



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 231 OF 2018

MARY MAKOFFU.....1ST PLAINTIFF

FREDRICK MAKOFFU.....2ND PLAINTIFF

=VERSUS=

CANUCK HOLDINGS LIMITED.....1 ST DEFENDANT

JACQUELINE W NJERU formely T/A

JAVISAPA ENTERPRISES LIMITED.....2 ND DEFENDANT

ANN WANGARI NJUGUNA.....3RD DEFENDANT

HUMPHREY W OKUKU T/A

OKUKU AGENCIES AUCTIONEERS.....4TH DEFENDANT

CHIEF LAND REGISTRAR.....5TH DEFENDANT

RULING

1. The plaintiffs are mother and son. On 16/5/2018, they brought this suit contending that on 20/8/2009, the 1st plaintiff entered into a sale agreement with the 1st defendant pursuant to which the 1st defendant agreed to sale to the 1st plaintiff **Flat Number 3 Block C** erected on **Land Reference Number 3724/15** (the **suit property**) situated in Lavington, Nairobi, at a consideration of Kshs 7,000,000. They contended that the 1st plaintiff paid the purchase price but the lease instrument could not be registered because there was a prohibitory order against the Title issued in Nairobi High Court Civil Case Number 524 of 2009 which involved the 1st and 2nd defendants. They added that, unknown to the 1st plaintiff, the two parties to the said suit subsequently compromised the suit through a consent order which vacated the prohibitory order and sanctioned sale of the suit property through public auction. The suit property was subsequently sold to the 3rd defendant through a public auction conducted by the 4th defendant. Consequently, they were dispossessed of the suit property and evicted therefrom in May 2018.

2. Aggrieved, the plaintiffs brought this suit seeking, among other prayers, a declaration that the said consent order was illegal, and an order setting it aside. They also sought an order staying or reversing the sale.

3. Together with the plaint, the plaintiffs brought a notice of motion dated 15/5/2018 seeking the following orders:

1) *Spent.*

2) *Spent.*

3) *Spent.*

4) *That pending the hearing and determination of this suit, a temporary injunction be issued restraining the 2nd, 3rd and 4th respondents whether by themselves, their employees, servants and or agents or otherwise, assigns and or any person whatsoever acting on their behalf and or under their mandate and or instructions from trespassing, alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring charging or otherwise in any manner whatsoever interfering with Flat*

Number 3, Block C erected on Land Reference Number 3734/15 Lavington, Nairobi.

5) That an order be issued by this honourable court staying and or setting aside the order issued on 6th December 2017 in Civil Case No 524 of 2009; *Jacqueline Wambui t/a Javisapa Enterprises Limited vs Canuck Holdings Limited* which directed that there be a sale by public auction of Flat Number 3 Block C erected on Land Reference Number 373/15 Lavington, Nairobi as the same was illegally obtained.

6) That an order be issued directing the 2nd, 3rd and 4th respondents and or their employees, servants and or agents or otherwise, assigns and or any person whosoever acting on their behalf and or under their mandate and or instructions to vacate Flat Number 3 Block C erected on Land Reference Number 3734/15 Lavington, Nairobi.

7) That in the alternative to prayer 6 hereinabove, an order be issued directing that the status quo before 11th May 2018 be maintained and the 2nd applicant's occupation of the suit property be reinstated.

8) That an order directing the 2nd and 4th respondents to return all items illegally seized from Flat Number 3, Block C erected on Land Reference Number 3734/5 Lavington, Nairobi and or compensate for the loss and damages suffered by the 2nd applicant.

9) That an order be issued directing the Officer Commanding Station Muthangari Police Station and or his officers to oversee and ensure peace during the said vacation of Flat Number 3, Block C erected on L. R. No 3734/15 Lavington, Nairobi and the return of all household items confiscated during the illegal eviction of the 2nd application on 11th May 2018 by the 2nd, 3rd and 4th respondents;

10) Spent

11) That pending the hearing and determination of this suit an order be issued staying, cancelling and or stopping any purported registration and or any similar entry in the register of titles by the 5th respondent conferring proprietorship interests on the 3rd respondent.

12) That costs of this application be provided for

4. The said application is the subject of this ruling.

5. The application was supported by the affidavit of the 1st plaintiff sworn on 15/5/2018. She reiterated her case as summarized above. She further deposed that she was a *bonafide* purchaser and proprietor in possession and occupation of the suit property. She added that she could not initiate objection proceedings against the public auction because she was not served with a notice of attachment or notice of auction. She further deposed that she could not lodge a caveat against the title because she did not have a court order. Lastly, she deposed that the 2nd plaintiff was in actual occupation of the suit property until May 2018 when he was evicted.

6. The 1st defendant did not respond to the application. The 2nd defendant opposed the application through a replying affidavit sworn on 20/6/2018. She deposed that she entered into a joint venture agreement with the 1st defendant pursuant to which she was the main contractor in the construction of blocks of apartments that now stand on Land Reference Number 3734/15 and the suit property is one of the said apartments. At the end of the construction, she had not been paid her entitlements under the joint venture agreement and this prompted her to initiate Nairobi High Court Civil Case Number 524 of 2009 seeking to recover her dues. The said suit was stayed pending arbitration. Subsequently, the arbitral tribunal awarded her Kshs 33,816,864 plus interest and costs. The arbitral award was subsequently adopted as a judgment of the court. The judgment was subsequently enforced through a sale by public auction and a vesting order was issued by Sewe J on 2/5/2018. The 2nd defendant further deposed that the plaintiffs were all along aware of the proceedings and the sale, adding that the defendant placed several advertisements in the local dailies.

7. The 3rd defendant filed a replying affidavit sworn on 20/6/2018. She deposed that she bought the suit through a public auction conducted on 16/4/2018 by the 4th defendant. She added that vacant possession was handed to her after paying the requisite purchase price. She deposed that the plaintiffs did not safeguard their interest in the suit property on time and therefore the application was unmerited and should be dismissed.

8. The 4th defendant filed a replying affidavit sworn on 20/6/2018. He deposed that he was appointed by the court to auction the suit property. He further deposed that the purchaser took possession in the presence of the 2nd plaintiff. He added that the 2nd plaintiff took his belongings which had been kept by him. He averred that this suit was *subjudice* and *resjudicata* and the same should be dismissed with costs.

9. The application was canvassed through written submissions. The plaintiffs filed their submissions on 23/1/2019. They submitted that this court had the jurisdiction to issue the orders sought. They contended that Section 13(1) of the Environment and Land Court and Article 162(2) (b) of the Constitution conferred jurisdiction on this court to entertain the dispute herein. It was their submission that this court had the jurisdiction to set aside the judgment and decree issued in Nairobi HCCC 524 of 2009 because there was fraud involved in acquiring the suit property. Reliance was placed on **S P Chengalvaraya Naidu v Jagannath (199) AIR 853, Badami (D) Tr. Her LR v Bhali Supreme Court of India Civil Appeal No 1723 of 2008** where the court held that a decree or judgment obtained by fraud was treated as a nullity by every court.

10. The plaintiffs further submitted that they had established that the 1st plaintiff was the lawful owner of the suit premises after paying full purchase price for the suit property. They added that they had met the three conditions for grant of a temporary injunction as set out in the case of **Giella v Cassman Brown (1973) EA 358**. It was their submission that they had established a *prima facie* case by producing

documents showing that the 1st plaintiff was the legal owner of the suit property. Reliance was placed on case of **David Ngugi Ngaari v Kenya Commercial Bank Limited (2015) eKLR** where the court defined a prima facie case as the case where the court will conclude that there exists a right which had been infringed based on the materials placed before it.

11. On the limb of irreparable damage, it was submitted that the 1st plaintiff had developed the property with the intention of making it her retirement home and should the defendants be allowed to keep the suit property, the resultant injury would not be indemnifiable by way of damages. It was also submitted that since the 1st plaintiff was unlawfully evicted and rendered homeless, no amount of money could adequately indemnify him against the injury suffered.

12. On the limb of balance of convenience, it was submitted that the balance of convenience tilted in favour of grant of injunction. Reliance was placed on **Kisimani Holdings Limited & another v Fidelity Bank Limited (2013) eKLR** where the court held that selling one's property deprives one a right recognized in law and should not be allowed to proceed under doubtful circumstances.

13. The 2nd and 3rd defendants filed their submissions on 5/3/2019. It was their submission that the plaintiffs had not established a prima facie case to warrant an injunction. It was further submitted that they had not demonstrated that they had a genuine case or that their rights had been infringed, contending that the title to the suit property was registered in the name of the 3rd defendant. It was argued that the orders given in favour of the 2nd defendant had never been challenged by the plaintiffs. They added that the auction was similarly not challenged.

14. On the limb of irreparable loss, it was submitted that the plaintiffs had not demonstrated to this court the loss they would suffer. It was further submitted that the loss suffered by the plaintiffs was occasioned by themselves by failing to carry out due diligence because the property had an encumbrance when it was paid for. On the balance of convenience, it was their submission that the balance of convenience tilted against the plaintiffs because the property was registered in the 3rd defendant's name and the claim by the purchaser could not override their interest based on the orders issued by the court in Nairobi HCCC 524 of 2009. Lastly, it was submitted that the plaintiff's slept on their rights because all along they knew about the case and the encumbrance.

15. The 2nd and 3rd defendants challenged the court's jurisdiction. It was their submissions that the orders issued in HCCC 524 of 2009 can only be set aside by the court which issued the orders or by an appellate court. Reliance was placed on **Joseph Ndirangu Waweru t/a Mooreland Mercantile Co & another v City Council of Nairobi (2015) eKLR**. It was also submitted that the plaintiffs were not parties to that suit and therefore, the judgment and decree was regularly entered. It was further submitted that the order of eviction and return of the goods the plaintiffs claim were seized are immature and can only be determined after trial. They added that this court cannot grant an order to maintain the *status quo* because the property has already changed hands and the legality of the title will be determined during trial.

16. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. Three key issues fall for determination in this application. The first issue is whether this court has jurisdiction to stay and or set aside the order issued on 6/12/2017 in Nairobi HCCC No 524 of 2009 as sought by the applicants. The second issue is whether the applicants have satisfied the criteria for grant of mandatory orders as sought by them. The third issue is whether the applicants have satisfied the criteria for grant of prohibitory interim injunctive orders as sought. I will make brief pronouncements on the three issues sequentially in that order.

17. The first issue relates to the jurisdiction of this court to stay and or set aside the order issued by the High Court on 6/12/2017 in Nairobi HCCC No 524/2009. There is no gainsaying that both the High Court and the Environment and Land Court are distinct third tier superior courts of equal status created by the Constitution of Kenya 2010. The Supreme Court of Kenya in **Republic v Karisa Chengo & 2 others (2017) eKLR** made it clear that the three third tier superior courts created by the Constitution are distinct superior courts of equal status exercising distinct jurisdiction. This court does not therefore exercise review or appellate jurisdiction over the High Court. It therefore follows that the proper forum for seeking stay and review orders sought by the applicants is the court which made the impugned orders. That court is the High Court. Similarly, the proper platform for canvassing the stay and setting aside application is Nairobi High Court Civil Case Number 524 of 2009 in which the impugned orders were made.

18. In the event that the applicants feel that this court is now the proper court seized of constitutional jurisdiction to deal with the particular dispute, the recourse available to them is to apply for transfer of Nairobi HCCC 524 of 2009 to the Environment and Land Court and thereafter move the court for review orders after the suit is properly transferred. It is therefore my finding that this court lacks jurisdiction to stay and or review the order issued on 6/12/2017 by the High Court in Nairobi HCCC No. 524 of 2009. Secondly, this suit is not the proper platform for seeking the review orders.

19. The second issue is whether the applicants have satisfied the criteria for grant of mandatory injunctive orders. The criteria upon which a mandatory injunctive order is granted was outlined in the case of **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901** in the following terms::

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had already been granted, that being a different and higher standard than was required for a prohibitory injunction.”

20. The applicants in the present application seek eviction of the current occupants of the suit property. Presented to the court as evidence to support that application is a consent court order sanctioning the sale of the suit property. Also presented as evidence is a court order issued by Sewe J vesting the suit property in the purchaser, Anne Wangari Njuguna (3rd defendant). The two court orders have not been set aside and subsist to date. Without saying much, I do not think the circumstances of the present application constitute the clear case and special circumstances contemplated in **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901**. It is therefore my finding that the applicants have not satisfied the criteria for grant of a mandatory injunctive order.

21. The last issue is whether the applicants have satisfied the criteria for grant of ordinary interim prohibitory injunctive order. The ordinary interim prohibitory injunctive orders are sought against the 2nd, 3rd and 4th defendants together with their servants, agents, assigns and any person acting on their behalf. The evidential material placed before court demonstrate, firstly, that the public auction took place pursuant to the impugned consent order. Secondly, the property has been vested in the 3rd defendant through a court vesting order which is still in force. In my view, in the circumstances, the plaintiffs do not appear to have a *prima facie* case against the 3rd defendant who is the current registered proprietor of the suit property. This court will not be acting properly if it were to issue the injunctive orders which serve to displace the 3rd defendant in the circumstances of this case.

22. Lastly, the 1st plaintiff's case is that she bought the suit property from the 1st defendant at Kshs 7,000,000. The 1st defendant subsequently entered into a compromise allowing auction of the suit property. The 2nd plaintiff's case is that he was unlawfully evicted. He has quantified his loss. It is therefore my view that should the plaintiffs succeed, they will be able to quantify their damages and they will be indemnified through an award of damages. It is therefore my finding that the applicants have not satisfied the criteria for grant of a prohibitory injunction.

23. In light of the above findings, the plaintiff's notice of motion dated 15/5/2018 is declined. Taking into account the background of this dispute and the apparent probable role played by the 1st defendant in creating the dispute herein, I will not condemn the plaintiffs to pay costs of the application at this point. Costs of the application will be in the cause and will await disposal of the main suit.

DATED, SIGNED AND READ AT NAIROBI ON THIS 17 TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Muthama holding brief for Mr Ndolo for the plaintiff

Mr Pala for the 4th respondent and holding brief for Mr Njenga for the 3rd and 4th respondents .

Court Clerk - June Nafula