



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 256 OF 2017(OS)

PARDEEP SINGH GHATAHORA (suing as

the legal representative of the estate of

GURNAM SINGH GHATAHORA).....PLAINTIFF

VERSUS

EXOTIC CRAFTS LIMITED.....1ST DEFENDANT

KCB BANK KENYA LIMITED.....2ND DEFENDANT

RULING

The application before me was brought by the plaintiff by way of Notice of Motion dated 18th April, 2017. In the application, the plaintiff has sought an order of injunction restraining the defendants from interfering with and/or demanding possession of all that parcel of land known as L.R No. 209/7023 (hereinafter referred to as “the suit property”) pending the hearing and determination of this suit.

The plaintiff’s case:

The plaintiff’s case as stated in his affidavit and further affidavit sworn on 18th April, 2017 and 25th July, 2017 respectively is as follows. At all material times, the late Gurnam Singh Ghatahara (hereinafter referred to as “the deceased”) was the registered owner of a half share of the suit property. The deceased died on 28th January, 2017. After his demise, the defendants erroneously and/or irregularly transferred the suit property from the deceased to the 1st defendant and charged the same to the 2nd defendant on 30th January, 2017. The plaintiff averred that the 1st defendant was harassing the deceased’s family seeking vacant possession of the suit property. The plaintiff averred that the 1st defendant had not furnished any evidence showing that the agreement for sale dated 18th September, 2015 allegedly entered into between the 1st defendant and the deceased was completed on or about 15th May, 2016 or that the completion period was extended. The plaintiff averred further that the documents made available by the 2nd defendant relating to the transaction showed that the same were executed after the completion period and were booked for registration after the death of the deceased thereby raising the question as to when the completion of the alleged agreement for sale took place.

The plaintiff averred that prior to his death the deceased had been ailing since August, 2016. The plaintiff averred that it was doubtful if the deceased was in a stable state of mind when he executed the purported instrument of transfer of the suit property in favour of the 1st defendant. The plaintiff averred further that as the legal representative of the deceased, his rights and interests in the suit property relate back and take effect from the date of death of the deceased and as such the booking of the purported instrument of transfer of the suit property for registration after the death of the deceased was contrary to section 51(2) of the Land Act, 2012.

The plaintiff averred further that a half share of the suit property that was held by the late Jaswant Singh vested upon Gurnam Singh Ghatahara (the deceased) and Pritam Kaur as administrators of the estate of the late Jaswant Singh on 28th September, 1984. The plaintiff averred that a continuing trust had been created in respect of the estate of Jaswant Singh since the late Jaswant Singh had minor children. The plaintiff averred that the said trust subsisted until the demise of Gurnam Singh Ghatahara (deceased) on 28th January, 2017 and that before any action could be taken in respect of the trust property, there was need for a further grant to be obtained so that one or more persons could join the sole administrator of the estate of Jaswant Singh in the administration of the estate. The plaintiff averred that the booking of the purported instrument of transfer of the suit property after the demise of one of the administrators of the estate of Jaswant Singh was contrary to the law.

The plaintiff averred further that the estate of the deceased stands to suffer irreparable loss since there is no proof that all remittances of the

alleged purchase price had been made to the advocate who is said to have been acting for the deceased in the alleged transaction. The plaintiff averred that owing to the 1st defendant's refusal to co-operate with the deceased's family, there was a further risk of loss of machinery worth millions of shillings which were on the suit property.

The 1st defendant's case:

The 1st defendant opposed the application through a replying affidavit sworn on 8th June, 2017 by its director, Tajinder Singh Karwal. The 1st defendant averred that Tajinder Singh Karwal and Shingara Singh Karwal entered into an agreement dated 18th September, 2015 with the deceased for the purchase of the suit property. The 1st defendant averred that the deceased executed the sale agreement as a vendor in his own right and in his capacity as a legal representative of the estate of Jaswant Singh, and further as an appointed attorney of the other administrator of the estate of Jaswant Singh, Pritam Kaur. The 1st defendant averred that upon the execution of the said agreement, it paid a deposit of Kshs. 21,000,000/- to Archer & Wilcock Advocates who were acting for the deceased and the estate of Jaswant Singh (the vendors) to hold as stakeholders. The 1st defendant averred that Tajinder Singh Karwal and Shingara Singh Karwal nominated it as the transferee of the suit property through a deed of nomination dated 10th November, 2016.

The 1st defendant contended that the deceased in his own right and, the deceased and Pritam Kaur as administrators of the estate of Jaswant Singh executed the instrument of transfer on 16th December, 2016 thereby completing the deceased's obligation under the sale agreement aforesaid. The 1st defendant averred that the said transfer was booked for registration on 30th January, 2017 without knowledge of the death of the deceased. The 1st defendant contended that it had since the registration of the said transfer and charge paid the balance of the purchase price to the tune of Kshs 210,000,000/- of which a sum of Kshs. 157,500,000/- was paid through the 2nd defendant to the firm of Archer & Wilcock to hold as stakeholders on behalf of the deceased.

The 1st defendant averred that the estate of the late Jaswant Singh of which the deceased was one of the administrators had no issue with the transaction in dispute. The 1st defendant averred that the plaintiff had failed to show any illegality on its part in the registration of the transfer of the suit property in its favour and as such the requirements for grant of the injunctive order sought had not been met.

The 2nd defendant's case:

The 2nd defendant opposed the application through a replying affidavit of its legal manager, Tom Ogola sworn on 6th July, 2017. The 2nd defendant averred that by a letter of offer dated 3rd August, 2016, it offered to the 1st defendant banking facilities in the nature of term loan I and term loan II. The 2nd defendant averred that the approved limit for term loan I was Kshs. 157,500,000/- which was for purposes of acquiring the suit property while the limit for term loan II was Kshs. 29,250,000/- which was for purposes of financing the sub-division of 7 go-downs on the suit property.

The 2nd defendant averred that the said term loan facilities were to be secured by way of among others, a legal charge of Kshs. 250,000,000/- over the suit property which was to be registered in the name of the 1st defendant. The 2nd defendant averred that a legal charge dated 29th December, 2016 was created and registered against the title of the suit property on 30th January, 2017.

The 2nd defendant averred that the sale agreement dated 18th September, 2015 and the instrument of transfer dated 16th December 2016 were executed before the death of the deceased and that the plaintiff had not challenged the deceased's signatures on the said documents. The 2nd defendant averred further, that the plaintiff had not challenged and/or questioned the deceased's passport photograph, identification number as well as PIN number affixed on the transfer document.

The 2nd defendant averred that the deceased's execution of the sale agreement and transfer signified a completed transaction. The 2nd defendant contended that plaintiff had failed to demonstrate any irregularity and/or illegality in the registration of the transfer and charge in dispute as such there was no basis for granting the reliefs sought.

The Submissions:

The plaintiff's application was argued orally before me on 3rd October, 2017. The advocate for the plaintiff submitted that ½ share of the suit property was registered in the name of the deceased while the other ½ share was held by the estate of Jaswant Singh. The plaintiff's advocate argued that the deceased passed away on 28th January, 2017 and that his half share in the suit property devolved to his estate under the Law of Succession Act, Chapter 160 Laws of Kenya with effect from 28th January, 2017. Counsel referred to section 51(2) of the Land Act, 2012 and submitted that the interests and rights of the beneficiaries of an estate in land registered in the name of a deceased person takes effect from the date of death of the deceased proprietor. Counsel submitted that the sale in contention could not have been completed since the payment of the purchase price had not been made and registration of the transfer had not been effected as at the date of death of the deceased. Counsel submitted further that even possession of the suit property had not been given to the 1st defendant. The advocate for the plaintiff submitted further that the rights of the beneficiaries of the deceased's estate had been infringed and that there was no evidence to show that the sale had been completed before the death of the deceased. Counsel submitted that the transfer that was registered after the death of the deceased was irregular. She argued further that the deceased's estate was suffering and would continue to suffer irreparable harm as it had been prevented from accessing the suit property. Counsel submitted that the balance of convenience tilts in favour of the plaintiff. The plaintiff's advocate submitted that it was doubtful if the deceased was involved in the sale transaction and that even if he was involved, it would have been left to the estate of the deceased to complete the same.

In his submissions in reply, the 1st defendant's advocate submitted that there was no contention that the deceased did not sign the sale agreement and the instrument of transfer dated 18th September, 2015 and 10th December, 2016 respectively. He argued that the transfer was

clear that the deceased had acknowledged receipt of the purchase price in the sum of Kshs. 210 million. The 1st defendant's advocate admitted that the transfer was lodged for registration after the death of the deceased. He submitted that the said transfer was lodged for registration by the 2nd defendant's advocates who were not aware that the deceased had passed away.

The 1st defendant's advocate submitted that the deceased's estate had not suffered any prejudice as a result of the registration of the said transfer after the death of the deceased. He argued that there was nothing left for the estate of the deceased to complete and that after the transfer of the property; the same ceased to be part of the estate of the deceased. Counsel submitted that the plaintiff had not met the conditions for the grant of the orders sought.

In his submission in reply, the 2nd defendant's advocate associated herself with the submissions by the advocate for the 1st defendant and submitted that the deceased's signature on the sale agreement and transfer had not been challenged. She argued that there was no evidence that the deceased was of unsound mind when he signed the aforesaid documents. Counsel argued that upon the deceased executing the agreement for sale and the instrument of transfer, the suit property ceased to be part of the deceased's estate. Counsel submitted that what was part of the estate was the purchase price that had been paid for the suit property. Counsel submitted further that section 51(2) of the Land Act, 2012 only takes effect after the issuance of a full grant.

Analysis and determination:

I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavits that were filed by the defendants in opposition to the application and the submissions by the advocates for the parties. What is before me is an application for interlocutory injunction. The issue for determination is whether the plaintiff has satisfied the conditions for grant of a temporary injunction. The principles which guide the court when considering an application for a temporary injunction were set out in the case of Giella vs. Cassman Brown and Co. Ltd. (1973) E.A 358. An applicant for a temporary injunction must establish a prima facie case with a probability of success; demonstrate that he will suffer irreparable injury which cannot be compensated by an award of damages and; where the court is doubtful, the application is determined on a balance of convenience. In the case of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as:

“a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal stated 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 bona fide 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.”

From the material before me, I am not satisfied that the plaintiff has satisfied the conditions for grant of the temporary injunction sought. The plaintiff's case is that the suit property was transferred to the 1st defendant and thereafter charged to the 2nd defendant after the death of the registered proprietor thereof. That fact is not contested. The plaintiff has contended that since the suit property was registered in the name of the deceased as at the time of his death, it formed part of his estate and as such should have been dealt with in accordance with the provisions of the Law of Succession Act, Chapter 160 Laws of Kenya. The plaintiff has also contended that it is doubtful whether the deceased executed the instrument of transfer of the suit property in favour of the 1st defendant. The plaintiff has also brought up the issue of the resulting trust arising from the estate of Jaswant Singh.

The defendants have placed sufficient evidence before the court showing that as at the date of his death, the deceased had signed the agreement for sale and instrument of transfer. What remained was the registration of the said transfer in favour of the 1st defendant. In the said instrument of transfer, the deceased acknowledged having received the purchase price in full. The plaintiff has not placed any evidence before the court showing that the purchase price for the suit property was not paid to the firm of Archer & Wilcock Advocates as contended by the defendants. The deceased having received the full purchase price for the suit property and having executed the instrument of transfer in favour of the 1st defendant and provided all the completion documents, I am of the view that the sale had been completed and there was nothing left for the estate of the deceased to do regarding the transaction.

I am of the view that after receipt of the purchase price and the execution of the instrument of transfer, the deceased held the suit property in trust for the 1st defendant pending registration of the said transfer. I am not persuaded in the circumstances that the suit property formed part of the estate of the deceased. As to whether or not the deceased had entered into the said agreement for sale and executed the instrument of transfer, there is no evidence placed before the court to the effect that the deceased was not in sound mental condition when he is said to have executed the said agreement and transfer. As rightly pointed out by the defendants', the signature of the deceased on the two documents was not contested. With regard to the estate of Jaswant Singh, the plaintiff has not controverted the defendants' claim that the estate of Jaswant Singh has no problem with the transaction. In any event, the plaintiff has not brought this suit on behalf of the estate of Jaswant Singh.

For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case against the defendants with a probability of

success. It has also not been demonstrated that the plaintiff would suffer irreparable harm that cannot be compensated in damages. The upshot of the foregoing is that, I find no merit in the Notice of Motion dated 18th April, 2017. The application is dismissed with costs to the defendants.

Delivered and Signed at Nairobi this 26th day of April, 2018.

S.OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Mutua h/b for Shabana for the Plaintiff

Ms. Munene for the 1st Defendant

Ms. Akonga for the 2nd Defendant

Catherine Court Assistant