



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Case 130 of 2006

HASHAM LALJI PROPERTIES LTD:.....PLAINTIFF

VERSUS

HASSAN K. KOSKEY alias JASSAN K. KOSKEY:.....DEFENDANT

RULING

The plaintiffs/applicant application seeks the following two main orders:-

1)

2) That the defendant by himself or by servant and or agents be and is hereby restrained by way of injunction from alienating, transferring or obtaining an interest in, claiming to be the owner, selling, charging mortgaging, leasing letting offering as security, excluding the plaintiff from, collecting rent with respect to, sub letting or in any other manner interfering with the plaintiff's rights as the owners of parcels known as Eldoret Municipality/Block 13/60 and Eldoret Municipality Block 6/115 pending the hearing and determination of the suit herein.

3)

4) That the defendant, his agents and/or servants now stationed on the premises Eldoret Municipality Block 13/60 be ordered to vacate by way of mandatory injunction.

5) That costs be provided for.

Plots No.Eldoret Municipality/Block 13/60 and Block 6/115 are said to be registered in the names of **HASHAM LALJI PROPERTIES LTD** the plaintiff/applicant. **DIAMOND HASHAM LALJI** who said he is the Chief Executive Officer of the company swore an affidavit in support of the application in which he retaliated that the two plots are registered in the name of the plaintiffs company. The two plots are developed with residential building on them. The defendant/Respondent was a tenant on parcel No. Block 6/115 in the name of Cottage Hospital but he stopped paying rent in July 2006. Plaintiff has been paying rates to the council. That however in October 2006 they discovered from the land Registry that respondent was claiming to have bought the two plots and had placed cautions. There were also two letters allegedly written by A.H. Lalji referring himself as the managing director of the company purporting to acknowledge receipt of purchase price from the respondent. The deponent averred that there was no time the company sold the said plots to the respondent. A.H Lalji was never a Managing Director of the company.

Further it was deponed that on 12th October,2006 the respondent invaded plot No. Block 13/60 and forcefully took possession and has stationed guards there.

Ahmed Hashan Lalji also swore an affidavit in which he denied ever negotiating with the respondent for the sale of the two plots or ever receiving any money from him. He also denied writing the two letters to him and said his signature was forged and so were the company's letter heads. He also denied ever being the managing director of the company stating that there was no such a position in the company as the highest office is that of Chief executive officer.

The respondent **HASSAN K. KOSKEY** swore and filed a replying affidavit. He averred that Ahmed Hassan Lalji a director of the company informed him that the company wanted to sell the two plots. They negotiated and agreed that he will buy plot No. Block 6/115 for Shs.4.5 million and plot No. Block 13/60 for shs.8 million. He paid the said money to him and he acknowledged receipt in writing. He thereafter wrote several letters to the plaintiff requiring him to prepare conveyance documents to effect transfer of the plots into his name. On 6th July 2006 he received lease certificate of plot No. Block 13/60 from the plaintiff. He later received keys to plot No. Block 13/60 from Ahmed Lalji and went into occupation. He therefore denied that he went into the plot illegally. Further he said that after he paid the money there was change of mind by the plaintiffs as there has been family disputes by the directors of the company who are brothers and to appease the others Diamond and Ahmed filed this suit. They had been even reported to police that he stole the lease certificate while was found to be false.

The application was prosecuted by Mr. Kuloba and Mr. Wagara appeared for the respondent. Both counsels submitted at length with much skill and vigor. They both retaliated averments by their respective clients and argued on points of law. I need not reproduce what they said here but suffice it to say that Mr. Kuloba said that the two plots are registered in the names of the plaintiff and that they had never been sold or transferred to the respondent. There was no evidence of sale as there was no sale agreement or evidence of any money being received. The respondent was only a tenant up to July 2006 and he therefore could not have purported to have bought the plots in the year 2002. He took possession of plot No.13/60 forcefully and he should therefore be removed.

Mr. Wagara on the other hand submitted that no prima facie case has been established by applicant to warrant issuance of an injunction. He retaliated that the respondent had bought the plots as evidence by the letters from Ahmed M. Lalji which were annexed to his affidavit. He paid the purchase price and he was given keys to plot No.13/60. Those letters were not forged as there was no evidence from the document examiner to show that. The receipt showing that respondent was paying rent were not stamped as required. He said even the balance of convince falls in his clients favour.

As for mandatory injunction he said that the respondent did not go into the plot illegally. No special circumstance have been shown. As stated the application seeks interlocutory prohibitive injunction and interlocutory mandatory injunction. The first is based on order 39 rule 1 and 2 CPR while the latter is based on S.3A CPA which are all invoked in the application. I will deal with the issue of interlocutory prohibiting injunction first. The principles of granting or rejecting such an order are well set out in the case of *GIELLA VS. CASMAN BROWN & CO. LTD (1973) E.A. 358*. The applicant must show he has a prima facie case with chances of success at the trial, that if the order is not issued, the applicant would suffer injury which would not be adequately compensated in damages and lastly, if the court is in doubt to decide on the balance of convenience. At this stage the court is only dealing with an interlocutory application. The court cannot therefore decide with finality on the facts or law. To do so would compromise the main trial.

In this application it is not disputed that the suit properties are all registered in the name of the applicants. Search certificates were exhibited to that effect. Secondly it is not in dispute that the applicant are in control and possession of plot No. Block 6/115 and that the respondent only went into occupation of Block No.13/60 only in October 2006 about two months before this suit and the application was filed. Infact it was deponed and submitted, a fact never rebutted that he has only stationed guards at the premises. He himself is not in actual occupation. On the other hand the respondent claim to have bought and paid for the plots. This claim is denied by the plaintiff and A.H. Lalji, who is said to have sold the plot and received the money has sworn an affidavit denying the claim. Apart from two letters allegedly written by the said A.H. Lalji, who has denied writing, there was no other evidence of the sale or the payment. No sale agreement or receipt were exhibited. As I said this is an interlocutory stage and I

cannot at this stage say if there was a sale or not. I cannot also say with certainty if the alleged purchase price was paid or not. These are issues to be canvassed during the main trial and cannot be decided on affidavit evidence. However suffice it to say that sale and receipt of money has been denied on oath. I cannot also fail to note that the amount involved is not chicken feed. It is huge amount of money by any standards. I therefore except that each party will at the hearing canvass his case. However at this stage even if one is to assume money was paid the property has not been transferred to the respondent. They are in the names of the applicant. The applicant therefore has an arguable case and there is therefore need to have status quo maintained until the suit is heard and determined. Even the balance of convenience tilts in favour of the applicant who is the registered owner of the plots. I therefore find that the applicant have satisfied the principles set in Giella case, and is entitled to an order of prohibitive injunction.

I now turn to the issue of mandatory injunction. I have already said that such orders can only be sought and granted under S. 3A CPA and not order 39 CPR. The applicant has invoked S.3A CPA in his application. A mandatory injunction is defined in BLACK'S LAW DICTIONARY 7th Edition page 788 as follows:-

“ An injunction that orders an affirmative action or mandates a specific cause of conduct.”

Courts have held over and over again that a mandatory injunction ought to be granted only in the clearest cases and where special circumstances exists – see **KENYA BREWERIES LTD vs. OKEYO (2002) IEA 101**. The question to ask therefore is if this is a clear case or if there are special circumstances. The respondent has not denied going into occupation of plot No. Block 13/60. However court has been told that he did this only two months ago and he has only posted guards there to stop agents of the applicant from entering into the premises. It is not denied that the plot is registered in the name of the applicant and sale has been denied. The land has not been transferred into the name of the respondent. I believe this can be said to be a clear case. The respondent chose to enter into the premises even though it is not registered in his name. His claim that he was given keys by A.H. Lalji was denied and in any case if that was so one wonders why he should post guards to deny entry to servants and or agents of the applicant. There was no denial that such guards are posted there. Such acts need to be remended with an order of mandatory injunction. There is no evidence that he was put into possession by the applicant. Even if he believes he had bought the land he could not choose to go into occupation forcefully without first having it transferred to him. If in every transaction of sale of property the purchaser chooses to go into occupation without having the land transferred to him and without authority of the other party then that would lead to anarchy. Courts have duty to stop such actions and can only do so through orders of injunction. I am therefore satisfied that this is a proper case to grant such an order. The respondent has not claimed to have done any developments on the plot or that he is living there. He is not as of now the registered owner.

From the foregoing therefore I find the application is well merited. I accordingly grant prayers 2 and 4 as prayed in the application. Costs be in the cause.

Dated and Delivered at Eldoret on 12th July,2007.

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESENCE OF:-

C/C - David

Mr. Kuloba for Applicant

Mr. Omboto for Mr. Wagore for Respondent