



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT NO. 539 OF 2007

STEPHEN KIAMA KIGANO & ANOTHER
.....PLAINTIFF
VERSUS
ZAVERCHAD RAMJI SHAH &
OTHERS & OTHERS.....
.....DEFENDANTS

RULING

1. The 1st and 2nd applicants in the amended chamber summons dated 24th September, 2008 are husband and wife. It is contended that on or about 30th April, 1986 they purchased a sub-division of a property known as LR No. 4242/3 from the 3rd defendant at the time, the 3rd defendant was a wholly owned subsidiary of the 5th defendant. The applicants paid a deposit of Ksh. 300,000/= and they were given vacant possession of the suit premises. The balance of the purchase price was to be paid upon completion. The applicants constructed their home at the suit premises however, within the same year the 5th defendant was placed under the statutory management of the Official Receiver before the completion of the sale.
2. The plaintiffs placed a caveat to forbid any dealings with the suit premises on 4th December, 1986. They left the country and returned sometimes in August, 1995 in January, 1997 they discovered the caveat they had lodged over the suit premises was irregularly removed and their property had been transferred to the 3rd defendant by the official receiver. The 1st respondent instructed the 2nd respondent to levy distress for unpaid rent amounting to over Ksh. 3 million while claiming that the applicants are tenants.
3. The auctioneers moved into the property of the applicants on 10th August, 2007 and carted away their property. This is after the applicants had been in occupation of the suit premises for about 25 years. The auctioneers carted a way the applicants house hold goods which have not been accounted for. It is for that reason that the applicants filed the suit and also an application under order 39 of the Civil procedure rules seeking for an injunction against the respondents jointly or severally from selling trespassing on or dealing in any way with the plaintiff's portion of property known as LR No. 4242/3 pending the hearing of the suit.
4. This application is supported by the affidavit of Stephen Kiama Kigano sworn on 24th September, 2008. At the time the suit was filed the Official Receiver was not party to the suit. The applicants sought leave to enjoin the official receiver which leave was granted on 4th October, 2008 by **Kimaru J.** The applicant was also granted an ex parte order of an injunction but when the application came up for inter partes hearing the respondents raised a preliminary objection on points of law. That preliminary objection was determined by **Lesit J** who delivered a reasoned ruling on 7th March,

2008. The preliminary objection was dismissed thus the application for injunction was ordered to proceed for hearing.

5. According to Mr. Kirundi learned counsel for the applicants, there was no tenancy relationship between the plaintiff and the respondents to warrant a levy of distress for rent on the applicant's property. Secondly, before the Official Receiver could purport to sell the applicants property, they were supposed to find out that the applicants were creditors. There is communication from the Official Receivers Advocates confirming that the official receiver was willing to transfer the property. The Official Receiver never denied that the suit property was sold to the applicants. Going by the correspondence exchanged between the Official Receivers Advocates and the plaintiff's, the plaintiffs have established a prima facie case with a probability of success.

6. The suit property is also a special piece of property within the prime area of Kitusuru which was purchased in 1986 and the agreement reads 'balance will be paid on completion'. According to the plaintiffs completion date has not come due to the intervening appointment of the official receiver. Events also occurred where the Official Receiver sold the property to the 1st defendant under mysterious circumstances.

7. Counsel urged the court to find the balance of convenience tilts in favour of the applicant who has been in occupation of the suit premises for close to 25 years. The suit raises many triable issues and to find that the necessary leave to sue the Official Receiver was properly granted by **Kimaru, J.** Moreover, the respondents filed a defence in this matter thereby submitting to the jurisdiction of this court. The respondent's preliminary objection having failed, they are estopped from raising the same issues which have been determined.

8. This application was opposed by the respondent . The 1st defendant relied on the affidavit sworn by **Zavachard Ramji Shah** on 23rd May, 2008. According to the deponent, he contends that he purchased the property from the 3rd defendant in 1995 at a consideration of Ksh. 32 million. As at the time, the 3rd defendant was registered proprietor of the suit premises. The 1st defendant is therefore a stranger to the allegations that there was a contract between the plaintiffs and the 5th defendant. Secondly, the plaintiff's seeks to rely on a sale agreement which was entered into in 1986. If the provisions of that agreement are to be followed, it is the plaintiffs who failed to comply with the terms to complete the transaction.

9. To date the balance of the purchase price has not been paid thus the plaintiffs cannot come to court to seek an equitable remedy. There is correspondence from the firm of **Ndungu Njoroge and Kwach** of January, 1991 in which the plaintiffs were being asked to complete the purchase price of the suit premises. However to date that balance has not been paid and the plaintiffs are not entitled to an order of injunction. The 5th defendant was entitled to sell the property; in any event this suit is barred by the provisions of section 6 of the Limitation of Actions Act. There is also another suit being **HCC No. 3462 of 1995** in which the plaintiff sought to be enjoined. The two suits involve the same subject matter and the court should find the present suit an abuse of the court process.

10. The 3rd and 5th defendant also opposed this application; reliance was placed on the replying affidavit by **Patrick Kanywera**. It was submitted that the applicants failed to complete the transaction despite having taken vacant possession of the suit premises in 1986. It was submitted that the mere fact that the plaintiffs entered into an agreement does not confer title upon which an order of injunction can be granted. Counsel relied on the cases of; ***Silas Nyori N. Mbugwa Vs Saul Chemos Tuka {2009} eKLR*** and the case of; ***Mua Park Investments Ltd Vs Kenya National Assurance Milimani HCC No. 141 of 2004*** to support their respective arguments.

11. The above is a summary of the salient issues raised in this application and in the affidavit in the opposition as well as the submissions by counsel for the applicants and respondents. This application seeks for an order of injunction pending the hearing and determination of the main suit. It is unfortunate since the suit was filed in October, 2007, not much progress has been made towards resolving the main

suit. The record shows there have been twists and turns and I need not go into those details. The principals to guide the court on whether or not to grant an order of injunction are well settled in the often cited case of ; Giella Vs Casman Brown and Co. Ltd {1973} EA P 358.

12. The applicants must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which cannot be compensated for in damages would rise and if in doubt the court determines the matter on a balance of probability. The Court of Appeal has further explained what constitutes a prima facie case in the case in the case of: **Mrao Ltd V First American Bank of Kenya Ltd & 2 others {2003} KLR 125.**

“ A prima facie case in a civil application included but is not confined to a “ genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal; properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call an explanation pr rebuttal from the latter.”

13. The applicant’s case is founded on a sale agreement dated 30th April, 1986. It is contended by the plaintiffs that the third defendant that was an entity wholly owned by the 5th defendant did not provide the completion documents. There is correspondence after the 5th defendant was placed under the statutory management of the Official Receivership that the 5th respondent was still in the process of acquiring a separate title of the portion being sold to the applicants.

14. According to the applicants these documents were never availed. To protect their interests, they placed a caveat on the suit premises and they claim they were never notified by the Official Receiver when the caveat was removed. The property was sold to the 3rd defendant who sold it to the 1st defendant. The applicants are alleging fraud and irregularities in the manner in which the property they have been in occupation was sold and transferred. Secondly, the plaintiffs claim that they are not tenants of the 1st defendant thus distress for rent could not have been levied against them.

15. I have carefully considered this application and in my humble opinion, it raises triable issues that can only be determined by way of oral evidence. The 3rd and 5th defendants will be called upon to explain how they overlooked the sale agreement entered into with the plaintiffs. The 4th defendant will explain how the caveat lodged by the plaintiffs was removed and 1st defendant will explain how the plaintiff’s became their tenants. I also find the technical issues which are raised by the respondent were determined by the ruling of **Lesiit J.** alluded to earlier in this ruling. I also find leave to enjoin the Official Receiver in this suit was granted by **Kimaru J.** and if the respondents want to challenge that leave they can do so at the hearing of the suit.

16. For the aforesaid reasons, the applicants application is allowed in terms of prayer No. 3 that is;

“The defendants, their servants, employees and/or agents or otherwise howsoever be and are hereby enjoined and restrained jointly and severally, from selling, trespassing on, disposing, advertising for sale and/or in any way from dealing adversely with the plaintiff’s portion of the property known as L R No. 4242/3 pending the hearing of the substantive suit”.

The costs of this application shall abide the out come of the suit.

Ruling signed and submitted for delivery on 1st November, 2010

**MARTHA KOOME
JUDGE**

Delivered and countersigned on 8th day of December, 2010.

**MURUGI MUGO
JUDGE**