



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 654 of 2012

MARGARET WAMBUI GATIBA.....PLAINTIFF

VERSUS

JACKLINE P. A. OMOLO t./a

JACKLINE P. A. OMOLO & CO. ADVOCATES.....1ST DEFENDANT

JOHN ODHIAMBO MAGAMBO.....2ND DEFENDANT

RULING

The application for determination is the Notice of Motion dated 2nd October 2012 brought by Plaintiff under Section 3A of the Civil Procedure Act and Order 40 Rules 2, 4 and 10 of the Civil Procedure Rules. The Plaintiff is seeking the following substantive orders:-

1. That the 1st Defendant by herself, her agents, servants, employees or otherwise howsoever be restrained from releasing the entire purchase price of Kenya shillings Two Million One Hundred Thousand (Kshs.2,100,000/=) which is in respect of sale and purchase of land known as Ruiru/Ruiru West Block 2/276 pending the hearing and final determination of the suit herein.
2. That in the alternative, the 2nd Defendant be compelled to release the entire purchase price of Kenya Shillings Two Million One Hundred Thousand (Kshs.2,100,000/=) paid and held by the 1st Defendant as a stake holder to the Plaintiff.
3. That the costs of this application be in the cause.

The application is supported by the Plaintiff's affidavit dated 2nd October 2012 wherein, the grounds outlined in the application are detailed. The Plaintiff's case is that on 25th June 2012, she signed an agreement of sale with the 2nd defendant as the vendor of land parcel known as Ruiru/Ruiru West Block 2/276. The Plaintiff has attached a copy of the agreement for sale as evidence. The Plaintiff has stated that it was a term of the agreement of sale that the 2nd Defendant would forward all completion documents including the Certificate of Lease and a valid consent to Transfer which the 2nd Defendant has failed to do thereby hindering the transfer of the parcel Number Ruiru/Ruiru West Block 2/276 to the Plaintiff. The Plaintiff in this respect also attached a letter dated 18th September 2012 from the District Lands Office, Thika District requesting for a true copy of the lease document.

The Plaintiff further stated that she deposited Two Million One Hundred Thousand Shillings (Kshs.2,100,000/=) with the 1st Defendant as a stake holder as provided for by the sale agreement, and

that the same amount was to be released to the 1st Defendant upon the expiry of 30 days. A copy of the bank deposit slip has been attached to the application. The Plaintiff is apprehensive that she will suffer irreparable loss and damage if the purchase price is released to the 1st Defendant who has failed to honour his obligations under the sale agreement.

The application is opposed by the 2nd Defendant in a replying affidavit sworn on 25th October 2012 and filed in court on 26th October 2012. The 2nd Defendant admitted to having entered into a sale agreement with the Plaintiff for the sale of the property known as LR No. Ruiru/Ruiru West block 2/276 and that the Plaintiff paid the full purchase price. He stated that he furnished the Plaintiff with all completion documents as set out in clause 6 of the agreement for sale, and attached copies of the Rent Clearance Certificate, Consent to transfer, Land rent receipt, a letter dated 20th June 2012 requesting the District Land Registrar, Thika to issue consent to transfer, as well as a letter to the Plaintiff's Advocate's forwarding the said completion documents dated 6th September 2012.

The 2nd Defendant maintains that he has never had any other document of ownership other than the Certificate of lease which is legal document of title, and that during a previous charge of the property in favour of Kenya Commercial Bank, the Commissioner gave the consent to charge without the requirement of the alleged lease. He stated that the Plaintiff's exhibit of the letter dated 18th September 2012 from Thika District Lands office was authored at the Plaintiff's instigation, and the 2nd Defendant insists that Thika Lands Office issued a consent to transfer on 13th August 2012 which has not been cancelled or recalled and therefore stands good. According to the 2nd Defendant, the Plaintiff has not established a *prima facie* case with a probability of success.

The Plaintiff contended in a supplementary affidavit sworn on 12th November 2012 that the lease document which the Defendants are unable to provide is what would show the terms and conditions under which the suit property is held, and insisted that the fact that the subject property was charged to Kenya Commercial Bank Limited is not sufficient to validate the certificate of lease. The Plaintiff maintained that her advocate is still holding all the documents, which they are willing to return to the Defendants as soon as the purchase price is refunded. The Plaintiff denied instigating the letter dated 18/9/2012 from the lands office at Thika, and stated that the same was given to her advocates upon presenting the documents for valuation and assessment.

The application was heard on 18th February 2013 and the Plaintiff relied on written submissions dated 15th February 2013 and filed in court on 18th February 2013. The Defendants' Counsel made oral submissions. The Plaintiff's counsel in his submissions argued that the Defendants had not availed proper completion documents and had breached the sale agreement. Counsel for the Plaintiff further argued that the production of the original lease before a disposition of the lease can be registered was a mandatory requirement of section 32 of the Land Registration Act and therefore, that parties cannot contract outside the law. Reliance was placed on the case of **Karuri -vs- Gituru CA No. 25 of 1980** where it was held that a valid land control board consent cannot be issued after the expiry of a period of 3 months from the date of lodging the application.

Counsel for the Plaintiff argued that the Plaintiff had established a *prima facie* case with a probability of success. It was further submitted that the Plaintiff will suffer irreparable harm as she is about to lose Kshs 2,100,000.00 since she cannot legally be registered as the proprietor of the suit land. Lastly, it was submitted for the Plaintiff that the agreement between the parties was subject to the Law Society Conditions of sale 1989 which provided that where the property is lease hold, the title shall commence with a lease and therefore, that the 2nd Defendant cannot be heard to say that the lease document was not a requisite document in the sale agreement.

The Defendants' counsel in his oral submissions relied on the terms of the sale agreement entered into between the Plaintiff and 2nd Defendant on 25th June 2012. He argued that the Law Society of Kenya Conditions for sale had been varied to the extent of completion documents specified in the said agreement, and that no other document could be imported into the agreement. Further, that under clause

6.2 of the said agreement it was the original certificate of lease which was to be provided, and the same had been provided to the Plaintiff.

It was argued for the Defendants that the original lease had been granted to the original allottee who was not the 2nd Defendant. Counsel for the Defendants stated that the lease was not a completion document, neither is it a mandatory document, and that the registrar has discretion not to have the lease produced pursuant to section 33 of the Land Registration Act. Further, that there was no document from the Commissioner of Lands stating that the consent to transfer that was given by the 2nd Defendant was obtained fraudulently, and that the consent therefore remains valid until it is recalled or cancelled. It was also argued by the Defendants that they never received the later dated 18th September 2012 from the Thika District Lands office.

The Defendants contended that the 1st Defendant was a mere stakeholder whose joinder is improper for reasons that no orders can be made against him. Lastly, the Defendant's counsel submitted that this was not a clear cut application for the grant of a mandatory injunction as sought by the Plaintiff.

I have read and carefully considered the pleadings, evidence and submissions by the made by the parties. I am required to firstly determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and secondly, to determine if the Plaintiff has in addition shown any special circumstances to entitle them to the mandatory injunction sought.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of the sale agreement entered into with the 2nd Defendant dated 25th June 2012 and evidence of payment of the full purchase price. The payment of the purchase price of Kshs 2,100,000/= is also not disputed, and the Defendants Advocates did confirm in court on 22nd January 2013 that the said money is still in the custody of the 1st Defendant as stakeholder. The Plaintiff in her Complaint dated 2nd October 2012 is seeking orders for rescission of the agreement for sale and release of the Kshs 2,100,000/= paid as purchase price. I find that the Plaintiff has established a *prima facie* case to the extent that she has brought evidence of payment of the full purchase price, and to the extent that her allegations of her inability to transfer the suit property are not contested by the Defendants.

The second issue then to be decided is whether the Plaintiff is entitled to the mandatory injunction sought. The Court of Appeal as held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The Defendants have argued that they have provided all that they were required to provide as completion documents under the sale agreement and that the original lease was not one such document, and neither is it mandatory. They have also raised issues of interpretation of the clauses in the said agreement particularly clause 6.2 and OF the completion documents that were required thereunder.

It is clear from the Defendants arguments that they are not in possession of the original lease that is required during registration of any disposition as is stipulated in section 32 of the Land Registration Act which states as follows:-

"On the registration of any disposition of a lease or charge, the original and the duplicate of the lease or charge shall, unless the Registrar is satisfied that they cannot be produced, be produced to the Registrar, who shall note particulars of the disposition on the lease or charge and on the duplicate"

It is to be noted from the cited provisions that the exercise of a Registrar's discretion not to require the production of the original and copy of the lease is to be exercised upon reasonable cause been shown. In the present case the Thika Lands Registrar in the letter dated 18th September 2012 has on the contrary

specifically requested for a certified copy of the lease document in a letter addressed to the 1st Defendant.

Parties cannot contract outside the provisions of the law, and the law requires that the original or copy of the lease be produced for a transfer of the property which is the subject of the sale agreement between the Plaintiff and 2nd Defendant to be effected. This would still be the case even if this court were to hear detailed arguments on the effect of the sale agreement entered into by the Plaintiff and 2nd Defendant, and whether or not the lease document was part of the completion documents.

The said original or copy of the lease has not been produced by the 2nd Defendant nor has he shown to the satisfaction of the Registrar why it cannot be produced. In addition, the Defendants admitted in their submissions that the said original lease is with the original allottee and not in their custody. Proceeding with the suit herein in the circumstances would therefore be tantamount to flogging a dead horse.

I therefore find for these reasons that this is a clear case for a mandatory injunction to issue. I hereby order that the 1st and 2nd Defendant refund to the Plaintiff the entire purchase price of Kshs.2,100,000/= paid to and held by the 1st Defendant as a stake holder within 15 days of the date of this ruling, and in default the said amount shall attract interest at court rates for the period it remains unpaid.

The Defendants shall bear the costs of the Plaintiff's Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____10th____ day of ____April ____, 2013.

P. NYAMWEYA

JUDGE