



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

Civil Suit 367 of 2009

LOISE M. WAMBUA.....PLAINTIFF/APPLICANT
VERSUS
KENYATTAUNIVERSITY.....1ST DEFENDANT/RESPONDENT
KENYATTAUNIVERSITY BOMA CO-OPERATIVE
SOCIETY LIMITED.....2ND DEFENDANT/RESPONDENT
RULING

The plaintiff brought this suit against the 1st and 2nd defendants' in respect of a parcel of land known as LR.NO.13136 in Nairobi. It is her case that she entered into a Sale Agreement with the 1st defendant in respect of the said parcel of land but now the 2nd defendant has threatened to sell her land.

She moved the court for orders that there be a permanent injunction to restrain the two defendants whether by themselves, individually or jointly, their servants or agents or any of them from entering into any sale agreement, selling, transferring, disposing off, pledging, leasing, charging or in any manner whatsoever alienating or dealing with that piece of land known as LR. NO.13136 in Nairobi.

She also sought to restrain the two defendants from effecting any change whatsoever in the state, condition, ownership and occupation of the plaintiffs portion or any part thereof, and also from interfering in any manner whatsoever in the plaintiff's interest in the suit property, including the plaintiff's right of occupation and enjoyment of the property. She also sought an order for allocation of her plot to herself by the 1st defendant, general damages and costs of the suit.

Alongside the said plaint she filed an application by way of Chamber Summons under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and Section 52 of the Indian Transfer of Property Act seeking restraining orders as set out in the plaint pending the hearing and determination of the suit. On 28th July, 2009 this court granted interim orders in favour of the applicant herein. That application has now been canvassed and both learned counsel have filed written submissions in that regard. Several authorities have also been brought to the attention of the court.

The plaintiff has the duty to show that she has a *prima facie* case with a probability of success and that if the order is not granted she is likely to suffer loss that may not be adequately compensated by an award of damages.

If the court is in doubt it shall decide the matter on a balance of convenience. The thrust of the defendants' case is that the plaintiff has breached the conditions and terms of the 2nd defendant which was formed by the 1st defendant to facilitate the development of the parcels of land owned by members of the 2nd defendant. It is the plaintiff's case on the other hand that, she is not a member of the 2nd defendant and therefore has no obligation to comply with their demands, terms and conditions.

The Sale Agreement has not been denied, neither has it been alleged that the plaintiff did not pay the purchase price in respect of the said parcel of land. The fact that the plaintiff says she is not a member of the 2nd defendant is a triable issue that goes to the root of this particular dispute.

Some submission has been made on behalf of the 1st defendant to the effect that it is not a party to the dispute and that, the plaintiff's claim against it is misconceived. I note however that, the 1st defendant has not denied that the Sale Agreement was between the plaintiff and the 1st defendant and that the purchase price was paid through the 1st defendant

on behalf of the plaintiff. It is also not denied that it is the 1st defendant who incorporated the 2nd defendant as a Co-operative Society to facilitate the development of the said property. In any case, Order I Rule 9A of the Civil Procedure Rules provides that a suit cannot be defeated for non-joinder of the parties.

Taking into consideration all the matters before me, I am persuaded that the plaintiff has established as *prima facie* case against both defendants with a probability of success. The value of land keeps on rising every day and it is feared that if the defendants are not restrained they may dispose off the land to the detriment of the plaintiff who may not be able to acquire similar land at the price she paid when she purchased the present piece of land.

In that regard, damages may not be adequate compensation. I am not in doubt about this but even if I were, the balance of convenience tilts in her favour considering the commitment she has made in respect of this parcel of land.

Accordingly, the application is hereby allowed, orders shall issue as prayed against the defendants jointly and severally and shall remain in place until the final determination of the suit. The plaintiff shall have the costs of the application against both defendants. Orders accordingly.

Dated, signed and delivered at Nairobi this 1st day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE