



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 6 OF 2019

NIRMAR KAUR SIAN.....1 ST PLAINTIFF

LAKHBIR KAUR BANSAL.....2 ND PLAINTIFF

VERSUS

PRITHVI PAL SINGH SIAN.....1 ST DEFENDANT

LAND REGISTRAR NAIROBI.....2 ND DEFENDANT

ATTORNEY GENERAL.....3 RD DEFENDANT

RULING

Background

1. The 1st and 2nd plaintiffs are mother and daughter, respectively. The 1st defendant is a biological son to the 1st plaintiff. The plaintiffs brought this suit on 18/1/2019 through a plaint dated 14/12/2018, contending that the 1st plaintiff was the rightful sole owner of Land Reference Number 209/3682 situated in South B, Nairobi, and that her son, the 1st defendant, had illegally and fraudulently, caused the suit property to be transferred into his name. They itemized the following particulars of fraud on part of the 1st defendant: (i) forging the 1st plaintiff's signature and transfer documents; (ii) falsifying and presenting fake transfer documents; (iii) obtaining title by false pretence; (iv) colluding with officers of the 2nd respondent to commit the fraud (sic); and (vi) illegally and falsely acquiring the title. She sought the following verbatim orders:

- a) That a permanent injunction do issue restraining the defendants, by themselves, their agents, employees, assigns, servants, representatives or whomsoever acting under their authority from alienating, selling, leasing, encroaching, and or trespassing, interfering, wasting or further dealing in whatsoever manner with the plaintiffs/applicants property Land Reference Number 209/3682.*
- b) A declaration that the 1st plaintiff is the legal owner of the suit property*
- c) An order do issue directing that the title deed illegally and irregularly issued to the 1st defendant on the suit property Land Reference Number 209/3682 be revoked.*
- d) An order compelling the 2nd defendant, Land Registrar, Nairobi Registry, to regularize the register and issue the 1st plaintiff with a title deed for Land Reference Number 209/3682 in her name.*
- e) General damages for interfering with the plaintiffs' proprietary rights over Land Reference Number 209/3682.*
- f) Costs of the suit.*

2. Together with the plaint, the plaintiffs brought a notice of motion dated 14/12/2018 seeking an interim injunctive order restraining the defendants against alienating, selling, leasing, encroaching on, interfering with, wasting or dealing with the suit property. They also sought an interim order registering a restriction on the title. The said notice of motion is one of the two applications under consideration in this ruling.

3. In response, the 1st defendant filed a defence and counterclaim dated 22/2/2019. He contended that his mother (the 1st plaintiff) sold to him the suit property at a purchase price of Kshs 5,500,000 in 2002. He added that the said purchase price was paid by way of direct loan and interest repayment made by him to the Standard Chartered Bank to redeem the title and additional direct payments made to the 1st plaintiff. He contended that the 1st plaintiff duly executed the sale agreement and the instrument of transfer in the presence of Mugambi

Gathungu Advocate. He added that the 1st plaintiff's allegation that she neither sold to him nor consented to the transfer of the suit property to him was highly untruthful and deceptive. He denied the allegation of fraud. He prayed for the following verbatim orders in the counterclaim:

- a) **A mandatory injunction be issued compelling the 1st plaintiff to vacate from Land Reference Number 209/3682.**
- b) **A permanent injunction to restrain the plaintiffs and their agents from trespassing, interfering, claiming or dealing in any way with the 1st defendant's property Land Reference Number 209/3682.**
- c) **General damages**
- d) **Mesne profits**
- e) **Cost of the suit**
- f) **Any other relief this court may deem fit to grant.**

4. In addition to the defence and counterclaim, the 1st defendant filed a notice of motion dated 22/2/2019 through which he sought an order discharging the interim order which this court granted on 6/2/2019 pending the *interpartes* hearing and determination of the plaintiffs' application. He also sought an order restraining the plaintiffs against collecting rent or other income derived from the suit property. Further, he sought a mandatory injunctive order compelling the 1st plaintiff to vacate the suit property. The application was supported by the 1st defendant's affidavit which was sworn on 22/2/2019 to support the 1st defendant's application and to also oppose the plaintiffs' application. The said notice of motion dated 22/2/2019 is the second application under consideration in this ruling.

Submissions

5. The two applications were canvassed by way of written submissions. The plaintiffs filed their submissions dated 10/6/2019 on 11/6/2019. It was the plaintiffs' submission that the 2nd plaintiff had the *locus standi* to institute this suit against the 1st defendant because she had a beneficial interest in the suit property. The plaintiffs further submitted that this suit was not time-barred. It was argued that Section 26 of the Limitation of Actions Act provides that where there is fraud, the period of limitation does not begin to run until the fraud is discovered. It was contended that in this suit, the cause of action arose in the year 2018 when the plaintiffs came to learn about the fraudulent transfer of the suit property to the 1st defendant hence the suit was filed within the limitation period. Reliance was placed on **Mintina Ene Keton Koponi (suing as a legal representative of the estate of Keton Ole Koponi Parsena v Francis Njakwe Gathiari & 2 others [2018] eKLR.**

6. The plaintiffs further submitted that a mandatory injunction is a final order which is issued in special circumstances and should not be granted in the present suit. Reliance was placed on **Cyka Holdings Limited v Nairobi City County Government & 2 others [2017]** where the court held that in the absence of special circumstances, a mandatory injunction ought not be granted.

7. The plaintiffs further submitted that they had established a *prima facie* case against the defendants because the 1st plaintiff had always lived in the suit property which is her matrimonial home and if evicted, no amount of damages would be adequate to compensate her. It was further submitted that the balance of convenience tilted in favour of the plaintiffs because the 1st defendant obtained title to the suit property fraudulently and if not stopped by a court order, he would dispose the suit property. It was added that this court should grant an injunction because it was the best way to preserve the subject matter of the dispute pending the hearing and determination of the suit. Reliance was placed on **Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR.** Lastly, it was argued that the 1st defendant was not entitled to rent being paid to the 1st plaintiff because the little rent income caters for her needs.

8. The 1st defendant filed his submissions on 25/7/2019. He submitted that the 2nd plaintiff lacked *locus standi* to institute this suit. It was argued that the 2nd plaintiff had never been the registered owner of the suit premises and cannot claim any rights over the suit property. It was further submitted that the suit herein was time-barred because the cause of action arose 17 years ago. The 1st defendant argued that the 1st plaintiff was aware that he was the registered owner because at some point, she took to him documents of title in Canada. The 1st defendant argued that the damage caused by the plaintiffs cannot be remedied through monetary award. He added that the court was entitled to grant a mandatory injunction where the injury complained of is immediate and pressing and is likely to cause extreme hardship. Reliance was placed on **Malindi Civil Appeal No. 4 of 2015 Lucy Wangui Gachara v Minudi Okemba Lore [2015]eKLR.** The 1st defendant submitted that the fact that the plaintiffs continue to collect rent and were denying him entry to the premises is immediate and pressing.

Analysis and Determination

9. I have considered the two rival applications together with the rival affidavits and submissions. I have also considered the relevant legal frameworks and jurisprudential principles. The single issue to be determined in the plaintiffs' application dated 14/12/2018 is whether the two plaintiffs or either of them has satisfied the criteria for grant of a prohibitory injunctive order. Two issues fall for determination in the 1st defendant's application dated 22/2/2019. The first issue is whether the 1st defendant has satisfied the criteria for grant of a prohibitory injunctive order. The second issue is whether the 1st defendant has satisfied the criteria for grant of a mandatory injunctive order. The two questions relating to prohibitory injunctive orders in the rival applications will be discussed and answered simultaneously. The question relating to mandatory injunction will be answered last. Before I discuss the above issues, I will make a few interlocutory observations regarding the plea for interim injunctive orders by the 2nd plaintiff against the defendants.

10. For avoidance of doubt, it is to be understood that at this point of interlocutory proceedings, the court does not pronounce definitive findings on any issue. The focus of the court is on whether the party seeking an injunction has satisfied the mandatory criteria.

11. The 2nd plaintiff is a daughter to the 1st plaintiff and a sibling of the 1st defendant. At this stage, there are no evidential materials before court disclosing any interest of the 2nd plaintiff in the suit property. The suit property was previously owned by Arta Singh Sian and Nirmal Kaur Sian as tenants in common in equal shares. Upon the death of Arta Singh Sian, his share was transferred by assent to his widow, Nirmal Kaur Sian on 29/9/1998. The impugned transfer to the 1st defendant was subsequently effected on 28/8/2002. At this point no legal or equitable basis has been demonstrated by the 2nd plaintiff to warrant grant of an injunctive order in favour of the 2nd plaintiff against the defendants. The 2nd plaintiff's plea for an injunctive order is therefore declined on the ground that there is no *prima facie* case disclosed in the 2nd plaintiff's application against the defendants. I will now go to the question relating to prohibitory orders in the parallel applications in relation to the 1st plaintiff and the 1st defendant.

12. The 1st plaintiff contends that she is the legitimate owner of the suit property and that her son, the 1st defendant, fraudulently caused the suit property to be transferred into his name without her knowledge. Her case is that she learnt about the fraudulent transfer in 2018 when the 1st defendant called her and told her to start paying him rent for the suit property which is her home where she has lived all along. Shocked by the demand, she carried out a search and discovered that the 1st defendant had caused the suit property to be transferred into his name in 2002. In her affidavit sworn after the 1st defendant brought a parallel application and exhibited a sale agreement and transfer, she denied ever selling or transferring the suit property to the 1st defendant. She deposed thus:

“ 13. That I remember sometimes in the year 2002, when the 1st defendant came back from Canada, the 1st defendant brought some documents in the house and asked me to sign the documents which he told me were from the Standard Chartered Bank and were meant to discharge the property, I innocently believed him and signed the documents not knowing they were transfer documents.

14. That I did not voluntarily, willingly and knowingly sign and sale agreement or transfer document to the effect of selling and transferring my matrimonial house to the 1st defendant for whatever amount at all and I did not appear before any advocate to sign any sale agreement to that effect”.

13. The 1st plaintiff adds that had she known what she was signing were sale agreement and transfer, she would not have signed them. She contends that the 1st defendant took advantage of her illiteracy and fraudulently transferred the suit property into his name without her knowledge or consent and without the knowledge of his siblings.

14. On his part, the 1st defendant contends that the suit property was used as a collateral to secure a bank facility extended to their family company, Lovely Enterprises Limited. The company defaulted in the loan repayment and he came in to repay the loan. Consequently, the 1st plaintiff sold to her the suit property at Kshs 5,500,000. Part of the purchase price was the principal sum and interest paid to the Standard Chartered Bank while the rest of the purchase price was paid by the defendant directly to the 1st plaintiff. He has exhibited the sale agreement and the transfer which he contends were executed by the 1st plaintiff.

15. At this point, it is not possible to tell whether the impugned sale agreement and transfer were procured in accordance with the requirements of the law and were knowingly executed by the 1st plaintiff as alleged by the 1st defendant. It is also not clear whether indeed the said documents were fraudulently procured as alleged by the plaintiff. The impugned sale agreement indicates that the discharge of charge, sale agreement, and the transfer were all drawn by M/s Mugambi & Kariuki Company Advocates. Clause 7 of the sale agreement indicates that the said law firm was the 1st defendant's advocates. It does not disclose who the 1st plaintiff's advocates were in the transaction. Significantly, both the 1st plaintiff's signature and the 1st defendant's signature on the sale agreement and on the transfer were witnessed by one Mugambi Gathungu Advocate. Lastly, there is no evidence of any payment or remittance of any consideration to the 1st plaintiff.

16. Given the above unclear circumstances, I cannot say that either of the parallel applications has satisfied the principle in **Giella v Cassman Brown (1973) EA 358**. I am however alive to the fact that the dispute before me relates to a house in South B, Nairobi. The 1st defendant is currently holding title to the suit property. The 1st plaintiff has all along lived in the suit property and contends that her son duped her and fraudulently procured the title into his name. She continued to enjoy quiet possession of the suit property even after the impugned transfer was registered in 2002. I will, in the circumstances, preserve the suit property, maintain the existing *status quo*, and focus on quick disposal of the main suit.

17. It is my further finding that, given the unclear circumstances of this case, a mandatory injunction cannot be granted at this stage.

18. The 1st defendant contended that the suit herein is statute-barred. I have reflected on that contention. The plaintiffs pleaded fraud. They contend that the 1st plaintiff discovered the fraud in 2018. This suit was filed on 18/1/2019. In the circumstances, I will not lock the 1st plaintiff out of the seat of justice unless controverting evidence is placed before the court.

Disposal Orders

19. In light of the above findings, the plaintiffs' notice of motion dated 14/12/2018 and the 1st defendant's notice of motion dated 22/2/2019 are disposed in the following terms:

a) The 2nd plaintiff's plea for injunctive orders against the defendants is dismissed for lack of merit.

b) Pending the hearing and determination of this suit, the suit property, Land Reference Number 209/3682 is hereby preserved in that no dealings shall be registered against the Title and the 1st defendant shall not part with the Title documents which he holds.

c) Pending the hearing and determination of this suit, the 1st plaintiff shall continue to have possession of the suit property.

d) Each party shall file and serve a single, bound, paginated and indexed bundle containing pleadings, written statements and documentary evidence within 30 days from today.

e) This matter will be mentioned on a date to be set at the time of rendering this ruling for the purpose of fixing an early hearing date.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Thuita for the 1st defendant

Mr Nirmar Kaur Sian - 1st plaintiff - present in Person

Lakhbir Kaur Bansal - 2nd plaintiff - present in Person

Court Clerk - Mr Waweru