



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 24 OF 2018

STEPHEN KIVANDI KAMULA...../PLAINTIFF

-VERSUS-

BONIFACE KIOKO MWOLOLODEFENDANT

RULING

1. What is before me for ruling is the notice of motion application expressed to be brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law for orders:-

1. Spent

2. Spent

3. An order of injunction barring the defendant from entering onto, transferring, alienating, disposing, collecting rent from tenants or in any manner whatsoever interfering with the Plaintiff's occupation and use of the suit property MAKUENI/EMALI TOWN/234 pending the hearing and determination of the suit herein.

4. That costs of this application be provided for.

The application is dated 21st March, 2018 and was filed in court on 22nd March, 2018. It is predicated on the grounds on its face and is supported by the affidavit of Stephen Kivandi Kamula, the Applicant herein, sworn at Machakos on the 21st March, 2018.

2. The Defendant/Respondent has opposed the application vide his replying affidavit sworn at Nairobi on the 03rd May, 2018 and filed in court on the 04th May, 2018.

3. Directions were issued that the application be disposed off by way of written submissions.

4. Both parties herein are in agreement that the principles for the grant of an order of injunction are as set out in the case of **Giella Vs. Casman Brown and Company Ltd (1973) EA 358**. I need not repeat those principles herein.

5. On whether or not the Applicant has shown a prima facie case with probability of success, the Applicant's Counsel's cited the case of **Kenleb Cons Ltd Vs New Gatitu Service Station Ltd & another {1990} KLR 557 where Bosire, J** (as he then was) held that; "to succeed in an application for injunction, an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction."

The counsel submitted that in this application, the Applicant has demonstrated that his right to the property that he bought through an agreement with the Respondent is being infringed upon and it is only through an injunction at the first instance before the determination of this suit that can provide a curative as well as preventive mechanism from further violation of that same right by the Respondent.

6. In his further submissions, the Applicant's counsel has submitted that the Applicant was registered as the duly appointed person to hold specific power of attorney on behalf of both Bella Rose Lavi and as such, he has legal capacity to bring this application on her behalf.

7. The counsel submitted that the purchasers have complied on their part with the agreement in that they paid the purchase price in full.

8. On the other hand, the Respondent's counsel submissions were that since the Applicant's suit is premised on a sale agreement that is not

enforceable in law, the orders sought cannot be granted due to several reasons which include non-compliance with the sale agreement. The counsel further submitted that the injunction can only be granted where monetary damages are not adequate. He added that since the sale agreement is not enforceable, the only remedy available to the purchasers is refund of the purchase price.

9. On the principle of interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Applicant's counsel submitted that the Applicant having expended his resources into acquiring the suit property from the Respondent and legally so, it would be reasonable to say that he will be greatly harmed if the injunction is not granted. The counsel added that despite the fact that the Applicant can be compensated by damages as his loss can monetarily be quantified, it is understandable that this being a land matter, no one parcel of land can be equated to another. The counsel cited the case of **J. M. Gichanga Vs Co-operative Bank of Kenya Ltd (2005) eKLR**.

10. On the other hand, the counsel for the Respondent was of the view that since the basis of the suit is the sale agreement between the Respondent and the purchasers which agreement is not enforceable, the only remedy available is refund of purchase price. As such the counsel added, the second principle in Giella's case does not favour the Applicant.

11. On the principle of if the court is in doubt, it will decide an application on a balance of convenience, the Applicant's counsel's submissions were that the Applicant had performed his end if the bargain while the Respondent neglected to perform his. That the Respondent now alleges that he cannot transfer the suit property because there was no spousal consent. The counsel went on to submit that the Respondent has waited all this time to come to court claiming protection on his own indolence. The counsel added that this cannot be allowed to go on.

12. In his further submissions, the Applicant's counsel submitted that on the 09th March, 2017, Andrew Makundi and Company Advocates, on behalf of the Respondent, in a letter forwarded completion documents to Achola Jaoko & Company Advocates on behalf of the purchasers, which included a consent duly executed by the vendor's spouse. The counsel pointed out that **Section 11(a) of the Land Law Amendment Act No.28 of 2016 amended Section 28(9) of the Land Registration Act**, extinguishing spousal rights as automatic overriding interests. The counsel submitted that the Respondent is not in any way precluded from performing his part of the agreement by his own breach to procure consent to transfer.

13. The counsel further urged the Court to invoke the doctrine of lis pendens so as to protect the subject matter of this suit, so that the court's decision will not be rendered a pure academic exercise, and judicial resources expended in vain. The counsel cited the cases of **Bernadate Wangare Muriu V National Social Security Fund Board of Trustees & 2 others (2012) eKLR** where the court held that;

“(i) The property is a subject on going litigation.

(ii) The prime movers of the action complained of namely the 1st and 3rd defendants are not only parties to the on going pending litigation but are fully aware of the same.

(iii) The interested parties are bound by the said doctrine/maxim irrespective of whether they had notice of the litigation or not.

(iv) The 1st and 3rd defendants could only transact with the interested parties with the sanction of the court which they did not seek prior to involving the interested parties.”

The Applicant's counsel added that Bernadatte's case was quoted with approval by the Court of Appeal in **Naftali Ruthi Kinyua Vs Patrick Thuita Gachure & another (2015) eKLR**.

14. Having read the application together with the supporting affidavit as well as the replying affidavit and having read the submissions that were filed by the counsel for the parties herein, I do note that the following issues arise.

15. Firstly, it is not in doubt that the one Bella Rose Lavi and one Josephine Mutindi Kiluva entered into a sale agreement annexed as {SKK-2(a)} with the Respondents. The validity of the said agreement is contested by the parties herein and that is an issue that will be determined during the substantive hearing of the main suit. One Bella Rose Lavi did assign power of attorney to the Applicant herein to act on her behalf in every aspect that includes court cases amongst others. In that case, therefore, the Applicant has locus standi to file this application and suit.

16. Secondly, the Respondent herein is in possession and occupation of the suit premises which is still registered in his name. The applicant claims that he has fulfilled his obligation under the contested sale agreement. As it were, there is a contested property dispute between the parties herein. Their respective rights are yet to be determined. On the issue of whether or not the Applicant has a prima facie case with probability of success, I do note that the Respondent has not denied the fact that he received the purchase price. Regarding the principle of an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, I agree with the Applicant's counsel that the Applicant who has expended his resources might suffer irreparable injury if the orders sought are not granted. Regarding the principle of balance of convenience, I hold that the same tilts in favour of the Applicant.

17. Arising from the above and on the basis of the doctrine of lis pendens, I hereby issue an order of injunction barring the Respondent from transferring, alienating and disposing the suit property Makueni/Emali town/234 pending the hearing and determination of the suit herein. I further direct that the rent collected from the date of this order shall be paid into an interest earning account in the joint names of the advocates on record for the parties herein until further orders from this court. The Applicant shall have the costs of the suit.

Signed, dated and delivered at **Makueni** this 17th day of **January, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Hassan holding brief for Mr. Kilonzo for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Mr. Kwemboi – Court Assistant

MBOGO C. G.,

JUDGE,

17/01/2019.