REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 34 OF 2020

FELIX FISCHER.....PLAINTIFF

VERSUS

DAVID ADRIAN FISCHER.....1ST DEFENDANT

KEZIA WANGUI FISCHER.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff claiming that he transferred his interest in the suit land to the defendants who are his son and daughter in law subject to being paid from the rents but he has not been so paid; evidence showing that the plaintiff gifted the defendants the property and allowed them to pay by instalments from the rent but the instalments could be irregular and could cover 10 to 12 years which have not lapsed; no instrument vide which the plaintiff secured any interest in the suit property; no prima facie case established; application dismissed)

1. This suit was commenced through a plaint which was filed on 2 March 2020. The plaintiff avers that by an agreement in writing dated 2017 and 2018, the plaintiff agreed to sell to the defendants the land parcel Kwale/Diani Complex/1009 at the price of Euros 50,000 with this price being offset from the rent after the plaintiff transfers the property to the defendants. The plaintiff avers that he did transfer the property to the defendants but the defendants have failed to perform their part and have failed to clear the purchase price. In the suit, the plaintiff wishes to have orders for the suit property to revert back to him. Together with the plaint, the plaintiff filed an application for injunction seeking to have the defendants restrained from transferring, leasing or in any other way, disposing the suit property until the hearing and determination of this suit. In his supporting affidavit, he has more or less reiterated the above and has annexed some two agreements.

2. In response to the application, the 2nd defendant filed a replying affidavit. She has deposed that she is the co-owner of the suit property. She is married to the 1st defendant since the year 2010 and the plaintiff is thus her father in law. She stated that sometimes in the year 2017, the plaintiff approached his son (the 1st defendant) and herself, and informed them of his wish to gift the suit property to them as it was a problem managing it from abroad. He thus transferred the property to them at a nominal amount of Euros 50,000. She avers that it was agreed that this would be treated as a loan. They thus entered into a loan agreement where the plaintiff would be paid a total of Fr. 75,000 within 12 years, from the rent collected from the apartments on the suit property. She has stated that they never agreed on the date of commencement of payment of the loan and the plaintiff has never complained to them or asked them to start making payment.

3. She has deposed that towards the end of the year 2018, she and the 1st defendant came to the country and renovated the suit property to make it lettable. They eventually got tenants to let the same and they appointed an agent to collect rent. Soon thereafter, the 1st defendant and herself started having troubles in their marriage. During this period, she contends that the 1st defendant withdrew all the money from their joint account and directed tenants to deposit rent into a different account. She therefore did not touch any rent. They had separation proceedings with the 1st defendant and in the course of the proceedings, the 1st defendant started harassing her to transfer back the property to them (1st defendant and his father). She is afraid that they wish to sell the property fraudulently without her consent so that they can deprive her of her rights in the property. With this knowledge, she placed a restriction on the property. She subsequently wrote to the 1st defendant to have rent deposited in a joint interest account but the tenants have ignored this because the 1st defendant has advised them otherwise. She believes that it is the separation which has led to the problem with the plaintiff.

4. Nothing was filed by the 1st defendant to respond to the application, although after I had given a date for ruling, the 1st defendant filed an application under certificate on 12 October 2020, seeking to arrest the ruling scheduled for today, and to be allowed to respond to the application. I did not find merit in that application as the 1st defendant had been properly served but failed to respond to the application.

5. I have taken note of the submissions of Mr. Chebukaka, learned counsel for the plaintiff and Ms. Nyambura Kamau, learned counsel for

the 2nd defendant.

6. To succeed in an application for injunction, the plaintiff needs to demonstrate a prima facie case, demonstrate that he stands to suffer irreparable loss if the injunction is not granted, and where the court is in doubt, it will decide the application on a balance of convenience. These are time tested principles affirmed in the case of *Giella vs Cassman Brown (1973) EA 358*. I need not re-invent the wheel. So has the plaintiff disclosed a prima facie case with a probability of success ?

7. The brief outline of the plaintiff's case is that he transferred the suit property to the defendants on the understanding that they would pay the purchase price from the rent. That is indeed not disputed by the 2nd defendant, only that the 2nd defendant has explained that the payments were allowed to be irregular and could be made within 12 years. I have looked at the agreements displayed by the plaintiff. The first document dated 18 December 2017 is titled *"Agreement regarding early inheritance."* It states inter alia that the plaintiff wishes to transfer his property in Ukunda (the suit property) to his son. The value of the property is estimated at 150,000 Euros. That document states that in order to keep the transfer costs low, the selling price is set at 50,000 Euros and the remaining amount Euros 100,000 is a gift or an early inheritance to the 1st defendant from his father. What was to be paid (Euros 50,000) would be granted as a loan and the interest rates and repayment would be regulated by a later loan agreement. The property was indeed transferred to the defendants and they became registered as proprietors on 7 February 2018. The other document that I can see is that dated 5 July 2018. It is titled *"Loan Increase."* That document inter alia states that the loan of Euros 50,000 is increased to Euros 75,000. At clause (3) that document provides that *"the loan will be paid back in irregular and variable instalments probably in the 10 to 12 years. This can be in Switzerland by repayment in CHF or by Ksh of the rental income from the property, which can be offset against the cost on the international direct aid."*

8. Now, if these are the documents relied on by the plaintiff, it will be seen that the money could be paid back in *"irregular and variable instalments probably in the 10 to 12 years."* I do not therefore see the quarrel of the plaintiff , at least at this stage of the proceedings, subject to being convinced otherwise after a full hearing, because 10 or 12 years (the ambiguity notwithstanding) have not lapsed. I also wonder why the plaintiff is now being apprehensive about the property being interfered with, yet he was voluntarily gifting it to his son. There is no clause in their agreement (if one was to call it an agreement) which provides for enforcement by way of restricting the property. If this was the intention of the plaintiff, then nothing would have been easier than for him to register a formal charge instrument over the property to secure what the parties seem to have called a "loan" though for all intents and purposes, as far as I can see, it was just a means to have the defendants pay for the property in a soft way. I cannot at this stage of the proceedings, see any proprietary rights that the plaintiff secured on the suit property.

9. Given the above, I am not persuaded that the plaintiff has demonstrated a prima facie case with a probability of success. I have no option but to dismiss this application and it is so dismissed. The plaintiff will thus have to prove his case without the benefit of an injunction. Costs will be to the 2nd defendant.

10. Though I have dismissed the application with costs, I would encourage the parties to try and negotiate a settlement of this matter out of court especially given their relationship.

11. Orders accordingly.

DATED AND DELIVERED THIS 15TH DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA