



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 10 OF 2018

PERIS SHARIFA WANJIRU.....PLAINTIFF/APPLICANT

VERSUS

DAVID KIRWA KIMAYO.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 18th January 2018 brought by way of notice of motion by the plaintiff/applicant seeking for orders:

a) Spent

b) An interlocutory injunction do issue against the defendant restraining him whether by himself his servants and /or agents from trespassing, constructing, demolishing alienating, leasing, charging, collecting rent, selling and /or depriving the plaintiff of her interests or carrying out any acts inconsistent with the plaintiff's proprietorship in respect of that land parcel known as ELDORET MUNICIPALITY/BLOCK 11/1081 pending the hearing and determination of this application *inter partes* and thereafter pending the hearing and determination of the suit.

c) The honourable court do order the defendant to remit to court all the rent collected from October 2017 and to continue remitting rent collected from the plaintiff's premises situated on that parcel of land known as ELDORET MUNICIPALITY/BLOCK 11/1081 until hearing of this application *inter partes* and thereafter pending the hearing and determination of this suit.

d) The costs of this application be provided for.

This matter was filed under certificate of urgency on the same date when the court granted interim orders of injunction. The defendant later filed an application for setting aside the *ex parte* orders but the court ordered that the issues be canvassed during the hearing of the application.

Counsel for the plaintiff/applicant argued the application and relied on the grounds on the face of the application together with the supporting affidavit and annexures. He stated that the plaintiff was registered as the owner of the suit land on 28/12/06 and that she entered into a sale agreement on 30/5/17 with the defendant.

Counsel submitted that it was a term of the agreement that the defendant was to pay the plaintiff Kenya shillings. One million and a further 5.2 million was to be paid to oriental bank to offset a loan which the plaintiff was a guarantor. Counsel further submitted that the plaintiff was at liberty to rescind the agreement should the defendant fail to pay the balance by 15/9/17 of which he defaulted.

Mr. Mathai Counsel for the plaintiff further submitted that on 18/9/17 the applicant communicated with the defendant vide a letter indicating that she had rescinded the agreement due to non-payment of the due amount as per agreement and the bank was notified accordingly.

It was further Counsel's submission that the defendant went ahead and transferred the suit land in his name on 10/10/17 contrary to section 26 of the Land Registration Act. He posed a question whether the title was acquired procedurally as the defendant registered a charge on the same day. He submitted that the balance of convenience tilts in favour of the plaintiff and therefore the application should be allowed.

Mr. Ayieko for the defendant/respondent opposed the application and relied on the replying affidavit sworn by David Kirwa Kimaiyo. He submitted that the application is an attempt by the applicant to enrich herself unjustly as the prayer sought is equitable in nature and as such the applicant must come to court with clean hands.

It was Counsel's submission that the suit land is registered in the defendant's name who has a right to property which is protected by article

40 of the Constitution. He further submitted that the property was acquired procedurally as per the agreement on record whose terms are very clear. Further that the applicant has not pleaded fraud in the plaint and the land Registrar has not been enjoined in this suit.

Mr. Ayieko stated that the applicant was paid Kshs. 600,000/ and was to pick a balance of Kshs. 400,000/ which she has been dodgy about. As for the letter for repudiation of the contract he stated that the same was addressed to the respondent but the address was for the applicant as demonstrated by annexure PSW3. Counsel stated that there will be no loss that the applicant will suffer which cannot be cured by way of costs. He therefore urged the court to find that the convenience tilts in favour of the respondent and thus the application should be dismissed with costs.

Analysis and determination

Both Counsel argued the application to support their client's position. They relied on the threshold for grant of temporary injunctions and listed authorities in favour of the position they took. Before the end of their submission, Counsel agreed by consent on the following terms.

By consent of both parties,

- 1) Pending the ruling of the application dated 18/1/18 the proceeds of rent from land parcel No. Eldoret Municipality Block 11/1081 be deposited with M-ORIENTAL BANK ELDORET Bank loan account No.0050051183.
- 2) The notice issued on 23/1/18 by the applicant is hereby withdrawn and a fresh notice be issued to the tenants.
- 3) The respondent to serve the applicant through Mathai Maina & Co. Advocates with copies of bank slips of rent deposited with Oriental bank and a clear record of the tenants.

The principles for grant of injunctions are clear and I need not repeat the same. Both Counsel have alluded to the said principles and stated that their clients had either met or not met the threshold.

The issue for determination is whether the plaintiff/applicant has satisfied the principles for grant of injunction as was laid down in the case of Giella vs Casman Brown & Co Ltd (173) EA 358. It is not in dispute that the plaintiff entered into a sale agreement with the defendant. It is also not in dispute that the defendant paid Kshs. 600,000/ and he was supposed to pay Kshs. 400,000/ by 15/9/17. It is further on record that the plaintiff wrote a letter to the defendant on 18/9/17 rescinding the agreement. It was the defendant's contention that he paid the amount to Seneti Oburu & Co Advocates and the plaintiff was asked to pick the cheque but she did not pick it prompting the advocates to send a letter to her by registered post.

The suit plot is currently registered in the defendant's name and the issue as to whether the same was done procedurally or unprocedurally is a matter that will be dealt with at the full trial of the case. The fact that the registration was done and a charge registered on the same day does not necessarily mean that the procedure was flawed. The land was sold with an encumbrance of a loan to Oriental Bank which the defendant was taking over. There is no way the bank could have discharged the property without full payment of the loan. This was one reason why the plaintiff was selling the property to the defendant to help offset the loan.

The other issue that was raised was that the plaintiff had rescinded the agreement two days after it fell due. There is evidence of communication to pick the balance of Kshs. 400,000/ vide a letter from Seneti Oburu & Co Advocates before the date of the completion of the agreement. These are pointers that the plaintiff has not come to court with clean hands to demand for equity. This has not been explained.

The letter rescinding the agreement was addressed to the respondent with the applicant's address. It is important to note that the same was done 2 days after the due date. The LSK conditions of sale provides for 21 days for repudiation, this was not the case in this matter.

From the forgoing I find that the plaintiff has not established a prima facie case against the defendant with a probability of success against the defendant.

As to the second limb on whether the plaintiff will suffer irreparable loss that cannot be adequately compensated by an award of damages, I wish to state that this is a property which was sold and an amount was tagged to it. The plaintiff had an intention of relinquishing the suit property to the defendant at an agreed monetary compensation. I therefore find that this limb too fails.

Finally, I have considered the pleadings together with the submissions of counsel and the authorities thereof and come to the conclusion that the plaintiff's application dated 18th January 2018 lacks merit and is hereby dismissed with costs to the defendant.

Parties to comply with order 11 within 30 days and fix the main suit for hearing.

Dated and delivered at Eldoret on this 6th March, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Ayieko for the Defendant/Respondent and in the absence of Mr. Mathai for Plaintiff/Applicant.

Ms. Topister: Court Assistant.