing to issue a notice requiring completion as provided by the Law Society of Kenya conditions of sale. Mr. Kibet is of the considered of view that the plaintiff has miserably failed to establish the principal necessary for an order of injunction in terms of the case of **Giella Vs. Cassman Brown.** On the other hand the 2nd defendant's counsel Mr. Ogunde opposed the application by the plaintiff. The 2nd defendant relies on the replying affidavit by Gathoni sworn by Gathoni Hamilton Foster filed on 3rd January, 2010 and the written agreements filed on 14th January 2010. According to Mr. Ogunde prayer C of the plaint seeks to perfect the interest over the suit property by asking the court to ultimately order and compel the 2nd defendant to execute a partial reconvenes of the mortgage in respect of the suit property. Further to the above Mr. Ogunde referred the court to the sale agreement at page 15 which clearly provides and contemplates that the agreement required the consent of the 2nd defendant. That apart the 2nd defendant would be obliged to partially discharge the security that it had over the suit property. As of today he submitted that there is not dispute that the 2nd defendant never consented to the sale. Other wise it would have executed page 15 of the sale agreement. He was of the view that the plaintiff could not acquire any interest in the property without the consent of the 2nd defendant. He also submitted that parties reach an agreement in writing, in law they cannot add or take

away anything from the agreement. That means that the document speaks for itself. He further submitted that nobody has contested the fact that 2nd defendant has legal mortgage over the suit property duly registered. Neither is there any dispute that the 2nd defendant has a debenture over the property. In support of his submissions he quoted the case of **Millicent W. Mugih Vs. Speedway Investments Limited and CFC Stanbic Bank Limited.**

This court has carefully considered the opposing submissions by the learned counsels. It is not in dispute that the plaintiff and the 1st defendant signed a sale agreement in relation to the suit premises. The parties are also in agreement that the said agreement was subject to the consent by the 2nd defendant as the mortgagee. For unknown reasons the 2nd defendant did not approve the sale agreement between the parties. It is apparent that the application before court seeks interlocutory orders of injunction against both defendants. The basic principles for issuing of the injunction are laid out in the case of **Giella Vs Cassman Brown E.A. Page 358.** In that case the court stated as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. 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. (E.A. Industries Vs. Trufoods (1992) E.A. 420).”

When faced with similar suit my colleague, Justice Kimaru stated in the case of **Millicent W. Mughi Vs. Speedway Investment Ltd & CFC Stanbic Limited, Milimani HCCC No. 768 of 2009** as follows: *“In the present application it is apparent that the plaintiff is predicating her application on the agreement that she entered with the 1st defendant on 30th May, 2007. As is evident from the facts of this application, to be valid and enforceable, the said agreement for the sale of the suit property had to be consented to by the mortgagee, the 2nd defendant. As a mortgagee, the 2nd defendant had an interest in the suit property because it had advanced money to the 1st defendant for the construction of the flats on the said property. The 1st defendant could not, in law, part with possession of the suit property without the consent or the approval of the 2nd defendant.*

Can the plaintiff enforce the said agreement she had with the 1st defendant, as against the 2nd defendant? As has been stated earlier in this ruling, it was clear that the 2nd defendant was not a party to the agreement between the plaintiff and the 1st defendant. The plaintiff was aware that for the said agreement to be valid and enforceable, the 2nd defendant had to give its consent. The plaintiff cannot plead ignorance because page 13 of the agreement clearly provided that without consent of the 2nd defendant, the agreement would be invalid. The plaintiff's visit to the 2nd defendant's offices is further proof that the plaintiff was aware that the sale of the suit property would not be valid without the 2nd defendant's consent. Having evaluated the facts of this application, it was apparent to this court that, if the plaintiff has any case in connection with the debacle relating to the determination of the purchase consideration of the suit property, then the party that she should pursue is the 1st defendant. The 2nd defendant, as the Americans would say, had nothing to do with it.

This court is not therefore persuaded by the plaintiff's argument that the agreement that is the subject of this suit is such that it can be enforced against the 2nd defendant to enable the plaintiff obtain ownership and possession of the suit property. The 2nd defendant was a stranger to the said agreement. If the plaintiff will suffer any damages, such damages are quantifiable. This court was not convinced that the plaintiff will suffer irreparable damage that cannot be compensated by an award of damages if the injunction sought is not granted. The balance of convenience tilts in favour of the 2nd defendant who is being kept from recovering the sums that it had advanced to the 1st defendant.”

At the outset it must be pointed out that in HCCC No. 768/2009 was decided by a courts of concurrent jurisdiction. Though the same means that this court is not bound by that decision I am of the considered opinion that the same is of persuasive and convincing value. I also do agree with the reasoning and the logic in that ruling since the same reflects the correct position of the law. In view of the above I hereby

dismiss the application by the applicant dated 23rd December, 2009 since the same has no merits at all. Costs to the respondents in any event. Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of:

Ngugi - Plaintiff/Applicant's Counsel - present

1st Respondent's Counsel - absent

Ogunde - 2nd Respondent's Counsel - present

MUGA APONDI
JUDGE

6TH SEPTEMBER, 2010