REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 211 of 2006

JAYNE WANGUI GACHOKA…….....…….PLAINTIFF

VERSUS

IN TIME LIMITED…….....……..1ST DEFENDANT

PANAMA ROVERS…….....……..2nd DEFENDANT

R U L I N G

This is an application by the plaintiff for an interlocutory injunction pending the hearing and determination of the suit. The injunction orders sought are intended to restrain the defendants from attaching, disposing, alienating or in any other way interfering with the plaintiff's possession of the goods set out in the proclamation dated 3rd April 2006, or in any other goods of the plaintiff.

It is the plaintiff's case that the proclamation was allegedly for purposes of settling arrears of rent on the premises known as L.R. NO. 214/468, MUTHAIGA, Nairobi. The said premises will, hereinafter be cited as "**the suit premises."**

She says that she has at all material times been in occupation of the suit premises, but not as a tenant of the 1st defendant.

On the other hand, the 1st defendant agrees that the plaintiff has been in occupation of the suit premises, but insists that the plaintiff is a tenant.

The first question that I must first grapple with is the nature of the relationship between the plaintiff and the 1st defendant. Of course, I do remind myself that at this interlocutory stage I should strive to avoid making any definitive conclusions of fact or law.

According to the plaintiff, the proclamation in issue named the tenant as Fredrick Ngatia trading as Andrews Apartments. However, a perusal of the said proclamation actually names two persons as the tenants. The two persons are said to be;

"**Fredrick Ngatia T/A Andrews Apartments & Jane Gacoka"**

Therefore, on the face of it, the plaintiff appears to be wrong when she asserted that the proclamation only named a person other than herself as being the tenant.

However, that does not alter the fact that the lease document which was annexed to the further

affidavit in answer to the application was only as between the 1st defendant (as the Lessor) and M/s Andrew Apartments (as the lessee). The plaintiff is not named in that lease, as being a tenant or lessee.

But it is common ground that the plaintiff is in occupation of the suit premises. Is she a tenant or a purchaser of the said property?

There is no doubt that the Plaintiff signed an Agreement for Sale, through which she was to purchase the suit premises. That Agreement is dated 6th July 2005, and it states that the agreed purchase price was KShs. 54,000,000/=.

There is no dispute about the fact that the plaintiff did pay to the 1st defendant a 10% deposit, which in real terms is KShs. 5.4 million.

As far as the plaintiff is concerned, there had been an agreement between her and the 1st defendant to the effect that after paying the 10% deposit, the plaintiff did not need to pay any rents pending the completion of the sale transaction. The said agreement, in that respect, is said to have been arrived at between the plaintiff and Mr. Ashok Mediratta, who was a director of the 1st defendant.

Regrettably, Mr. Ashok Mediratta has passed away, and therefore there is no way we could ever get to know his version of the story about the alleged agreement with the plaintiff. So, does that mean that the court should accept the version put forward by the Plaintiff? In my considered view, that is not necessarily the case, for one has to give careful consideration to all the other facts and circumstances presenting themselves.

One such fact is the letter dated 8th December 2004, which was written by the 1st defendant to the plaintiff. The letter was signed by Mr. Ashok Mediratta, and the subject matter thereof was the sale of "**Muthaiga House."**

As far as the plaintiff was concerned that letter embodied the intention of the plaintiff and the 1st defendant, on the question of rent. And, the plaintiff contends that the letter clearly manifests the intention that the plaintiff should not pay any rent after executing the Agreement for Sale.

In order to have a full appreciation of the said letter, I find it necessary to set it out herein in full. It reads as follows;

"**RE: SALE OF MUTHAIGA HOUSE**

Further to our discussions we hereby confirm that should there be any monies due to you against the advance rent together with any deposits being held by us, the same will be refunded to you after reconciling the account.

We hope this will satisfy your requirement.

Thanking you.

Yours faithfully

IN TIME LTD

(signed)

ASHOK MEDIRATTA

DIRECTOR"

In my reading of that letter, I find no assurance or confirmation emanating from the 1st defendant, to the effect that the plaintiff was not to pay any rent after paying the deposit for the purchase price. Indeed, the letter contains no reference to the purchase price. If anything, the letter contains a reference to "**advance rent."**

In the light of that reference, to "**advance rent"**, it would appear that some form of rent was actually contemplated as between the plaintiff and the 1st defendant.

The said reference is also wholly consistent with clause 8 of the Agreement for Sale, which made it clear that the sale would be subject to the Law Society Conditions of Sale (1989) Edition, in so far as they were not inconsistent with the conditions contained in that Agreement.

It is important to note that the two documents which needed to be given consideration, so as to ascertain whether or not there was inconsistency between them, were the Agreement for Sale dated 6th July 2005, and the Law Society Conditions of Sale (1989) Edition.

In my understanding, as the Agreement for Sale was drawn up and executed almost seven (7) months after the letter dated 8th December 2004, the said Agreement for Sale must be deemed to have incorporated all the conditions which the parties intended to govern the intended sale. Therefore, if there had been negotiations which reflected some intentions that may have been inconsistent with the contents of the final Agreement, it must be presumed that the parties decided to abandon such contents as would otherwise be inconsistent with the Agreement.

However, as I have already held, I find the contents of the letter dated 8th December 2004, wholly consistent with the Law Society Conditions of Sale.

Furthermore, the plaintiff has expressly stated that the lease between Frederick Ngatia, trading as Andrew Apartments, and the 1st defendant had lapsed or been terminated. That assertion is made at paragraph 12 of the Plaint. If that be the case, the plaintiff must be deemed to have removed the former tenant from the picture altogether, thus leaving only herself and the 1st defendant.

But even before the 6th of July 2005 when the plaintiff executed the Agreement for Sale, she states (at paragraph 15 of her replying affidavit) that she had continued paying rent to the 1st defendant. One cannot help but wonder in what capacity the plaintiff was continuing to pay rent, if she was not a tenant, regardless of the absence of "**a new tenancy agreement."**

In the Plaint, the reliefs sought are as follows;

"**(a) A declaration that the plaintiff does not owe any rent to the 1st Defendant.**

(b) A permanent injunction restraining the Defendants by themselves, their agents and/or servants from attaching, disposing, alienating or in any other way interfering with the Plaintiff's possession of the goods set out in the said proclamation notice.

(c) Specific performance of the agreement dated 6th July 2005 in respect of L.R. No. 214/468, Muthaiga, Nairobi between the plaintiff and the 1st Defendant.

(d) Damages for misrepresentation.

(e) Costs of this suit."

In order to become entitled to the interlocutory injunction sought, the plaintiff would have to first show a prima facie case with a probability of success, as was set down in **GIELLA V CASSMAN BROWN & CO. LTD [1973] EA 358.**

The applicant would also need to prove that if the injunction sought is not granted she would suffer irreparable loss or damage, which could not be compensated in damages.

Thirdly, if the court was in doubt, it would decide the application on a balance of convenience.

In this case, I have already made a finding to the effect that the plaintiff would appear to be a tenant, based on her actions of paying rent, and also on the contents of the letter dated 8th December 2004. Therefore, if she stopped paying rent, she fell into arrears, and that then gave to the defendants the right to levy distress.

The Plaintiff submitted that although time was of the essence in the completion of the sale transaction, the delay in completion was wholly attributable to the 1st defendant's failure to get proof that IDB would discharge its charge over the suit premises.

Apparently IDB had registered a charge over the title to the suit premises. The plaintiff accuses the 1st defendant of misleading her to believe that the suit premises was being sold free of any encumbrance. However, the plaintiff says that she later discovered that the title was encumbered, and that therefore, the 1st defendant would not be in a position to convey, to the plaintiff, the suit premises. Such conveyance was said to be subject to the discharge of the charge registered in favour of IDB; yet the 1st defendant was being accused of not having as much as sought assurance from IDB that they would discharge the charge, so that the suit premises could be sold and transferred to the plaintiff.

To my mind, if the failure by the 1st defendant to get the assurance from IDB (regarding the discharge of charge) is a real impediment to the sale transaction, as asserted by the plaintiff, that would imply that there could not be an order for specific performance, as the 1st defendant would be incapable of passing title over to the plaintiff.

Meanwhile, as regards the issue of misrepresentation, the plaintiff has submitted that she was under no obligation to conduct a search against the title to the suit premises. As far as she is concerned, the obligation was on the 1st defendant to disclose to her about the charge in favour of IDB. And, because the 1st defendant had not made the disclosure about the said charge, it is submitted that the 1st defendant was guilty of misrepresentation.

In that regard, the plaintiff placed reliance on the decision in **MANKS V. WHITLEY (1910) 1 CH. D 735 at page 757**, whereat FLETCHER MOULTON L.J. held as follows;

"**But upon the decisions, it is clear that as a purchaser she was under no obligation to search the register under penalty of being affected with notice of all that such a search would have disclosed."**

Even if that be the position taken by the court in that case, I respectfully find myself unable to accept it as a correct statement of law. I have always understood it to be the responsibility of any person who intended to purchase any real property to carry out a search against the title of such property. The exercise of conducting a search against the title is intended, first and foremost, to verify the ownership thereof. Secondly, the search would also disclose any encumbrances which may have been registered against the title. That responsibility vests in the buyer.

By virtue of Section 55 (1) (a) of the Transfer of Property Act;

"**The seller is bound –**

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover."

The existence of a charge over the title to the suit premises is not a defect, leave alone a material one. And in any event, if the buyer had exercised the ordinary care of carrying out a search against the title, she would have established the existence of the said charge. Therefore, it would appear that there was no obligation on the part of the 1st defendant to disclose the existence of the charge by IDB.

And as regards the issue of rent, Section 55 (4) (a) of the Transfer of Property Act stipulates that;

"**The seller is entitled –**

(a) to the rents and profits of the property till the ownership thereof passes to the buyer."

Prima facie, therefore, the plaintiff appears to be under an obligation to pay rent, unless she is able to prove otherwise.

In the case of **IBRAHIM NOOR MOHAMED & ANOTHER V. ESMAIL ABDULALI TAJIBHAI & 4 OTHERS, MSA HCCC No. 724 of 1995,** the Hon RINGERA J. (as he then was) held that an injunction to restrain distress for rent was the inappropriate remedy where the tenant was contending either that no rent was due at all or if it was due, the amount was disputed.

In this case, the plaintiff is in possession. And whereas she may consider herself as anything but a tenant, the law stipulates that the 1st defendant, who is the seller, is entitled to rent until the property passes to the buyer. As the buyer has only paid 10% of the purchase price, the title cannot have passed to her. Therefore, it would appear that the rent, to which the seller is entitled, should be paid by the person in possession, even if she does not consider herself as a tenant.

It is the plaintiff's case that she had spent the sum of KShs. 28,000,000/= in improving the suit premises, after she had entered into the Agreement for Sale. Therefore, it is the plaintiff's contention that it would be unjust and inequitable to allow the defendants to auction her property in settlement of rent arrears amounting to KShs. 2,061,000/=, which was not due from her. Indeed, the plaintiff believes that the proclamation was greatly detrimental to her business, which is her only source of livelihood.

If the defendants were allowed to carry on with the process of levying distress to its logical conclusion, the plaintiff says that that would cause her to suffer a lot of humiliation and embarrassment.

The foregoing submissions were intended to prove that if the injunction sought was not granted, the plaintiff would suffer irreparable loss.

I accept that the process of having ones goods distrained does cause humiliation and embarrassment. It also is detrimental to the business which was affected by the said process. However, I do, at this interlocutory stage, share the views expressed by Mr. Satish Gautama, advocate for the defendants. Even though I am not making a substantive finding on the issue, but I believe that it is highly improbable that the plaintiff, who had only paid Kshs. 5,400,000/= towards the purchase price of KShs. 54,000,000/= should have proceeded to incur an expense of KShs. 28,000,000/= to improve the property which was still not hers. At the same time, the plaintiff was sourcing for funds for the purchase of the suit premises, as demonstrated by her, through the letter from Cezam and Associates Ltd, dated 13th April 2006. To my mind, it does not seem to add up.

Meanwhile, from the letter dated 10th April 2006, the plaintiff's advocates appear to be well aware that the sum "**acceptable to the**

Industrial Development Bank Limited for purposes of discharging their mortgage on the property (is) namely KShs. 42,000/000/=, all of which amount will be paid to Industrial Development Bank Limited."

The proviso to Section 55 (5) (b) of the Transfer of Property Act recognises the fact that if

"**the property is sold free from encumbrances, the buyer may retain out of the purchase money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto."**

From the foregoing legal provisions, it is clear that the plaintiff's intention of paying KShs. 42,000,000/= directly to IDB, for purposes of discharging their mortgage is in accordance with the law.

In other words, the law recognises the fact that even though there should exist an encumbrance against the title of a property, it can nonetheless be sold free of any encumbrance. Therefore, I think that it could not be correct to argue that the existence of the charge made it impossible for the 1st defendant to complete the sale transaction.

As the plaintiff herself recognises, if the sums due to the chargee, IDB, were paid off, the charge would be discharged. I think that there is no requirement for the chargee to give any prior confirmation that they would discharge the charge. There would actually be an obligation on the part of the chargee to discharge the charge upon receipt of the money due to it.

In the case of **MINAR RESTAURANT V PLAZA TRUST LIMITED & 2 OTHERS, MILIMANI HCCC No. 679 of 2001,** the Hon. RINGERA J. (as he then was), held as follows regarding the loss attributable to the irregular distraint for rents;

"…… **I think this is a matter of clear legal principle, the Distress for Rent Act, Cap. 293, pursuant to which the distress complained of is levied is quite clear that the tenants remedy is in damages. Section 8 of the said statute reads:**

"**If any distress and sale are made under this Act for rent pretended to be in arrears and due, when in truth no rent is in arrears or due to the person destraining …. then the owner of the goods or the chattels distrained …… shall be entitled to recover double the value of the goods and chattels so distrained and sold together with full costs of the suit from the person so distraining …… and the double value and costs of the suit may be recovered as a civil debt recoverable summarily."**

Thus not only is the tenant's remedy expressed by the statute itself to be in damages, but the measure of the damages thereof is prescribed."

Although, the learned judge made reference to tenants, it is noteworthy that the statutory provision talks of "**the owner of the goods or chattels distrained".** Therefore whether or not the plaintiff is ultimately found to be a tenant in this case, her remedy would be in damages, equivalent to double the value of the goods and chattels distrained and sold. In effect, her compensation would have been already quantified by statute.

In the final analysis, I find that the plaintiff has failed to establish a prima facie case with a probability of success. I also find that the loss or damage which the plaintiff may suffer due to the distress for rent is quantifiable in accordance with statute, and that it is thus capable of being compensated by an award of damages. Strictly therefore, I need not consider the issue as to the balance of convenience, as there is no doubt on the first two principles which govern the applications for interim injunctions.

However, even if there was need to consider the balance of convenience, I would hold that it is in favour of the defendants. I say so because the plaintiff has paid only KShs. 5.4 million, out of the purchase price of KShs. 54 million. She is in possession of the suit premises, and is deriving benefit therefrom. Meanwhile, the 1st defendant has not received payment of the purchase price, yet it is faced with a growing debt, which is owed to IDB. If the issue of the sale transaction is held in limbo, whilst the plaintiff pays neither rent nor the purchase price, I reckon that the 1st defendant's indebtedness to IDB would continue to grow, to the detriment of the said 1st defendant. The whole purchase price might become payable to IDB, so as to pay off the debt secured by the charge; and if that were to happen, the 1st defendant would have lost all the money which it may otherwise receive if the sale transaction were

completed forthwith; and if the plaintiff were to pay rents in the interim period.

For all those reasons, I find no merit in the application dated 20th April 2006. It is therefore dismissed, with costs to the defendants.

Dated and Delivered at Nairobi, this 11th day of October 2006.

FRED A. OCHIENG

JUDGE