



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND COURT CASE NO. 278 OF 2013

GHALIB KARA APPLICANT

- V E R S U S -

1. ALI ISHRAT HUSSAIN JAAFERI

2. NAHID ZAHRA JAAFRI

3. FATMA MUSTAQ GULAMHUSEIN.....DEFENDANT/RESPONDENT

RULING

[1] The applicants filed an application dated 27th November, 2013 praying for an injunction to restrain the 1st, 2nd and 3rd respondents from evicting the applicant from the suit premises pending the hearing and determination of this suit. The grounds supporting the application are well set out in that application. The application came up for hearing ex parte on 2nd December, 2013. I certified the application urgent and granted an injunction restraining the 1st, 2nd and 3rd respondents from evicting the applicant from the suit property pending the hearing and determination of this application.

[2] The respondents brought their own application dated 5th December 2013. They prayed among other things that pending the inter partes hearing the injunctive order granted on 27th March, 2013 be discharged forthwith and that this court dismisses the plaintiffs suit against the 3rd defendant with costs, and that the plaintiff do give vacant possession of the suit properties Mombasa Block XI/812-820 failing which eviction process be commenced forthwith. I granted prayers 1 and 2 of the said application and ordered it to be served on the plaintiffs.

[3] On 10th December, 2013 I ordered the plaintiff to deposit Kshs. 200,000 each and every month with effect from 31st December, 2013 and thereafter on every succeeding month and copies of the deposit slips to be sent to the 3rd defendant on the 5th of each month failing which, I gave the 3rd respondent liberty to evict the plaintiff from the suit premises. The application of 27th November, 2013 by the plaintiff and the application of 5th December, 2013 by the 3rd defendant were heard together on 5th March, 2014. The plaintiff and the 3rd defendant each filed very elaborate submissions.

[4] Mr. Aboubakar for the plaintiff/applicant argued that their application was merited. He said that the plaintiff had a prima facie case with a probability of success. The plaintiff based his case on a sale

agreement between the plaintiff and the 1st and 2nd defendants. That pursuant to that agreement his client had paid Kshs. 10 million as 10% deposit towards the purchase price. That the plaintiff was in possession and that there was 90 days completion period. He argued that the agreement had a well stipulated termination provisions on clause 4 (2) of the agreement. The plaintiff argued that he was entitled to be given 21 days notice for termination of the agreement, he argues that no such notice was given to him. The plaintiff argued that the agreement was still existing. The plaintiff argued that upon termination as per the agreement the entire Kshs. 10 million was to be refunded. That the refund of Kshs. 5 million by the 1st and 2nd defendants was unilateral. Further that the sale to the 3rd defendant was illegal and that it did not accord with the sale agreement. The plaintiff stated that he had stocks worth Kshs. 231 million 930 thousand in the suit premises. The plaintiff said that under Article 159 of the Constitution, the court should determine matters on their merits and that each party should be accorded an opportunity to ventilate their grievances in Court. The plaintiff stated that the balance of convenience favours him and no prejudice would be suffered by the 3rd respondent. The plaintiff argued that the 3rd defendants application is bad in law as it is made under Order 2 rule 15 and that under such order, there are no provisions for discharging injunctive orders. That the application should have been made under Order 40 rule 7. That the application is therefore incompetent.

[5] The 3rd defendant represented by Mr. Mogaka argued that it is not disputed that there is no privity of contract between the plaintiff and 3rd defendant. That the 3rd defendant was not a party to the agreement of sale between the plaintiff the 1st and 2nd defendant. He argued that there was no allegation that the 3rd defendant was fraudulent or had knowledge of the sale agreement between the plaintiff and the 1st and 2nd defendant. That there was no caveat or caution on the suit land. That the only thing known by the 3rd defendant was a tenant. That there was no allegation of fraud mistake or misrepresentation by the 3rd defendant. Learned Counsel took the court through many documents annexed to the written submissions showing that the plaintiff was aware of the sale to the 3rd defendant. Further that the plaintiff waived his rights when he compromised a case filed in this Court and later transferred it to the subordinate court. The 3rd respondent stated that he had paid Kshs. 125 million on the suit property and was a bona fide purchaser for value without notice.

[6] The plaintiffs in this case prays for a declaration that the sale agreement between the 1st and 2nd defendants was never rescinded and is still in force. That the sale between the 1st and 2nd defendant is null and void and that therefore the registration of the 3rd defendant as the owner of the suit property is illegal. Finally a permanent injunction restraining the 1st, 2nd and 3rd defendants from evicting the plaintiff from the suit premises and the 1st and 2nd defendants do complete the sale of the suit property to the plaintiff.

[7] In this case it is not denied that there was an agreement for sale of the suit properties between the plaintiff and the 1st and 2nd defendants. There is no dispute that Kshs. 10 million was paid as 10% of the purchase price. There is no dispute that the plaintiff is in possession pursuant to a lease between him and the first and 2nd defendants. Further that he is in possession to date. There is no dispute that Kshs. 5 million was refunded to the plaintiff by the 1st and 2nd defendant. There is a major dispute as to whether the agreement for sale for the suit lands as between the plaintiff and 1st and 2nd defendant was breached and if so by whom. There is also an issue as to whether the same is still in force. There is also an issue raised in the plaint as to whether or not the sale to the third defendant was illegal and whether he was a bona fide purchaser for value without notice and whether the registration of the 3rd defendant should be deregistered as proprietor.

[8] The application by the 3rd respondent asks the court to dismiss the suit against the 3rd defendant on the ground of a consent dated 24th April, 2013 in ELC case no. 6 of 2013 later CMCC. 364 of 2013 and that he has acquiesced and waived his rights after accepting a refund of Kshs. 5 million and that the doctrine of estoppel applied among other reasons. There is no prayer in this application for striking out the suit. The same is sneaked in the submissions. This court cannot dismiss this suit at a preliminary stage without hearing the parties. The issues raised of acquiescence, waiver and estoppel have to be canvassed by the party alleging at the hearing. Striking out a pleading is draconian and punitive. A court of law will resort to it only on clearest of circumstances and when it is shown that proceeding with the matter will only amount to wasting of the Court and parties time and where the facts and circumstances permit and

are self evident, I do not think that this is the case here. Massive evidence have been annexed to the 3rd defendants submissions here in a bid to show that the suit discloses no reasonable cause of action.

Order 2 rule 15 (2) states;

"No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made."

The law prevents the court from considering that annexed evidence at this stage on a case where the applicants seeks to ask for striking out of pleadings under Order 2 rule 15 (1) (a) as is the case here. The plaintiff is depositing Kshs. 200,000 each month in court to cater for the rent and other incidentals for the premises. If the 3rd defendant will be the eventual winner of the case, he shall collect his lumpsum from the court. The plaintiff has been in the premises from 15th August, 1998. He is still in the premises. He claims he has stocks in the premises in excess of Kshs. 231 million. This does not appear to have been disputed by the 3rd respondent.

[9] The issues raised by the parties in their respective pleadings cannot be effectively resolved without a full hearing. That is the time when all the allegations of fact shall be canvassed and tested through cross-examination. I find the plaintiffs application of 27th November 2013 on a balance of convenience merited and allow it as prayed. On the other hand I dismiss the application by the 3rd defendant dated 5th December, 2013 with costs to the plaintiff for the reasons I have stated.

It is so ordered.

Dated and delivered in open court at Mombasa this 4th day of September, 2014.

S. MUKUNYA

JUDGE

4.9.2014

In the presence of:

Aboubakar Advocate for the plaintiff/applicant

Mogaka Advocate for the 3rd defendant