

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 104 OF 2020

RUTH SYOMBUA MUTIA.....PLAINTIFF

VERSUS

JUSTINE JELAGAT alias JUSTINE JELAGAT BENJAMIN 1ST DEFENDANT

BEATRICE BUTENDE t/a IGARE AUCTIONEERS.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff having been a tenant of the 1st defendant before the 1st defendant offered to sell the suit property to her; the two parties entering into an agreement for sale and the plaintiff making significant payments towards the purchase price; 1st defendant not providing completion documents despite demand; 1st defendant now instructing the 2nd defendant, an auctioneer, to distress for rent; plaintiff seeking to have the defendants restrained from interfering with her possession pending hearing of the suit; no reply from defendants; plaintiff's display of the sale agreement and proof of payment demonstrating a prima facie case; plaintiff would stand to suffer irreparably if she is evicted; application for injunction allowed)

1. What is before me is an application dated 12 August 2020 which was filed alongside this suit. It is an application brought inter pursuant to the provisions of Order 40 of the Civil Procedure Rules and is basically one seeking an injunction to restrain the defendants from interfering with the possession of the plaintiff of the land parcel identified as CR No. 29883 Subdivision No. 9952 (hereinafter referred to as "the suit property") pending the hearing and determination of this suit. Despite being served, the defendants did not file anything to respond to the motion and what I can see from the record is only a Notice of Appointment of Advocate, filed on 27 October 2020, after 14 October 2020 when I gave today's date for delivery of the ruling. The only material that I have is therefore that supplied by the applicant.

2. From the plaint and supporting affidavit, I can discern that it is the applicant's case that she leased from the 1st defendant the suit property, which had a house, albeit not complete, sometimes in December 2017 and she paid for 5 months in advance at the rate of KShs. 30,000/= per month. The 1st defendant later met the plaintiff and disclosed to her that she is having some financial difficulties and requested the plaintiff to pay a further KShs. 540,000/= to cover rent for 1 ½ years which the plaintiff paid and was therefore to resume rent payments from September 2019. On 20 April 2018, the plaintiff avers that the 1st defendant offered to sell the house to her at KShs. 14,000,000/=. The 1st defendant presented to the plaintiff that she urgently needed KShs. 7,000,000/= to release her from some pressing financial issue. She avers that they had an understanding that costs to complete the house would be deducted and this was quantified at KShs. 1,297,900/=. She thus paid the 1st defendant the sum of KShs. 5,702,100/= as deposit for purchase of the suit property. On 23 April 2018, the parties met at the 1st defendant's advocate and a sale agreement was drawn, with KShs. 500,000/= being paid, and a further KShs. 500,000/= payable after ten days, with the balance of KShs. 6,000,000/= being due within 6 months of the sale agreement. The plaintiff avers that she paid the two instalments of KShs. 500,000/=. The plaintiff states that in October 2018, she demanded for the completion documents from the 1st defendant, before she could pay any further sums of money. She also went to conduct a search and while doing so, bumped into another advocate, who was also doing a search for a property being sold by the 1st defendant. Matters remained silent until 4 August 2020 when the 1st defendant sent the 2nd defendant, an auctioneer, to levy distress. She was surprised because the landlord/tenant relationship had ended. In the suit, the plaintiff seeks orders for specific performance, and a declaration that she is not a tenant of the 1st defendant. She also wants the defendants permanently restrained from selling the suit property or evicting her.

3. As I have mentioned, the plaintiff did file an application for injunction together with the suit. To the supporting affidavit, she has annexed various documents including the sale agreement dated 23 April 2018.

4. Since the defendants have not filed anything to oppose the motion, I have no reason to doubt that the 1st defendant did sell to the plaintiff the suit property on 23 April 2018. I really do not see, at least at this stage of the proceedings, any basis upon which the 1st defendant can levy distress for rent against the plaintiff. Even assuming that the plaintiff has not completed the purchase price, what has been paid under the sale agreement, which is more than KShs. 7,000,000/=, would adequately compensate the 1st defendant for any unpaid rent. There would thus be no legal basis upon which to levy distress.

5. I am thus of the view that the plaintiff has demonstrated a prima facie case with a probability of success. If an injunction is not issued, the defendants may move to evict her from the property and cause her irreparable loss. Even if I was to consider the balance of convenience, it tilts towards maintaining the status quo, for the simple reason that the 1st defendant is adequately covered, assuming that this court found that the sale agreement cannot be enforced for one reason or another.

6. Given the foregoing, I do allow this application for injunction. The defendants are hereby restrained from entering, being upon, levying distress, evicting, or in any other way interfering with the plaintiff's quiet possession of the suit property until this case is heard and

determined. The plaintiff is also barred by an order of injunction from selling, leasing, charging, or in any other way entering into any disposition over the suit property. There will also be issued an order of inhibition, inhibiting the registration of any disposition in the register of the suit property which from the search annexed is registered as Plot NO. 9952/I/MN Title NO. CR 29883.

7. The plaintiff will have the costs of this application.

8. Orders accordingly.

DATED AND DELIVERED THIS 5TH DAY OF NOVEMBER, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA