



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 1179 OF 2014

EUNICE NDUTA WANYOIKE.....PLAINTIFF/APPLICANT

-VERSUS-

NYAKINYUA INVESTMENTS LIMITED.....1ST DEFENDANT/RESPONDENT

SIMON MUTHARA.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff (“the Applicant”) seeks, by a Notice of Motion dated 2nd September, 2014 a negative injunctive order to restrain the 2nd Defendant (“the Respondent”) from interfering with the Applicant’s quiet user of Plot No. 4303 Nairobi pending the hearing and determination of this suit. The application is supported by the affidavit of the Applicant duly sworn on 2nd September, 2014.
2. The 2nd Respondent filed his reply to the application on 15th September, 2014 detailing the facts as he understood the same.
3. The application was urged through the written submissions of the parties with the 2nd Respondents submissions being filed on 26th September, 2014. On 10th October, 2014, the Applicant filed her submissions together with an amended Plaint besides a Reply to Defence and Defence to counterclaim. The latter was in reaction to the 2nd Respondent statement of Defence Counterclaim filed on 26th September, 2014.
4. Briefly, the Applicant claims to be the owner of Plot No. 4303. She claim to have bought the said parcel of land on 7th March, 2011 from the original allottee of the Plot one Rebecca Ngubia Njoroge. The plot had been allotted to Rebecca Ngubia Njoroge by the 1st Defendant in 2009. That the Applicant then received a loan advance of Kshs. 3,300,00/= from the 2nd Respondent and as security the Applicant pledged the plot No. 4303 together with the documents of ownership to the 2nd Respondent. The Applicant alleges that the 2nd Respondent has however proceeded to transfer the property to himself. The transfer, the applicant alleges, was fraudulent and illegal as the original owner had passed on without transferring the property to the Applicant. Consequently, according to the Applicant, no transfer could take place.

5. The 2nd Respondent does not deny the background facts stated by the Applicant. The 2nd Respondent is however clear that the Applicant borrowed from the 2nd Respondent the amount of Kshs. 2,500,000/= and agreed unequivocally to transfer the subject plot to the 2nd Respondent, the 2nd Respondent states that the agreement to transfer was made on 25th February, 2014. He states that the plot vested in the 2nd Respondent once the Applicant defaulted. With the consent of the Applicant who was paid an additional Kshs. 800,000/=, the transfer of the plot to the 2nd Respondent was completed.

6. In their respective submissions, both parties drummed up their cases. The Applicant submitted that she had established a prima facie case whilst the 2nd Respondent submitted that the Applicant had not. The 2nd Respondent also stated that there was no fraud as the transaction was above board. The Applicant on the other hand contended that the transaction was fraudulent and further that by virtue of the demise of the original allottee Rebecca Ngubia Njoroge, the 2nd Respondent could not transfer the property to himself or nominee, yet the 2nd Respondent had done exactly that.

7. The 2nd Respondent's submission were to the effect that the 2nd Respondent advanced the Applicant an amount of Kshs. 3,300,000/= in aggregate which was not paid. Pursuant to an agreement between the parties made on 17th October 2013, the 2nd Respondent transferred the property to himself. The was following default on the part of the Applicant. The Respondent further submits that the Respondent paid an amount of Kshs. 200,000/= to one James Kariuki Njoroge in whose favour the property had been held in trust.

8. I have read the submissions as well as the pleadings herein very carefully. The facts are as laid above. The Applicant and the 2nd Respondent engaged in a financial arrangement. The Applicant was to be advanced an amount of Kshs. 2,500,000/= by the 2nd Respondent. As security the Applicant pledged her property being plot No. 4303 to the 2nd Respondent. The plot does not constitute registered land. The arrangement was reduced into writing and if there was default on the part of the Applicant, the Applicant was to surrender the same property to the 2nd Respondent. Apparently, the 2nd Respondent later paid the Applicant an additional amount of Kshs. 800,000/= on 25th February, 2014 whereupon the Applicant authorized the beneficiary to transfer the plot to the 2nd Respondent. The transfer was effected to the 2nd Respondent's nominee one Pauline Nyambura Ngige on 21st March, 2014.

9. The question is whether the Applicant has met the requirements laid out on the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** as to the grant of a temporary negative injunction. Firstly, has the applicant established a prima facie case? The Applicant averred that she is the owner of the suit plot having brought the same from one Rebecca Ngubia Njoroge. She exhibited a sale Agreement dated 7th March, 2011. She also exhibited a copy of the certificate of ownership. The latter document was in the name of Rebecca Ngubia Njoroge as holding the suit plot in trust for James Karuiki Njoroge. The Applicant disclosed that the said trustee Rebecca Ngubia Njoroge passed on in November, 2013. The Applicant also disclosed that the original Certificate of ownership had been handed over to her but she in turn handed over the same to the 2nd Respondent following an advance of Kshs. 2,500,000/=. To that amount was later added another Kshs. 800,000/=. The Applicant then raves that the 2nd Respondent fraudulently transferred the property to himself as there was no legal representative of the estate of Rebecca Ngubia Njoroge appointed yet to enable any transfer of the suit plot.

10. It is to be noted from the outset that the said Rebecca Ngubia Njoroge was only a trustee. The Certificate of ownership revealed this. It appears as an express trust. Holding the property in trust meant the property was never part of her estate. It also meant that upon her demise the trust ceased and the beneficiary would then be entitled to be legally recognized as the owner absent any vesting order under the Trustee Act (Cap 167) Laws of Kenya. The said Rebecca Ngubia had also divested herself of any interest in the property when she agreed to transfer the same to the Applicant.

11. The Applicant also did reveal that the 2nd Respondent had advanced her some Kshs. 3,300,000/=. The Applicant did not however reveal how the money was advanced. It was advance in two batches. Firstly

Kshs. 2,500,000/= on 17th October, 2013 and then Kshs. 800,000/= on 25th February, 2014. On the latter date the Applicant apparently also authorized the 2nd Respondent to assume ownership of the suit plot. The parties, in effect, seem to have converted the loan into equity. This fact the Applicant neither revealed to the court nor contested the same when the 2nd Respondent through his Replying Affidavit of 9th September, 2014 revealed this fact to the court. The Applicant did not also contest the same in the subsequent pleadings filed by the Applicant. Yet this was a very material fact.

12. On the basis of the material before me, even in the absence of a trial, it is apparent that the Applicant agreed to vary the Agreement of 17th October, 2013 in relation to the suit plot from one of security to one of equity interest and disposition of the suit plot in favour of the 2nd Respondent. The Applicant expressly authorized the transfer of the suit plot. In these respects therefore, I am not convinced that the Applicant has established a prima facie case that the 2nd Respondent fraudulently transferred the suit plot to the 2nd Respondent's nominee.

13. Would the Applicant suffer irreparably if the injunction is denied? I would answer that question in the negative in the circumstances of this case. Even though the Applicant has not addressed me on the point, I am satisfied that damages can be an adequate remedy. The Applicant herself in pledging the suit plot made it a commercial item. The value of the suit plot can be ascertained just the same way the Applicant put the price of Kshs. 2,500,000 and later Kshs. 3,300,000/=.

14. Finally, it is to be noted that the Applicant came to seek equity's help but was not wholly candid. There was material non disclosure on the part of the Applicant which would have led to a denial of an injunction even if a prima facie case had been proven. The applicant should have revealed not only the fact of variation of advance from Kshs. 2,500,000/= to Kshs. 3,300,000/= but also the fact that the Applicant authorized the payment of Kshs. 200,000/= to a third party who had an interest in the property.

15. The upshot is that the Applicant is not entitled to an interlocutory injunction in the totality of the facts of this case. I consequently hereby dismiss the application dated 2nd September, 2014 with costs to the 2nd Respondent.

16. Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent