



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 500 OF 2016

Z K K alias A K K J.....1ST PLAINTIFF

Z K K alias A K (Suing as the Legal Representative

of the estate of the late N S S alias N Z K J.....2ND PLAINTIFF

VERSUS

A S M.....1ST DEFENDANT

S S M.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

ABDULKADIR ALI IBRAHIM.....4TH DEFENDANT

RULING

What is before me is the plaintiff’s application dated 25th May, 2016 in which the plaintiff has sought a temporary injunction restraining the defendants from; disposing of, transferring, alienating, assigning, charging, or dealing in any other manner with all that parcel of land known as L.R No. 1870/V/[particulars withheld] located at Mangu Gardens off Church Road, Westlands, Nairobi(hereinafter referred to as “the suit property”) and from dispossessing or evicting the plaintiff therefrom pending the hearing and determination of this suit.

The plaintiffs’ case:

The plaintiff has brought this suit against the defendants in his capacity as the surviving spouse of one, N S S alias N Z K J (hereinafter referred to as “the deceased”) and as the legal representative of the deceased. The plaintiff has contended that he is the owner of the suit property which he has occupied for over 30 years. The plaintiff has contended that without any reasonable or justifiable cause, the defendants have sought to dispossess him of the suit property. The plaintiff has contended that he married the deceased in 1982 and that the deceased is survived by his step daughters, the 1st and 2nd defendants who are resident in Oman. The plaintiff has averred that after marrying the deceased, he paid for the purchase of the suit property which was registered in the deceased’s name. The plaintiff has averred that he resided on the suit property with the deceased for a period of 32 years before her demise. The plaintiff has contended that since the suit property was acquired during his marriage to the deceased, the same constitutes Matrimonial Property under section 6 of the Matrimonial Property Act, No. 49 of 2013. The plaintiff has averred that prior to her death, the deceased had been sick for a very long time and had lost

her mental capacity for which she was under medication. The plaintiff has averred that upon the death of the deceased the 1st and 2nd defendants caused themselves to be registered as the owners of the suit property without his knowledge. The plaintiff has averred that the registration of the suit property in the names of the 1st and 2nd defendants was procured by fraud since the deceased lacked mental capacity to comprehend and appreciate the nature of the transaction which may have led to the said transfer. The plaintiff has contended further that the transfer of the suit property to the 1st and 2nd defendants was void under section 12(1) of the Matrimonial Property Act for want of his consent. The plaintiff has averred further that the deceased held the suit property in trust for the plaintiff under section 13(a) of the Matrimonial Property Act and as such he had an overriding interest in the suit property. The plaintiff has averred that after the death of the deceased, the 1st and 2nd defendants in the company of strangers entered the suit property and carried away the deceased's personal effects including, cash, cooking vessels, jewelry and clothes. The plaintiff has averred that the said acts amounted to intermeddling with the estate of a deceased person which is a criminal offence. The plaintiff has averred that on 28th November, 2015, the 1st and 2nd defendants returned to the suit property again in the company of strangers and attempted to gain entry into the property forcefully thereby destroying the property. The plaintiff has averred that he reported the above incidents to the police but was advised to seek the court's intervention. The plaintiff has averred that his attempts to register a caveat against the title of the suit property to restrain the 1st and 2nd defendants from transferring the property to third parties did not succeed.

The plaintiff has averred that the 4th defendant came to the suit property in the company of auctioneers and the police and purported to levy distress on his goods and to evict him from the suit property. The plaintiff averred that he was forcefully evicted from the suit property by the 4th defendant in the company of the said auctioneers and the police and the 4th defendant proceeded to lock the suit property and posted a guard with instructions to prevent him from accessing the property. The plaintiff has averred that it took the intervention of his advocates on record and the police for him to gain access to the suit property. The plaintiff has averred that he is apprehensive that the defendants may return to the suit property before the hearing of the suit and forcefully evict him therefrom. The plaintiff has averred that unless the orders sought are granted, he stands to suffer irreparable harm.

The application was opposed by the 4th defendant. The other defendants did not respond to the application.

The 4th defendant's case:

The 4th defendant has contended that he purchased the suit property from A S M A B, N S M A B and S M A B (hereinafter referred to jointly as vendors") at a consideration of Kshs. 18,000,000/- through agreement for sale dated 10th December, 2015. The 4th defendant has averred that when he purchased the suit property from the vendors who are the daughters of the deceased, the property was in their names, the same having been transferred to them by the deceased on 24th April, 2015 during her lifetime. The 4th defendant has contended that before transferring the suit property to the vendors, the deceased had granted to the vendors a power of attorney on 4th May, 2010 which authorized them to deal with the suit property. The 4th defendant has contended that the manner in which the deceased dealt with the suit property was inconsistent with the plaintiff's claim that the deceased held the suit property in trust for him. The 4th defendant has contended that the plaintiff who was the husband of the deceased did not place any evidence before the court showing his involvement in the acquisition of suit property. The 4th defendant averred that the deceased who was the sole registered owner of the suit property had power to transfer the suit property during her lifetime to the vendors who lawfully sold the suit property to the 4th defendant. The 4th defendant has averred that he carried out due diligence before purchasing the suit property and that he acquired the suit property lawfully. The 4th defendant has contended that his title to the suit property is absolute and indefeasible. The 4th defendant has averred that the suit property was transferred to him prior to the filing of this suit a fact that was known to the plaintiff. The 4th defendant has averred that the suit property did not form part of the deceased's estate and was not a matrimonial

property as claimed by the plaintiff.

Analysis and determination:

The plaintiff's application was argued by way of written submissions. The plaintiff filed his submissions on 17th January, 2017 while the 4th defendant filed his submissions on 22nd February, 2017. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the 4th defendant's affidavit in reply to the application. Finally, I have considered the written submissions filed by the parties' respective advocates and the authorities cited in support thereof. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for interlocutory injunction must establish a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was stated further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 that was cited by the plaintiff and went further to state as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

I am satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. It is not disputed that the deceased was married to the plaintiff and that they lived as husband and wife on the suit property as their matrimonial home until the death of the deceased. It is also not disputed that the suit property was acquired by the deceased during her marriage to the plaintiff. It is also not in dispute that the suit property was transferred to the vendors during the lifetime of the deceased while the deceased and the plaintiff were occupying the same as their matrimonial home. The suit property was transferred to the vendors on 24th April, 2015. At the material time, section 93(3) and (4) of the Land Registration Act, 2012 provided as follows;

“(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition”.

The plaintiff has contended that the suit property was matrimonial property and as such the deceased had to seek his consent pursuant to the said provisions of the Land Registration Act and section 12(1) of the Matrimonial Property Act, 2013 before transferring the property to the vendors. There is no evidence before the court showing that the plaintiff consented to the transfer of the suit property by the deceased to the vendors. If no such consent was obtained, the plaintiff would be entitled to have the transfer of the suit property by the deceased to the vendors nullified. If the court finds that the vendors had no valid title to the suit property, it would follow that they had not title that they could convey to the 4th defendant. It is also not disputed that when the vendors sold and transferred the suit property to the 4th defendant, the plaintiff was in occupation of the property. Although he may not have had a legal obligation to make inquiries about the plaintiff's interest in the suit property, I am of the view that proper due diligence would have necessitated such inquiry to be made. The 4th defendant has not contested the plaintiff's contention that the 4th defendant invaded the suit property on 25th May, 2016 in the company of auctioneers and police officers and attempted to forcefully evict the plaintiff from the suit property. I am of the opinion that even if the 4th defendant was the registered proprietor of the suit property, it was not open to him to forcefully evict the plaintiff from the suit property. Having purchased the suit property while the plaintiff was in possession, he had to follow the due process to obtain possession.

I am satisfied from the foregoing that the plaintiff has established a prima facie case with a probability of success against the defendants. I am also satisfied that the plaintiff would suffer irreparable damage if the injunction sought is not granted. The plaintiff has shown that there was an attempt to forcefully evict him from the suit property. If the injunction sought is not granted, the plaintiff may be evicted from the suit property which may thereafter be put beyond the plaintiff's reach by the 4th defendant. In the case of Notco(Mombasa) Ltd. and Another vs. Mrs. Halima Bakari Ramadhani, Civil Appeal No. 158 of 1992, the court stated as follows:

“Where the Plaintiff has been residing in the suit premises and that has been her home and the seat of the family for more than four decades, that place that she fondly calls her home has a value which cannot be measured purely on economic terms as money cannot buy for the Respondent a home with the same sentimental value and attachment as the suit property.”

The plaintiff herein finds himself in the same situation as the respondent in the cited case. Having found that the plaintiff has established a prima facie case and has also demonstrated that he will suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted, it is not necessary for me to consider the balance of convenience. Even if I was to consider the same, I am of the view that the balance of convenience in the circumstances would tilt in favour of maintaining the status quo. The 4th defendant had urged the court not to allow the plaintiff's application on the grounds that the plaintiff had concealed material facts to the court and had also misled the court. I am not satisfied that the plaintiff had full knowledge of the facts which he is accused of concealing to the court. I am also not convinced that the court was misled by the plaintiff into issuing the orders that were granted herein on 26th May, 2016.

For the foregoing reasons, the Plaintiff's application dated 25th May, 2016 is allowed on the following terms:

(i) An Injunction is hereby issued for a period of fifteen(15) months or until the hearing and determination of this suit whichever comes earlier restraining the defendants, their agents, servants and/or anyone acting through their authority from disposing of, transferring, alienating, assigning, charging or evicting the plaintiff from all that property known as Land Reference No. 1870/V/[particulars withheld] located at Mangu Gardens off Church Road, Westlands, Nairobi.

(ii) The cost of the application to be in the cause.

Dated and Delivered at Nairobi this 19th day of January, 2018

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

Mr. Ogado for the Plaintiff

N/A for the 1 and 2nd Defendants

N/A for the 3rd Defendant

Mr. Masika for the 4th Defendant

Catherine Court Assistant