



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 396 OF 2004

SOLOMON KIRAGU THANDEPLAINTIFF

VERSUS

SIMON NGATUNYI CHABI DEFENDANT

RULING

The plaintiff has moved this court by way of a chamber summons brought under Order 39 Rule 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiff seeks the following prayer:

“The defendant/Respondent by himself, his agent and or servant be restrained by an order of injunction from undertaking any development whatsoever on L.R. No. 2327/238 Karen, pending hearing and determination of this application”.

This prayer has an error, which was highlighted by the defendant’s counsel and the court tried to indicate to the Plaintiff’s counsel the error but the Plaintiff’s counsel simply failed to get the clue. The prayer seeks an injunction pending the hearing of the application; in other words pending the determination of that prayer. The prayer should have sought an injunction pending the final determination of the suit. On that ground alone the application would fail but I wish to go through the arguments raised by counsel.

On behalf of the Plaintiff it was submitted that on 31.1.2002 entered into a lease agreement over the suit property, known as “Workman Pub” for a period of 5 years and 3 months. Clause ‘C’ of the said lease agreement provided that the defendant would not undertake any development on the suit property with the consent of the Plaintiff landlord.

On 15th July 2003 whilst the lease was still subsisting the plaintiff offered to sell to the defendant the suit property at kshs 2 million. The defendant paid kshs 750,000 towards the purchase price but has failed to pay the balance thereof.

The suit property was charged to the co-operative bank but the plaintiff was under the mistaken belief that the property was discharged by a ruling in *HCCC No. 1281 of 2001* between the Plaintiff and the co-operative bank, hence on that mistaken belief he contracted to sell the property to the defendant.

The Plaintiff had sought to rescind the contract and had additionally offered to refund the amount paid by the defendant.

It was argued that the defendant, in the mean while has undertaken development on the suit property without the plaintiff’s consent.

On behalf of the defendant it was argued that the plaintiffs prayer seeks to determine the suit here and now for the reason the plaintiff only seeks a permanent injunction and if the plaintiff was granted an injunction there is no other prayer that will remain to be determined in the plaintiff.

The Plaintiff, it was argued, had come to court with unclean hands, for he offered to sell that which he had no capacity to sell. The Plaintiff, the defence counsel said, had failed, despite receiving a substantial deposit, to provide the title documents necessary to effect transfer.

Defence counsel concluded by saying that the plaintiff had failed to show a prima facie case with probability of success and the balance of convenience tilted in favour of not granting an injunction.

I have considered the submission made before and I am of the view that the application before me is not deserving.

The Plaintiff in the plaintiff did not plead that he is the registered owner of the suit property. It is only in the affidavit in support of the present application that he states that he is the registered owner; however by an exhibit annexed to his affidavit marked as "SKTI" is a letter dated 2nd August 2001 written by the Ministry of Lands and Settlement which states as follows: -

"RE L.R. No 2327/28 AND 240 I am unable to provide official search on the two above plots because according to our records the same are not registered".

It would seem from the above that the suit property is not registered in the name of the plaintiff and accordingly the plaintiff has no proprietary right to enforce by way of an injunction. In this regard I am persuaded by the case **HCCC No. 1838 of 2001 NAIROBI MAMBA VILLAGE – V – NATIONAL BANK OF KENYA** where the court ruled that a party without propriety right could not complain about the irregularity of sale of a charged property of sale of a charged property. Ringera – J (as he then was) said in party: -

"In my judgment the only person who can legitimately complain that a power of sale is being exercised unlawfully, irregularly or oppressively is the chargor".

In view of my finding hereof I am of the view that the application fails and accordingly the order of this court is that the Plaintiff's application dated 17th July 2004 is dismissed with costs to the defendant.

Dated and delivered this 30th September 2004.

MARY KASANGO

AG JUDGE