



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 184 OF 2020

LUCY NYAGUTHI MUGO.....PLAINTIFF

VERSUS

ZUMZUM INVESTMENT LTD.....DEFENDANT

RULING

1. The application for determination is the notice of motion dated 9th October, 2020 in which the plaintiff/applicant is seeking the following orders:

1. Spent

2. Spent

3. **That pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the respondent either by itself, their agents, servants and/or persons acting under their instructions from evicting and/or disrupting quiet possession and enjoyment of the plaintiff/applicant's parcel of LAND SUBDIVISION NO.7996/II/MN.**

4. **That the County Commander in Charge of Kisauni Police Station be directed to ensure enforcement of the orders granted by this Honourable Court.**

5. **That the costs of this application be provided for.**

2. The application is supported by the affidavit of Lucy Nyaguthii Mugo the plaintiff sworn on 9th October, 2019. The applicant avers that she is the registered absolute proprietor of the parcel of land known as SUBDIVISION NO.7996/II/MN (hereinafter referred to as "the suit property") and that the respondent has issued a notice to evict the applicant and others not before court from the suit parcel and other parcels of land not subject of this suit. That there is imminent danger of the applicant being evicted from her property. That any wrong done to the applicant cannot be remedied by damages and that it is in the interest of justice and fairness that the injunctive orders are granted adding that no prejudice will be suffered if the orders sought are granted.

3. The applicant states that she entered into a sale agreement with the respondent over the suit property and eventually a transfer was effected in the applicant's name. A copy of the transfer has been exhibited. The applicant has also annexed a postal search of the property confirming that she is the registered proprietor of the suit property. The applicant avers that she has enjoyed quiet possession of the suit property since the year 2015 when she acquired the same and has developed it. Photographs have been annexed.

4. In opposing the application the respondent filed grounds of opposition dated 16th November 2020 and a replying affidavit sworn by Abdulkarim Saleh Muhsin the Chairman and Director of the Defendant Company on 23rd November, 2020. It is the respondents contention that application is bad in law and an abuse of the court process as it purports to circumvent the orders issued in High Court Civil suit No. 25 of 2015 (formerly Mombasa ELC of 318 of 2014) **Abdulkarim Saleh Muhsin –v- Nedi Mohamed Ibrahim & 3 Others** on 17th December 2014, and confirmed on 18th October, 2019. That the purported transfer of the suit property to the plaintiff was in total contravention of the doctrine of *lis pendens* and amounts to contempt of court orders and therefore the same does not vest in the plaintiff any right capable of protection by the court.

5. Mr. Abdulkarim Saleh Muhsin has sworn that he together with Nedim Mohamed Ibrahim and Sara Abdalla Abdusemed are directors and shareholders of the defendant company whereby the deponent holds 100,050 shares which translates to 66.7% while the other directors hold 49,950 shares which translates to 33.3%. A copy of the CR.12 form has been annexed. He has deposed that sometime in December, 2014, he

commenced a derivative suit and/or action on behalf of the defendant company in Mombasa ELC No. 318 of 2014 **Abdulkarim Saleh Muhsin –v- Nedim Mohamed Ibrahim & Others** in which the deponent sought orders to restrain the other directors and/or shareholders and Chief Land Registrar from transacting in respect of the suit property herein among others owned by the defendant. That on 17th December 2014, the court granted the deponent leave to institute a derivative suit on behalf of the defendant company and the court further issued interim orders restraining Nedim Mohamed Ibrahim from selling, leasing or disposing off all sub division plots under MOTHER TITLE NO.CR.17051, PLOT NO.CR.19849 (LAND REF.NO. SUBDIV. NO 5905/I/MN, PLOT NO. CR.9750(LAND REF.NO.SUBDIV.NO.1067/I/MN, PLOT NO. MOMBASA/BLOCK XXIII/205, PLOT NO. MN/I/6431 AND PLOT NO. MN/I/6432. A copy of the court order has also been annexed. That all the defendants in that case were served with the order of the court and that they also participated in the hearing leading to the issuance of the court orders. That the aforesaid suit was transferred to the High Court and allocated a new number namely Mombasa HCCC No. 25 of 2015 and the application was heard and thereafter a ruling delivered and the orders confirmed by Lady Justice Njoki Mwangi on 18th October, 2019. A copy of the ruling has also been annexed. That the deponent's co-directors and the Land Registry were well aware of the aforesaid court orders considering that they participated in the proceedings in HCCC NO. 25 of 2015 as 1st, 2nd and 4th defendants respectively. It is averred that the transfer in favour of the plaintiff herein was executed and registered after the issuance of the court order and therefore the purported sale and transfer were in contravention of valid court orders which were in force. That the transaction is therefore illegal, made in contempt of court and made in bad faith and therefore does not vest in the plaintiff any right capable of protection by this court. That it is clear that the purported transaction was in contravention of the doctrine of *lis pendens* in so far as the same purported to transact on or transfer a property that was live and actively before the court. That therefore the plaintiff's application does not meet the threshold for granting injunctive orders and ought to be dismissed with costs.

6. The application was canvassed by way of written submissions which were duly filed by the advocates for the plaintiff and for the defendants. I have considered the application and the rival submissions as well as the authorities cited. The principles upon which an application for injunction is granted are settled in the famous case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**. The applicant must establish a *prima facie* case with probability of success; that the applicant stands to suffer irreparable loss if the interim injunction sought is not granted; and that, if the court is in doubt, the court will decide the case on the balance of convenience.

7. In this case, the applicant's case is that she entered into an agreement of sale with the defendant for the sale of the suit property. That after due process, transfer was effected in favour of the applicant. The applicant submitted that the suit property was sold with no encumbrances registered against it, and the applicant is now the registered absolute proprietor of the suit property. The applicant stated that she has developed the property and has enjoyed quiet possession of the property since the year 2015. The respondent has now issued an eviction notice against the applicant. The respondent has invoked the doctrine of *lis pendens* and cited restraining orders issued against some of the respondent's directors.

8. In the case of **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003)eKLR** it was held that:

“...what is a prima facie case, I would say in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter.”

9. I have looked at the material before me. Whereas the applicant has exhibited a copy of transfer in her favour and a copy of postal search confirming that the applicant is the registered owner of the suit property, the respondent on its part has produced court orders in Mombasa HCCC No.25 of 2015 (formerly ELC NO.318 of 2014) that restrained the respondent's directors namely, Nedim Mohamed Ibrahim and Sara Abdalla Abdusemed from selling, leasing, transferring or disposing off the defendant company's properties, including the suit property. I note that the transfer relied on by the applicant was executed by the said Nedim Mohamed Ibrahim and Sara Abdalla Abdusemed on 13th October, 2015 when the court (Omollo J) had issued orders restraining the sale of the property in question on 17th December, 2014. There is no evidence that the said orders had been set aside vacated or reviewed. Therefore, the court orders were still in force as at 13th December, 2015 when the purported transfer was executed. No doubt the said transfer was in total contravention of the doctrine of *lis pendens*. In the replying affidavit, the deponent has stated that his co-directors and shareholders (who executed the transfer in favour of the plaintiff) participated in the proceedings in HCCC NO.25 of 2015 (formerly ELC NO.318 of 2014) and therefore were aware of the existence of the court orders prohibiting any sale and transfer of the suit property. The allegations made by the defendant were not controverted.

10. Given the above position, and in particular the fact that the plaintiff is holding title in respect of the suit property which was procured in contravention of court orders, I find that the plaintiff has not established a prima facie case with a probability of success. Further, the court finds that the harm to be suffered by the plaintiff, if any, can be compensated by an award of damages as the value of the suit property and the development thereon can be ascertained. On the whole, therefore, the court finds that the plaintiff has failed to satisfy the requirements for an injunction.

11. The upshot is that the notice of motion dated 9th October, 2020 is not merited and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE