



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 197 OF 2001**

JULIA AKELO KUNGURU..... PLAINTIFF

VERSUS

SETH LUGONZO.....1ST DEFENDANT

KENYA TOURIST DEVELOPMENT CORPORATION.....2ND DEFENDANT

RULING

The 1st defendant filed an application pursuant to the provisions **Sections 3, 3A, 63(c) and (e)** of the **Civil Procedure Act** and **Order XXXIX Rules 1, 2 and 9** of the **Civil Procedure Rules** seeking interlocutory injunction to restrain the plaintiff, by herself or through her servants or employees from charging, selling, transferring or in any manner dealing with the property known as LR. No.Kakamega/Town/Block 11/26 (*hereinafter referred to as the suit property*), pending the hearing and determination of the suit. The 1st defendant further prayed for an interlocutory injunction to restrain the plaintiff, her servants or agents from harassing, intimidating, proclaiming, attaching, distraining or evicting or interfering with the quiet occupation by the 1st defendant's tenants in the suit property pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of the 1st defendant. The 1st defendant swore a supplementary affidavit in further support of the application. The application is opposed. The plaintiff filed a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Mr. Ashimosi for the 1st defendant and by Mr. Maweu for the plaintiff. Mr. Ashimosi submitted that the plaintiff and the 1st defendant entered into an agreement for the purchase of the suit property. The agreement was rescinded by the 1st defendant provoking the plaintiff to file the present suit seeking specific performance of the said land purchase agreement. He submitted that the claim was still pending determination before this court. During the pendency of the suit, the plaintiff had transferred the suit property to her name using a power of attorney which had been previously donated to her by the 1st defendant, but which had, at the time of the said transfer, been revoked by the 1st defendant.

Mr. Ashimosi referred the court to a copy of the notice of revocation of the power of attorney which was annexed in the affidavit of the 1st defendant in support of the application. He maintained that the plaintiff had used a fraudulent document to secure the transfer of the suit property to her name. He was of the view that the circumstances under which the plaintiff procured the said transfer using the revoked power of attorney instead of moving the court was suspicious. He submitted that it was due to this transfer that the 1st defendant was apprehensive that he will be deprived of his proprietorship over the suit land before the suit herein is heard and determined.

Mr. Ashimosi explained that there was no basis upon which the plaintiff would impeach the affidavit filed by the 1st defendant in support of the application solely on the grounds that the said affidavit was sworn sometime before the application was filed. He maintained that the plaintiff's assertion that the power of attorney was irrevocable was not supported by evidence since the relevant clauses in the disputed power of attorney did not specifically state that the power of attorney would be irrevocable. He reiterated that the transfer that was procured on the strength of the revoked power of attorney was fraudulent and therefore invalid. He urged the court to allow the application with costs.

Mr. Maweu for the plaintiff opposed the application. He submitted that the affidavit sworn in support of the application was fatally defective since it was sworn before the application was filed. He argued that that the affidavit could not be said to be in support of an application which had not been drafted at the time it was sworn. He urged the court to expunge the offending affidavit. He submitted that the plaintiff had expended a sum of KShs.6,438,599/70 towards acquiring the suit property. He explained that pursuant to the two sale agreements entered between the plaintiff and the 1st defendant, the plaintiff had fulfilled her part of the bargain by paying the purchase consideration, while the 1st defendant on his part had failed to fulfil his part of the bargain by executing the transfer documents.

Mr. Maweu explained that although the 1st defendant had indicated that he was ready to refund the purchase consideration to the plaintiff, such a refund had not been forthcoming. He submitted that the 1st defendant took no action while the land rates had escalated to an amount that the suit property was threatened to be sold by Kakamega Municipal council. He explained that the plaintiff had indeed transferred the suit property to herself by using the power of attorney which had been executed by the 1st defendant in her favour. He submitted that pursuant to **Section 116(5)** of the **Registered Land Act**, a power of attorney donated to a donee pursuant to payment of a valuable consideration was irrevocable. He maintained that by the time the plaintiff transferred the suit property to her name, the power of attorney donated to her by the 1st defendant was still valid. He explained that the 1st defendant could not legally revoke the power of attorney since the plaintiff had paid valuable consideration. He submitted that the reason why the plaintiff took sometime before she transferred the suit property to her name was because the title of the suit property had been charged. It was only after the plaintiff had repaid the loan initially advanced to the 1st defendant, that the title was discharged.

Mr. Maweu maintained that since the plaintiff was now the registered owner of the suit property, her title in respect of the same was indefeasible. The only remedy available to the 1st defendant was to pursue a claim for damages. He submitted that the plaintiff failed to establish a prima facie case to entitle this court grant the interlocutory injunction sought. He reiterated that there were no tenants in the suit property who were put there by the 1st defendant. In any event, he explained that the said tenants were not parties to the suit. He urged the court to dismiss the 1st defendant's application with costs.

I have carefully considered the rival arguments made by the respective counsels of the parties to this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the 1st defendant established a case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“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 v. Trufoods, [1972] E.A. 420.)”

Before giving reasons for my decision on the substantive issues, I wish to address the issue raised by the plaintiff regarding whether the 1st defendant's application is competently before court on account of the

fact that the affidavit sworn in support of the said application pre-dated the application. It was not disputed that the affidavit in support of the 1st defendant's application was sworn on 14th August 2008 while the application is dated 22nd August 2008. Does the fact that the affidavit sworn in support of the application pre-dates the application render the application incompetent? I do not think so. This court has discretion under **Order XVIII rule 7** of the **Civil Procedure Rules** to receive any affidavit sworn for the purposes of being used in any suit notwithstanding that there is irregularity in the form of the said affidavit. It is this court's view that the plaintiff was not prejudiced by the fact that the said affidavit predates the application. In any event, the plaintiff filed a response to the 1st defendant's application which issues are now being considered by this court. The objection to the said application on grounds of incompetency of the supporting affidavit has no merit.

On the substantive issues raised, certain facts are not in dispute in this application. It is not disputed that the plaintiff entered into two agreements with the 1st defendant in which the 1st defendant agreed to sell to the plaintiff the suit property. At the time of the sale, the 1st defendant owed a substantial amount to the Industrial and Commercial Development Corporation and the Kenya Tourist Development Corporation. In the agreement, it was provided that the plaintiff would settle the said debt owed to the two corporations and also pay the outstanding land rates owed to the Kakamega Municipal Council. The balance of the purchase consideration was to be paid to the 1st defendant. According to the plaintiff, she paid the entire purchase consideration as set out in the agreement. On his part, the 1st defendant contends that the plaintiff failed to abide by the terms of the agreements thus forcing him to rescind the contract. The 1st defendant stated that he was ready and willing to refund the purchase consideration to the plaintiff. That issue which will be determined by the court during the substantive hearing of the case.

It however emerged that during the execution of the said agreements, the 1st defendant's executed a power of attorney in favour of the plaintiff. The said power of attorney was duly registered at the Kakamega Lands Office in the register of the title of the suit property. Two clauses in the said power of attorney are worth of mention. Clause 2 and 6 provided that the 1st defendant had appointed the plaintiff as his attorney in respect of the suit property to:

"2. To discharge, sign and effect the transfer of my aforesaid property known as Kakamega Municipality Block 11/26 and all developments thereon into her name.

6. That this power of attorney is made pursuant to the agreement dated 19th day of May 1993 wherein I sold the aforesaid property to the said Mrs. Julia Kunguru pursuant to the agreement dated 19th May 1993."

The 1st defendant argued that he revoked the said power of attorney on 18th October 2007 before the plaintiff purported to transfer the suit property to her name on 17th June 2008. The plaintiff countered the 1st defendant's submission by relying on **Section 116(5)** of the **Registered Land Act** which provides that a power of attorney given for valuable consideration cannot be revoked. The plaintiff argued that she was entitled to use the said power of attorney to secure the transfer of the suit property to her name. The 1st defendant argued that the power of attorney he donated to the plaintiff was not irrevocable since it was not specifically stated that it would be irrevocable.

My analysis of the said argument made is that it is apparent that the plaintiff paid a substantial part of the purchase consideration, including repaying the loan amount that was owed by the 1st defendant to the 2nd defendant. The 2nd defendant released the title of the suit property together with the discharge of charge to the plaintiff on the strength of the power of attorney donated to her by the 1st defendant. I think the 1st defendant has a case when he argues that the circumstances under which the plaintiff was registered as the owner of the suit property raised suspicion taking into consideration the fact that he had revoked the power of attorney donated to her. The said revocation of the power of attorney was registered on the title at the Lands Office, Kakamega before the plaintiff presented the transfer documents for registration. It was evident that the plaintiff relied on a document which had been revoked to secure the transfer of the

suit property to her name. The plaintiff has some explaining to do in regard to the said transfer, especially in view of the pendency of this suit.

In the circumstances therefore, I do hold that the 1st defendant established a prima facie case to entitle this court grant interlocutory injunction in terms of prayer 3 of the 1st defendant's application dated 22nd August 2008. The plaintiff by herself or her agents is hereby restrained from charging, selling, transferring or in any manner whatsoever dealing with the suit property i.e. Kakamega Municipality Block 11/26 pending the hearing and determination of the suit. Since there is evidence on record that the plaintiff has already taken possession of the suit property, I will not grant prayer 4 of the said application. This court cannot restrain what has already taken place. The costs of the application shall be in the cause.

DATED at NAIROBI this 12th day of NOVEMBER, 2008.

L. KIMARU

JUDGE