



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 110 OF 2009

JOHN KARUGA WAHINYA.....PLAINTIFF/RESPONDENT

VERSUS

VIOLET WANJA GATEI DEFENDANT/APPLICANT

RULING

1. By an amended Notice of Motion dated the 16/9/2011 the defendant/applicant is seeking the following orders:

(i) That the plaintiff/respondent whether by himself, his officers, employees, servants and/or agents or otherwise howsoever be restrained from selling, alienating, or interfering with the defendant/applicant's property known as L.R. No. 170/36 Kiambu o.n.o 170/21/8 until further orders of this Honourable Court.

(ii) That the costs of this application be awarded to the plaintiff/applicant in any event.

The application is premised on five (5) grounds stated on the face of the application. The application is supported by the affidavit of Violet Wanja Gatei dated the 26/7/11 which was filed with the notice of motion dated 26/7/11. The application is brought under order 40 rule 1, 2 and 4 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya.

I note that the applicant filed the amended Notice of Motion so as to cite the proper provisions of the law as the previous notice of motion dated 26/7/11 was brought under order 39 rule 2,3 and 4 of the Civil procedure rules. The application was opposed. The plaintiff/respondent filed a replying affidavit dated the 14/9/11. The defendant/applicant filed a supplementary affidavit dated the 10/10/ 2011.

Before dealing with the present application I have carefully gone through the entire Court file and I note the following:-

2. After the plaintiff/respondent filed suit against the defendant, Judgment on admission was entered for the plaintiff against the defendant for the sum of Kenya Shillings 5 Million with interest at Court rates from 28th February 2008 to the date of payment in full. Costs were to follow the event. This was done on

the 29/9/2010. The defendant/applicant thereafter sought to have a stay of execution of the ruling dated 29/9/10 and the application was heard on the 8/2/11. Justice Muchelule dismissed the defendant/applicant's application dated 28/10/2010. After that application was dismissed, the plaintiff/respondent began the process of execution and warrants were issued on the 23/3/11. The plaintiff/respondent thereafter sought a prohibitory order on L.R. 170/36 Redhill (original No. 170/21/8) on the basis that the previous application for warrants of attachment dated 23/3/11 did not satisfy the decree and that the items attached were valued at 90,000/- yet the decree is for the sum of Ksh. 7,043,137/-. A prohibitory order was issued on the 15/6/11. The order restrained the judgment debtor /the defendant from transferring or charging the property L.R. No. 170/36 by sale or otherwise and all persons were prohibited from receiving the same by purchase, gift or otherwise. The decretal sum as at 15/6/11 stood at Kshs. 7,062,811/-. Thereafter the plaintiff/respondent moved to have a notice for settling terms and sale of immovable property for the judgment debtor/ defendant's property on the 5th July 2011. A Notice of the day fixed for settling a sale of notification was issued on the 18/7/11. The notice was for the 29th July 2011. As per the affidavit of service dated 21/7/11 and filed in Court on the 25/7/11, the defendant was served with the Notice of Settling terms dated 18/7/11. The defendant/applicant was served on the 20/7/11. On the 26/7/11 the defendant/applicant moved to Court with an application for injunctive orders and it was subsequently amended on the 16/9/11. The defendant/applicant is as already stated earlier seeking to stop the plaintiff/decree holder from selling or alienating or interfering with her property.

3. I have read the affidavits filed by the parties and the authorities cited. The defendant/applicant cited the said authorities; ***Charter House Investment Ltd. Vs. Simon Sang and other, Court of Appeal at Nairobi CA No. 13/04; Nationwide Finance Company Ltd. Vs. MECK (Industries Ltd) and Dickson Waichuchi Vs. Kahawa Sukari Ltd HCCC No. 992 of 2006, 2007 eKLR, and the case Geilla Vs. Cassman Brown 1973 E.A page 358.*** In the case of Charter House Investment Ltd the facts are very different, the Court of Appeal granted an injunction on the basis of evidence shown that there were issues of fraud that were raised to be considered. In the case of Nationwide Finance Company Ltd an injunction was granted because the Court noted the irregularities committed by the auctioneer. The Court found that the applicant had demonstrated an arguable appeal. In the case of Dickson Elijah Ngumi Waichuhi, the Court granted an injunction because the issue of ownership had to be determined. These cases have very different facts from the matter under consideration.

4. The defendant/applicant's reasons for seeking an injunction are that she is the registered owner of the suit property, and that is not disputed. That she has been negotiating with M/s Barclays Bank of Kenya to release the Title for purposes of sub-dividing the suit property and paying off the debt and that the plaintiff/respondent has agreed to the same and she has been granted approval for subdivision by the Commissioner of Lands (VWG5). That the matter took long as she had to convince the bank that she will be in a position to pay the outstanding loan. She argues that if the Court proceeds with the settlement of terms of the proclamation of sale, then she, together with her children will be disinherited as they have no other land and/or matrimonial home.

5. The plaintiff/respondent in opposing the application argued that a prohibitory order was issued on the suit property restraining the defendant/applicant from transferring or charging the property and hence the matter is a non- starter. That the applicant is misleading the Court that she is negotiating with M/s Barclays Bank of Kenya to pay off her debt and has attached a letter of the bank dated 17/12/09 but at that time the Court had not made its ruling on whether or not the defendant was indebted to him. That the defendant cannot say that the suit property is her matrimonial home yet she was ready to sell it to him. He denied that the defendant/applicant has approached him with a proposal to settle his debt and that the defendant/applicant is using the judicial process to delay and frustrate his attempts to receive and enjoy the fruits of his judgment. He urged the Court to dismiss her application.

6. In the applicant's supplementary affidavit she reiterates the contents of her supporting affidavit and states that she is negotiating financing from Barclays Bank of Kenya and other banking institutions and that the hold up in finalizing the said transactions was occasioned by facts beyond her control as the banks and the relevant government agencies delayed the transaction and that she stand to suffer irreparable loss.

7. I have read the applicant's written submissions. I have also considered the oral submissions made in Court by the parties and I find as follows: There is no dispute that there is judgment against the defendant which the plaintiff is seeking to enforce. There is also no dispute that the Plaintiff has a prohibition order. This Order I note has not been set aside. The Defendant has now come to court to seek an injunction order. She is not seeking to set aside the prohibiting orders but she is seeking to restrain the plaintiff from selling her property. The plaintiff has to show that she has a *prima facie* case with a probability of success, that she will suffer irreparable loss if the injunction is not granted and that the balance of convenience tilts in her favour. The plaintiff/respondent denies that the defendant has been negotiating with him. The defendant/applicant seeks to have the orders on the basis that she is negotiating with the banking institution. She owes the plaintiff a whole 7 Million plus. Has she been diligent in this matter since judgment was passed? I find she has not. I do agree with the plaintiff/respondent that she has not made out a case for an injunction. There is a judgment that has not been set aside nor the prohibition order. The applicant is out to stall the execution process. The issue of issuing the notice of settlement before a notice to show cause can be dealt with as it is a procedural issue but there is a judgment in place. Further the process taken by the plaintiff was done with a period of less than a year, and therefore, no notice to show cause was required. I note that the letter dated 17/12/09 was written before judgment was entered and the issue of subdivisions is for the applicant's own benefit. The applicant must show some seriousness in wanting to settle. She has failed to show that she has a *prima facie* case with a probability of success. On the issue irreparable loss I note that she was ready to sell the suit property yet she claims that she will suffer irreparable damages. She can be compensated by way of damages as the value of the property can be ascertained. A debt remains unsettled. The balance of convenience tilts in favour of the plaintiff/respondent. I therefore find no merit in the application dated 16/9/11 and I dismiss it with costs to the plaintiff/respondent.

Orders accordingly.

Dated, signed and delivered this 10th day of July 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Plaintiff

..... For the Defendant

..... Court Clerk