



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 73 OF 2019

SOPHIA MORAA BIRONGA.....APPELLANT

VERSUS

DAVID WAWERU NDUNG’U.....1ST RESPONDENT

GLADYS NJERI MAINA.....2ND RESPONDENT

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES.....3RD RESPONDENT

JUDGEMENT

1. The Appellant filed this appeal against the judgement of Hon. L. Gicheha (Mrs.) Chief Magistrate, delivered on 20/9/2019. The main ground of appeal is that in determining the issues at the trial, the Learned Magistrate misinterpreted the legal principles for granting a permanent injunction and wrongly applied principles applicable to temporary injunctions. The Appellant also faulted the Learned Magistrate for making a finding that the letter dated 27/11/2007 was delivered to her and for holding that she did not comply with the conditions set by the 3rd Respondent before she could be allocated plot numbers Nairobi/Block 21190/D/25 and Nairobi/Block 21190/D/28 (“the Suit Properties”). She faulted the Learned Magistrate for finding that David Goligoli Ntete was the owner of the Suit Properties and that he lawfully transferred them to the 1st and 2nd Respondents.

2. The Appellant set out 29 grounds in her Memorandum of Appeal which can be condensed into the main issues identified by the court and the Appellant in her submissions filed in court on 7/5/2020. The Appellant also contended that there was fraud committed by the Respondents in the alienation of the Suit Properties to the 1st and 2nd Respondents and denied that they purchased the Suit Properties in good faith without knowledge of fraud. She also challenged the validity of the Tenant Purchase Agreement between the 1st and 2nd Respondents with the 3rd Respondent.

3. Parties agreed that in determining the appeal, the court could go by the record of appeal prepared by the Appellant and needed not wait for the Chief Magistrates’ Court file to be brought to the Environment and Land Court. They filed written submissions which the court considered. The Appellant submitted that she acquired the Suit Properties from Kwa Ndege Self Help Group at a cost of Kshs. 90,000/= before it turned out that the land belonged to the 3rd Respondent and not Kwa Ndege Self Help Group. After discussions were held, the 3rd Respondent agreed to sell the land to the people who had initially bought the plots from Kwa Ndege Self Help Group. The Appellant was to purchase the Suit Properties under that arrangement. The 3rd Respondent agreed to sell the Suit Properties to the Appellant at Kshs. 315,000/= for the plot measuring 33 by 66 and Kshs. 800,000/= for the one measuring 50 by 100. The Appellant claimed that she paid the registration fees of Kshs. 1000/= to the 3rd Respondent and Kshs. 90,000/= towards the deposit for the two plots on 17/9/2007 and 8/10/2007. She denied ever receiving the 3rd Respondent’s letter dated 27/11/2007 requiring her to present a letter of introduction from Kwa Ndege Self Help Group to facilitate the sale of the Suit Properties to her. She submitted that the Respondents acted fraudulently when the 3rd Respondent sold the Suit Properties to the 1st and 2nd Respondents under the tenant purchase scheme.

4. She faulted the Learned Magistrate for finding that she had not complied with the conditions set by the 3rd Respondent for her to be allocated the Suit Properties and for finding that the Suit Properties were free for allocation to other third parties. She maintained that the fact that by the time the 3rd Respondent wrote the letter dated 27/11/2007 the Suit Properties had already been allocated to David Ntete Goligoli following his application dated 30/10/2007 demonstrated fraud in the transaction. David Ntete Goligoli transferred the suit plots to the 1st and 2nd Respondents. She contended that in any event the letter dated letter dated 27/11/2007 did not specify the time frame within which she had to provide the letter from Kwa Ndege Self Help Group to the 3rd Respondent.

5. The Appellant faulted the Learned Magistrate for failing to make a finding on the irregularities of the Tenant Purchase Agreement that the

3rd Respondent entered into with the 1st and 2nd Respondents. She pointed out that the agreements bore dates after the date the document were executed and contended that they were not validly executed by the Managing Trustee of the 3rd Respondent. She maintained that the 1st and 2nd Respondents had defaulted in paying the instalments required under those agreements with the 3rd Respondent. She averred that no transfer had been effected to the 1st and 2nd Respondents and contended that they were not the legal owners of the Suit Properties.

6. The Appellant maintained that there was an agreement between her and the 3rd Respondents for the purchase of the Suit Properties based on the fact that the 3rd Respondent had agreed to receive payment from the persons who had acquired portions of its land from Kwa Ndege Self Help Group and that based on that arrangement she made some payments to the 3rd Respondents for the Suit properties. She also faulted the Magistrate for not making a determination on her claim for special damages of Kshs. 399,000/= which she maintained she had proved and that it was not controverted by the Respondents. The Learned Magistrate only awarded her special damages of Kshs. 47,000/=. She submitted that the share certificate issued by Kwa Ndege Self Help Group to David Goligoli was not valid unlike the one that was issued to her and maintained that the Learned Magistrate had failed to consider her submissions.

7. The 1st and 2nd Respondents submitted that the Appellant failed to fulfil the conditions set by the 3rd Respondents before her ownership of the Suit Property could be regularized. The 1st and 2nd Respondents supported the findings by the Learned Magistrate and urged that there was no reason for this court to interfere with the judgement and that the appeal should be dismissed with costs.

8. The 3rd Respondent submitted that the learned Magistrate reached a correct finding and that there were no grounds for interfering with her decision.

9. The issue for determination is whether this court should set aside the judgement given by the learned Magistrate on 20/9/2019 and grant the orders which the Appellant sought in the Amended Complaint filed in court on 16/2/2011.

10. The background to this case is that the Appellant claimed that she purchased the Suit Properties from Kwa Ndege Self-help Group in June 2002. She paid the purchase price and registration fees to Kwa Ndege Self Help Group and commenced development on the plot by excavating the soil dumped on the land. She also dug up the foundation and erected pillars on the land. She averred in her statement that sometime in 2005 it became clear that the plots did not belong to Kwa Ndege Self-help Group since the land was the property of the 3rd Respondent. Following discussions, the 3rd Respondent agreed to let the people who had acquired plots constituting part of its land from Kwa Ndege Self-help Group to purchase the plots from the 3rd Respondent.

11. The Appellant claimed that the 3rd Respondent directed her to make a down payment of Kshs. 45,000/= per plot for the Suit Properties on 17/9/2007 which she paid into the 3rd Respondent's account. She later learnt that the 3rd Respondent had transferred the Suit Properties to the 1st and 2nd Respondents who demolished the structures she had put up on the Suit Properties and commenced their own developments on the land. The Appellant sought special damages in the sum of Kshs. 399,000/= being the expenses she incurred for soil excavation, river sand, ballast, building stones, steel, cement and the labour for pillar construction.

12. She sought a permanent and mandatory injunction to restrain the Respondents from dealing with the Suit Properties. In addition, she sought an order for specific performance to compel the 3rd Respondent to complete the transaction and transfer the Suit Property to her name. Alternatively, she sought a refund of Kshs. 2,200,000/= which was the value of the Suit Properties in 2011 plus interest from 7/12/2005 until payment in full. She also sought special damages and general damages.

13. The Learned Magistrate heard the case and evaluated the evidence adduced before her. She found that the Appellant failed to satisfy the conditions set out in the case of **Giella v Cassman Brown Limited [1973] EA 358**. The learned Magistrate found that the Appellant had failed to comply with the conditions set by the 3rd Respondent because she did not submit a letter of introduction from Kwa Ndege Self-help Group despite the 3rd Respondent's letter dated 27/11/2007. The court found that the plots were available for sale to other people when the Appellant failed to produce a letter of introduction from Kwa Ndege Self Help Group and that there was no fraud when the two plots were transferred to the 1st and 2nd Respondents who she found were innocent purchasers for value. The Learned Magistrate found that the Appellant had not established a prima facie case against the 1st and 2nd Respondents because they were bona fide purchasers. She dismissed the case against these two Respondents and entered judgement for the Appellant for Kshs. 47,000/=: costs and interest as against the 3rd Respondent.

14. The orders sought in this appeal are the reliefs the Appellant sought in the Amended Complaint which the Learned Magistrate declined to grant. The 1st and 2nd Respondents averred in their defence that the Suit Property belonged to the 3rd Respondent who had agreed to regularize the claims to ownership by the persons who had encroached on its land. The 1st and 2nd Respondents averred that they entered into an agreement with the 3rd Respondent and that they duly paid the sums required and complied with the requirements under the sale agreement.

15. The court agrees with the Appellant that the Learned Magistrate erred in finding that the Appellant had not established a prima facie case when determining the matter. The principles for the grant of an interlocutory injunction differ from those for a permanent injunction because in the former relief is mainly granted on a temporary basis while in the latter case it is invariably after the determination of the suit.

16. The court agrees with the Learned Magistrate that the Appellant ought to have joined Kwa Ndege Self Help Group as a party to the suit for the reason that the Group was instrumental in the land transactions having previously received monies from persons who were buying land that belonged to the 3rd Respondent. It was incumbent upon the Appellant to lead evidence to show that she had earlier acquired the Suit properties from Kwa Ndege Self Help Group because the dispute really revolved around the issue as to who the Self Help Group initially sold the plots to. It was therefore reasonable that the 3rd Respondent would require a letter from Kwa Ndege Self Help Group to confirm whom it had sold the Suit Properties to for it to complete the transaction with that person. The Appellant should have called a witness from

Kwa Ndege Self Help Group to confirm that she had acquired the Suit Properties from the Group and was to be recognised by the 3rd Respondent as the one entitled to purchase the Suit Properties from the 3rd Respondent. That witness would have led evidence to clarify who between the Appellant and David Ntete Goligoli purchased the Suit Properties from Kwa Ndege Self Help Group.

17. Looking at the documents the Appellant produced in court, they show that she paid the sum of Kshs. 13,400/= to Kwa Ndege Self Help Group on 29/6/2002 and 10/10/2006. She paid Kshs. 1,000/= to the 3rd Respondent on 7/12/2005 and Kshs. 1,000/= on 8/10/2007. The Appellant paid additional sums of Kshs. 20,000/= to the 3rd Respondent on 17/9/2007 and Kshs. 70,000/= on 8/10/2007. She produced petty cash vouchers in support of her claim for special damages for Kshs. 130,000/= dated 10/10 on account of excavation; Kshs. 232,760/= dated 12/7/2006 for building materials; and Kshs 20,280/= dated 13/11/2006 for water and payment of labour. She attached a valuation report prepared by Oleander Limited giving the value of the Suit Properties as Kshs. 2,000,000/= as at 6/1/2011.

18. The court notes that the petty cash vouchers relied on by the Appellant in support of her claim for special damages were issued to Kennedy Mogaka. The Appellant stated in her witness statement that she learned from the 3rd Respondent on 5/12/2005 that it owned the Suit Properties. She averred that she started construction on the Suit Properties on 10/10/2006. She paid Kshs. 20,000/= to the 3rd Respondent on 17/9/2007 and Kshs. 70,000/= on 8/10/2007 towards the purchase of the Suit Properties. In the court's view it was not prudent for the Appellant to commence construction on the Suit Properties in October 2006 after learning in December 2005 that the land belonged to the 3rd Respondent without first paying off the sum the 3rd Respondent required for her to acquire the Suit Properties. The sums claimed by the Appellant as special damages which apparently were incurred in 2006 cannot in the court's view be recovered from the 3rd Respondents because it had not entered into any agreement with the 3rd Respondent by then. The 3rd Respondent received the deposit for the Suit Properties in September and October 2007. The Appellant could only have claimed the special damages of Kshs. 399,000/= from Kwa Ndege Self Help Group together with the sums she paid to the Group when it purported to sell the Suit Properties to her.

19. The Appellant submitted that she had proved that she had an agreement with the 3rd Respondent over the sale of the Suit Properties and added that she was ready, able and willing to complete the sale transaction. It is not in dispute that the land did not belong to Kwa Ndege Self Help Group which initially sold the Suit Properties to the Appellant. It is also not in dispute that the 3rd Respondent agreed to sell the land to the persons occupying it who had acquired it from Kwa Ndege Self Help Group. Even though the 3rd Respondent agreed to sell the suit plots to the Appellant for Kshs. 315,000/= and Kshs. 800,000/= respectively, the Appellant did not enter into any written agreement with the 3rd Respondent. Under Section 3 of the Law of Contract Act, a suit can only be brought upon a contract for the disposition of an interest in land if the contract is in writing, signed by the parties and their signatures are duly witnessed. There was no contract between the Appellant and the 3rd Respondent in respect of which the court can order specific performance.

20. The Appellant only paid Kshs. 90,000/= in September and October 2007 to the 3rd Respondent towards the purchase price for the Suit Properties without any written agreement. She filed suit on 4/10/2010. The Appellant submitted that she was ready, able and willing to complete the purchase of the Suit Properties. No explanation was given as to why she did not take steps to pay the balance of the sums demanded by the 3rd Respondent from October 2007 until 2010 when she filed suit.

21. It is not in dispute that the 3rd Respondent entered agreements with the 1st and 2nd Respondents over the Suit Properties and there is therefore privity of contract between the Respondents and the court finds it difficult to review those transactions which the Appellant challenged without proof of fraud on the part of the 1st and 2nd Respondents. If the 1st and 2nd Respondents defaulted in paying the sums under the tenant purchase scheme then that is a matter between the Respondents depending on the terms of the agreement. The Appellant did not demonstrate before the Learned Magistrate that she had complied with the requirements set by the 3rd Respondent for it to complete the sale of the Suit Properties to her. The only sum the Appellant could have claimed from the 3rd Respondent was a refund of the deposit of Kshs. 90,000/= which she paid in 2007 because the 3rd Respondent sold the Suit Properties to someone else after receiving a deposit from the Appellant.

22. The court dismisses the appeal. The 3rd Respondent will pay the Appellant's costs for the appeal and the suit.

Dated and delivered at Nairobi this 1st day of October 2020

K.BOR

JUDGE

In the presence of:-

Mr. Julius Nyakiangana for the Appellant

Mr. Stephen Nganga for the 1st and 2nd Respondents

Mr. John Mburu for the 3rd Respondent

Mr. V. Owuor- Court Assistant