



REPUBLIC OF KENYA



**Maina v Wangu & 3 others (Environment & Land Case 34 of 2020)
[2022] KEELC 15401 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 34 OF 2020
CA OCHIENG, J
DECEMBER 19, 2022**

BETWEEN

VERONICA KAGORE MAINA PLAINTIFF

AND

LYDIA NYAWIRA WANGU 1ST DEFENDANT

MOSES NII NORTEI 2ND DEFENDANT

**THE REGISTRAR OF LANDS, MACHAKOS LANDS REGISTRY 3RD
DEFENDANT**

THE OFFICE OF THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the April 28, 2020 where she seeks for orders of injunction restraining the 1st and 2nd Defendants from dealing with or disposing of LR No. 12715/9357 hereinafter referred to as the 'suit land', pending hearing and determination of the Application including suit. Further, that an order be issued to the Officer Commanding Police Station at Mlolongo for eviction of the 1st Defendant or any person in occupation of the suit land.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Veronica Kagore Maina where she deposes that she acquired the suit land from Rugsan Land Development Limited *vide* a Sale Agreement dated the October 16, 2015 and paid Kshs. 2,100,000 as consideration. She confirms that the suit land was transferred in her name on October 10, 2016 and she obtained a Title Deed to that effect. She contends that she took possession of the suit land and constructed a residential house therein. She explains that she travelled to Uganda for business for eight (8) months. Further, she realized there was occupation on the suit land and upon undertaking a search, she discovered that she purportedly transferred the said land to the 1st Defendant. She denies knowledge



of the 1st Defendant and insists she acquired the suit land unprocedurally and through a fraudulent scheme. She avers that the 1st and 2nd Defendants are currently cohabiting together on the suit land. She explains that she reported the matter to Mlolongo Police Station *vide* OB No. 38/15/4/2020 and is currently in the process of instituting criminal proceedings. She has sought for cancellation of the 1st Defendant's title.

3. The 1st Defendant in opposition to the instant Application filed two replying affidavits. In the affidavit sworn by Lydiah Nyawira Wangu, she explains how she met the 2nd Defendant and visited the suit land where she found a stalled project slightly above the foundation. She deposes that she purchased the suit land for Kshs. 2.5 million. She explains that her uncle brought her the Sale Agreement. Further, that on March 21, 2018, she paid the 2nd Defendant the purchase price of Kshs. 300,000, Kshs. 500,000 and Kshs.700,000 respectively. She further paid him Kshs. 85,000 on March 21, 2018. She avers that on March 27, 2018, she issued the 2nd Defendant, with two Banker's Cheques of Kshs. 500,000 each, in payment of the purchase price. She explains that Transfer Documents were sent to the Plaintiff *vide* her email on April 5, 2018 and after several follow ups, the 2nd Defendant furnished them with the transfer documents and she got her title to the suit land. She reiterates that after she purchased the suit land, she continued with the stalled project by finishing the construction of the house. She insists that she is the one who purchased all the materials and paid all the workers.
4. In the Affidavit of Augustino Mutambo, he confirms that he introduced the 2nd Defendant to the vendor. Further, that it is the 2nd Defendant who paid the full purchase price of Kshs. 2,100,000 for the suit land. He explains that the 2nd Defendant later engaged his services to construct a house on the suit land but he later sold the said land to the 1st Defendant who retained them to finish the construction. He avers that the Plaintiff used to visit the suit land but they never saw her again after the said land was sold to the 1st Defendant.
5. The 2nd Defendant opposed the application and filed a replying affidavit where he explains his relationship with the Plaintiff and contends that they got married in 2014 through the Office of the Attorney General to enable them travel to Canada together. He confirms that he purchased the suit land and agreed he would pay the consideration of Kshs. 2,100,000 by way of instalment. Further, since he was a foreigner, they agreed to register the title in the Plaintiff's name. He avers that some of the monies were paid through the Verroko Account held at Equity Bank. He explains that he commenced construction on the suit land and contracted Mr. Agostino Ochuna to head the construction but due to the 2017 campaigns, he hit a financial snag. Further, that the Plaintiff agreed they sell the suit land on condition that she receives about Kshs. 300,000 of the purchase price, which she did and moved out of the matrimonial home. He confirms that he sold the suit land to the 1st Defendant and on 15th, 20th and March 21, 2018, she paid him Kshs. 300,000, Kshs. 500,000, and Kshs. 700,000 respectively. Further, on March 21, 2018 she further paid him Kshs. 85,000. He avers that the 1st Defendant further paid Kshs. 1,000,000 through two Banker's Cheques of Kshs. 800,000 and Kshs. 200,000 respectively. He states that the Plaintiff was sent for Transfer Documents via her email address which she signed and returned. He explains that the 1st Defendant continued constructing the house on suit land and they agreed he would manage the said construction on her behalf. He reiterates that the Plaintiff further signed an Agreement withdrawing her complaint with the DCI.
6. The Plaintiff filed a Further Affidavit reiterating her averments and insisting that she undertook financing of the whole construction project. She avers that the 2nd Defendant's Replying Affidavit should be expunged from record as it was filed by the firm of Messrs Odhiambo & Talam Advocates who had not filed a Notice of Appointment of Advocates as regards the 2nd Respondent.

The Application was canvassed by way of written submissions.



Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivaling submissions, at this juncture, the only issue for determination is whether the Plaintiff is entitled to orders of injunction pending the outcome of this suit.
8. The Plaintiff in her submissions reiterated her averments in the respective Affidavits and insists she has established a prima facie case to warrant the orders of injunction as sought. To support her arguments, she has relied on the following decisions: *Giella vs Cassman Brown*; *Mrao Limited vs First American Bank Limited & 2 Others* (2003) KLR; *Samuel Odhiambo Oludhe & 2 Others vs Jubilee Jumbo Hardware Limited & Another* (2018) eKLR; *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others* (2015) eKLR; Civil Appeal No. 246 of 2013, *Arthi Highway Developers Limited vs West End Butchery Limited & others* and *Kenya Building Construction, Timber & Furniture Industries Union Vs M/S Newline Furniture Limited* (2017) eKLR.
9. The 1st and 2nd Defendants' in their submissions insist the Plaintiff has not met the threshold set for granting an injunction. They contend that the Plaintiff has not denied signing the Sale Agreement dated the February 12, 2018. Further, she has not denied benefiting from the proceeds of sale of suit land. They reiterate that the Plaintiff has not controverted the fact that she was sent the documents *vide* her personal email which she signed and sent back to the 2nd Defendant. They challenge the loan of Kshs. 500,000 which the Plaintiff took from U & I Microfinance Bank and aver that the same was released on July 26, 2019 when the suit land had already been sold. They insist the Plaintiff has not proved the alleged fraud since she withdrew the complaint from DCI. To buttress their averments, they relied on the following decisions: *American Cynamid Co. vs Ethicon Limited* (1975) A AER 504 as cited in the case of *Peter Kairu Gitu vs KCB Kenya Limited & Another* (2021) eKLR; *Mrao Ltd Vs First American Bank of Kenya & 2 others* (2003) KLR 125; *Moses C Mubia Njoroge & 2 Others vs Jane W Lesaloi & 5 others* (2014) eKLR; *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR; *Paul Gitonga Wanjau vs Gatuthis Tea Factory Company Ltd & 2 others* (2016) eKLR; *Pius Kipchirchir Kogo Vs Frank Kimeli Tena* (2018) eKLR; *Vijay Morjaria V Nansingh Madhusingh Darbar & Another* (2000) eKLR; *Protus Wanjala Mutike Vs Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR; *Ndolo vs Ndolo* (2008) 1KLR and *Eastern Produce (K) Ltd vs John Lumumba Mukosero* (2008) eKLR.
10. Before I deal with the issue of whether the Plaintiff is entitled to orders of temporary injunction pending outcome of this suit, I wish to first determine whether there was a Notice of Appointment of Advocates on record for 2nd Defendant and note that the same was filed by Messrs Odhiambo, Talam & Company Advocates on March 18, 2022 after which the 2nd Defendant filed his replying affidavit on June 6, 2022.
11. As to whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit. The principles for granting of interlocutory injunctions are well established in the case of *Giella v Cassman Brown & Co Ltd* (1973) E.A. 356. Further, in the case of *Mrao Ltd v First American Bank Ltd & 2 Others*, (2003) KLR 125 the Court provided a definition of a prima facie case.
12. As to whether the Plaintiff has established a prima facie case to warrant the orders sought. It is not in dispute that the Plaintiff was initially registered as proprietor of the suit land. It is further not in dispute that the 2nd Defendant received the full purchase price from the 1st Defendant in respect to sale of the suit land. It is also not in dispute that the Plaintiff and the 2nd Defendant were previously husband and wife. What is in dispute is the Plaintiff's denial that she sold the suit land to the 1st Defendant. She contends that the 1st Defendant acquired the suit land fraudulently. The Plaintiff further claims



that she obtained a loan to construct a house on the suit land which fact is disputed by the 1st and 2nd Defendants.

13. Looking at the respective documents presented by the parties herein, I note the Plaintiff actually signed the Sale Agreement with the 1st Defendant. The Plaintiff did not controvert the averments that the documents were sent to her via her email address when she was in Uganda and she returned them to the 2nd Defendant, duly signed. The 2nd Defendant confirmed they jointly agreed with the Plaintiff to sell the suit land to the 1st Defendant. Further, that he was paid the full purchase price out of which he shared the proceeds therefrom with the Plaintiff and some was even used to purchase a car for her. The Plaintiff claims she took a loan to construct on the suit land but from the Letter of Offer from U & I Microfinance Bank in respect to the loan of Kshs. 500,000, I note it is dated the 26th July, 2019 when the suit land had already been sold to the 1st Defendant. Further, from the annexed Bank Statement from Equity Bank, it is not clear what the Plaintiff was withdrawing the monies for. I note in the Affidavit of Augustino Mutambo, he actually confirms having constructed a house on the suit land on behalf of the 1st Defendant as opposed to the Plaintiff who did not furnish court with any documents to prove how she undertook the construction nor who did the same for her. Further, the 1st Defendant produced many documents as annexures to demonstrate how she paid for materials used to construct on the suit land. I note as per the Plaintiff's letter dated the October 22, 2020, she actually withdrew her complaint lodged with DCI against the 1st and 2nd Defendants in respect to the suit land. Further, from the Memorandum of Settlement dated the October 22, 2020 between the Plaintiff and 2nd Defendant in respect to the suit land, she admitted at Clause (C), that they jointly sold the said land to the 1st Defendant who obtained a clean title with no defects. From my analysis above, it seems to me the Plaintiff indeed participated in the Sale of the suit land but she seeks to renege on the same. Based on the facts as presented including the annexures herein, while relying on the two decisions I have cited, I find that the Plaintiff has not established a prima face case to warrant the orders of injunction as sought.
14. In further associating myself with the decision *Nguruman Ltd. Vs. Jan Bonde Nielsen* CA No. 77 of 2012, where the Court of Appeal held that in instances when a party has failed to establish a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction and I will hence decline to do so.
15. It is against the foregoing that I find the Notice of Motion Application dated the April 28, 2020 unmerited and will proceed to dismiss it. I will further proceed to vacate the orders of temporary injunction issued on May 4, 2022.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF DECEMBER, 2022.

**CHRISTINE OCHIENG
JUDGE**

