



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 24 OF 2017**

**RONALD KENYANSA NYAMOSI.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RONALD MORARA NGISA**

**T/A MORARA NGISA & CO. ADVOCATES.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the notice of motion dated 17<sup>th</sup> January 2017 brought under Section 3A of the Civil Procedure Act, Order 40 Rules 1, 3 (1) and Order 52 Rule 4 (1) a, b, c of the Civil procedure Rules and all other enabling provisions of the law.

2. It seeks orders:-

*(1) Spent.*

*(2) That a temporary injunction be issued restraining the 1<sup>st</sup> defendant, their servants and/or agents from harassing, locking doors, repossessing or claiming interest in all that property known as LR No. Nairobi/Block 140/189/062 pending the hearing and determination of this Application.*

*(3) That That the 2<sup>nd</sup> defendant be ordered to produce cash account for the purchase of the property known as LR No. Nairobi/Block 140/189/062.*

*(4) That the 2<sup>nd</sup> defendants/respondents be condemned to pay costs of this application.*

3. The grounds are on the face of the application and are:-

*1. That the plaintiff/applicant is the registered owner of all that property known as LR NO. Nairobi/Block 140/189/062.*

*2. That the plaintiff/applicant bought the property from the 1<sup>st</sup> defendant/respondent whom I duly paid through my employer and a transfer duly executed.*

*3. That the 1<sup>st</sup> defendant/respondent has issued notices threatening to rescind the sale agreement between themselves and the plaintiff/applicant and repossess the property.*

*4. That the 1<sup>st</sup> respondent has been sending their agents to forcefully lock the doors of the applicant's house which was bought free from any encumbrances.*

*5. That if the restraining orders are not issued the plaintiff's/applicant's rights to quiet and peaceful enjoyment of the premises shall be threatened by the 1<sup>st</sup> defendant/respondent.*

4. The application is supported by the affidavit of Ronald Nyamosi the plaintiff/applicant herein sworn on the 17<sup>th</sup> January 2017.

5. The application is opposed. There is a replying affidavit sworn by Daniel Obebo a loans officer with the 1<sup>st</sup> defendant/respondent sworn on the 22<sup>nd</sup> February 2017. There are also grounds of opposition filed by the 2<sup>nd</sup> defendant/respondent dated 2<sup>nd</sup> May 2017.

6. On the 9<sup>th</sup> October 2018 the court directed that the application be canvassed by way of written submissions.

#### **The plaintiff/applicant's submissions**

7. The plaintiff/applicant is the rightful owner of the subject property as per the sale agreement entered on 15<sup>th</sup> November 2011 for a consideration of Kshs.5,500,000 which he paid to the vendor. That after the payment of the full purchase price the 1<sup>st</sup> defendant through the directors signed transfer forms in favour of the plaintiff/applicant. He was then issued with a title as the duly registered owner. He has since been in occupation of the suit property which is a residential house where the plaintiff has settled his family.

8. The plaintiff/applicant has established a prima facie with a probability of success. He has put forward the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. He will suffer irreparable harm which cannot be adequately compensated by an award of damages. The suit property is a matrimonial home where the applicant has settled his family. If taken away they will be left homeless. The subject property was purchased through a mortgage which has greatly pressed the applicant on its repayment. He has put forward the case of **Giella vs Cassman Brown [1973] EA 358; Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR**. He prays that the application be allowed.

#### **The 1<sup>st</sup> Defendant's/Respondent's Submissions**

9. The 1<sup>st</sup> defendant/respondent sold the suit property to one Fredrick M. Oeri who later requested to be transferred to Joan Yatich Kilele who was to pay Kshs.1,576,487/40 to redeem the account. The 1<sup>st</sup> defendant/respondent is not privy to the agreement the plaintiff/applicant had with Joan Yatich Kilele. There is no evidence of consent by the 1<sup>st</sup> defendant/respondent to sell.

10. The said Joan Yatich Kilele could not lawfully sell the property to the plaintiff/applicant. The agreement between them is null and void for want of consent. There is no agreement between the plaintiff/applicant and the 1<sup>st</sup> defendant/respondent. The transfer is signed by the 1<sup>st</sup> defendant/respondent cannot be lawful and valid without an agreement and consideration. The plaintiff/applicant is not entitled to the reliefs sought and the application ought to be dismissed with costs.

#### **The 2<sup>nd</sup> defendant/respondent submission**

11. The plaintiff/applicant, the vendor and the 1<sup>st</sup> defendant/respondent duly performed their respective roles in the sale agreement. The plaintiff/application paid the entire purchase price and the 1<sup>st</sup> defendant/respondent released the completion documents and executed the transfer forms. Subsequently a title deed was issued by the Lands Registrar in favour of the plaintiff/applicant. He has put forward the case of **Kimaiyo Chemor & Another vs Joseph Kipkoech Chemor (2013) Eklr**. The 1<sup>st</sup> defendant/respondent has no right whatsoever to lock the suit property as it is under the plaintiff/applicant who enjoys proprietary rights of ownership to the exclusion of all others.

12. Order 52 rule 4 (2) of the Civil procedure Rules specifically states that application for production of cash account by advocates should be by way of originating summons and not by way of notice of motion. This prayer ought to be dismissed from the record. The 1<sup>st</sup> defendant/respondent has never sought for any balance of the purchase price or instituted any legal claim. The plaintiff/applicant has not raised any claims to warrant the production of cash account by the 2<sup>nd</sup> defendant/respondent. There is no cause of action against the 2<sup>nd</sup> defendant.

13. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and grounds of opposition, the written submissions of counsel and the authorities cited. The issue for determination are:-

*(i) Whether or not the plaintiff/applicant's application meets the threshold for grant of temporary injunction.*

*(ii) Whether the prayer for production of cash account by the 2<sup>nd</sup> defendant/respondent is properly brought before court.*

*(iii) Who should bear costs?*

14. At this juncture it is necessary to briefly examine the legal principles governing the application of this nature. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to prima facie case.

15. In the case **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

*“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

16. I am not satisfied that the plaintiff/applicant deserves this kind of protection.

17. The 1<sup>st</sup> defendant/respondent was not privy to the agreement between the plaintiff/applicant and Joan Yatich Kilele. The said agreement which is marked as annexure “RN1” to the plaintiff/applicant’s affidavit shows that the purchase price was paid to the vendor. Section 3 (3) of the Law of Contract Act, (Cap 23 Laws of Kenya) provides that all agreements for sale of immovable property must be in writing and signed by the parties. There is no such agreement between the 1<sup>st</sup> defendant/respondent and the plaintiff/applicant. The upshot of the matter is that the transfer signed by the 1<sup>st</sup> defendant/respondent cannot be lawful without an agreement and consideration. I find that the plaintiff/applicant has failed to establish a prima facie case with a probability of success at the trial.

18. It is the plaintiff’s/applicant’s case that the consideration was paid to the vendor Joan Yatich Kilele. The said amount can be ascertained. I find that he has failed to demonstrate that he will suffer irreparable loss that cannot adequately be compensated by award of damages if these orders were not granted.

19. As regard to the prayer for production of a cash account by the 2<sup>nd</sup> defendant/respondent, I am of the opinion that the same is not properly before court. Order 52 rule 4 (2) of the Civil procedure Rules provides that:-

***“Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate”.***

The said provision is worded in mandatory terms. The plaintiff/applicant has brought the application by way of notice of motion. This is contrary to the provision of the Civil Procedure rules. Rules are not made in vain. They must be adhered to. Consequently, this prayer is dismissed.

20. In conclusion, I find that this application lacks merit. The same is dismissed in its entirety. The costs will abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 7<sup>TH</sup> day of MAY 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the 1<sup>st</sup> Defendants

.....Advocate for the 2<sup>nd</sup> defendant

.....Court Assistant