



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.637 OF 2017

MARGARET WAMBUI GATHIGA.....PLAINTIFF/APPLICANT

-VERSUS-

SAMUEL MURIGI WAIGWA.....DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Plaintiff's/Applicant's *Chamber Summons* application dated **28th June 2017**, brought under Sections 1A, 1B, 3 and 3A of the Civil procedure Act. The Applicant has sought for the following orders:-

1) Spent.

2) That the Defendant immediately stops the purported renovations on LR.No.18136 IR 59651, in Juja, Kiambu County, belonging to the Plaintiff.

3) That the Defendant do vacate and hand over the said property to the Plaintiff.

4) That in default or failure to vacate the said property the Defendant be condemned to pay monthly rent of Kshs.75,000/= from 16th February 2017, the date of occupation, until he vacates and hands over the said property to the Plaintiff or the determination of this suit or IN THE ALTERNATIVE the Defendant pays the amount of Kshs.11,760,000/= being the balance of the purchase price together with interest thereon at court rates from 16th February 2017 up to the payment of the said balance of the purchase price in addition to the said monthly rent and within 30 days from the date of this application.

5) That the costs of this application be in the cause.

This application is premised on the following grounds:-

a) By a purported sale agreement dated 16th February 2017, the Defendant purported to purchase the said property for an agreed amount of Kshs.12,000,000/=.

b) That through fraud, deceit and/or misrepresentation the Defendant/Respondent without the authority of the Plaintiff proceeded to occupy the said property in the month of February 2017, on the pretense that he intended to renovate the property and having paid only Kshs.240,000/=.

c) That the advocate on record for the parties has denied that the sale agreement was drafted by him or his office and/or that the said sale agreement was executed before him hence the alleged sale agreement is void and lacking validity.

d) That the Defendant has failed to heed to the Plaintiff's request to vacate and/or hand over the property to the Plaintiff or pay the amount of Kshs.11,760,000/= being the balance of the purchase price in an attempt to dispossess the Plaintiff of her property by fraudulent means.

e) That the Plaintiff is an elderly retired lady who built the said property from her life's savings and it is only fair and just that this Honourable Court comes to her aid in the face of devious and unscrupulous Defendant who is out to cheat her of her property.

The application is further supported by the Affidavit of *Margaret Wambui Gathiga*, the Applicant herein who averred that she is the

registered owner of **LR.No.18136, IR 59652** situated in **Juja, Kiambu County**. She further averred that by a purported **Sale Agreement** dated **16th February 2017**, the Defendant purported to purchase the said property for an agreed amount of **Kshs.12,000,000/=** as is evident from **MG-2**. She further averred that the said sale agreement was drawn by **Mbiyu Kamau & Co. Advocates** of **Thika**, who was acting for both parties. However, she alleged that the said sale agreement was for the benefit of the Defendant and to her disadvantage as it contained various **erroneous, deceitful** and **fraudulent** paragraphs which were meant to pass the title to the Defendant illegally. It was her contention that she was denied an opportunity to peruse and understand the meaning and tenor of the said sale agreement since she assumed that **Mbiyu Kamau Advocates** would take care of her interest.

She also alleged that the Defendant/Respondent entered into the suit premises on **16th February 2017**, without her authority or colour of right and purported to start renovations without her consent or go ahead. It was her contention that the Defendant has only paid **Kshs.240,000/=** as part of the purchase price but he has been demanding that she hands over the title of the property to him to enable him register the transfer and thereafter pay the balance of the purchase price. It was her further contention that this is an attempt to defraud her of her property having only paid a partly **Kshs.240,000/=** out of **Kshs.12,000,000/=** purchase price.

It was her further allegations that she did not agree with the

Defendant that the property required renovations as it was being sold **'as is'** and the Defendant has now failed to pay the full purchase price and/or vacate the said house. She further deposed that despite demand and request to vacate the suit premises, the Defendant has failed to do so and/or stop the purported renovations or hand over the property to her and thus this application. She urged the Court to allow her application.

The application is **contested** and **Samuel Murigi Waigwa** filed his **Replying Affidavit** on **8th September 2017** and averred that this instant application is **fatally defective, misplaced, misconceived, lacks merit** and is **brought in bad faith** with the sole intention of misleading the court. He admitted that on **11th February 2017**, he executed the Sale Agreement referred to by the Plaintiff wherein the Plaintiff/Applicant agreed to sell the stated parcel of land to him at agreed consideration of **Kshs.12 Million** and on terms and conditions specifically set out in the stated **Sale Agreement SMW-1**.

It was his contention that there was an express term of the agreement that the property was being sold with the development thereon and the vendor undertook to give vacant possession immediately. Further that the purchaser was to clear the outstanding land rents and bills accruing from the said property on condition that the monies spent by the purchaser was to be reimbursed to him upon payment of the first instalment.

He also contended that it was a further term of the agreement that the Plaintiff/Applicant would acquire the necessary consent from the Commissioner of Lands after which the property would be transferred and registered into his name after which the balance of the purchase price would be paid to the Plaintiff/Applicant. The Defendant/Respondent further averred that pursuant to the said execution, he paid a deposit of **Kshs.620,000/=** as land rents and other pending bills, caused the discharge of charge thereof and moved into the property in accordance with the provisions of the agreement and with the consent of the Plaintiff/Applicant.

Further that he carried extensive renovations and did perform all his obligations as required by the agreement. The Respondent further deposed that the Plaintiff/Applicant thereafter failed and/or refused to obtain and provide the necessary consent and has also failed to cause transfer of the property to the deponent thereby breaching the express terms and conditions of the said sale agreement. He contended that he has subsequently filed **ELC Case No.493 of 2017**, in this Court which is still pending.

It was further deposed that the said sale agreement was duly executed by both parties after having read and understood the contents thereof and having been satisfied with the terms and conditions therein and the Plaintiff/Applicant is therefore estopped from claiming that the same was **erroneous, deceitful, fraudulent** and meant to pass title to him illegally. He also denied that he has ever been requested to vacate the suit premises and that even if he was requested, he would not vacate the same since he reside on the said property with his family and he does not have an alternative premises. He reiterated that the Plaintiff's instant **Notice of Motion lacks merit, is frivolous, and is an attempt to steal a march** against him. He urged the Court not to allow the instant application as it will amount to miscarriage of justice.

The Applicant filed a **Supplementary Affidavit** and averred that she has no intention of misleading the Court but reiterated that she obtained the **Consent to transfer** marked **MWG-1** but the Defendant failed to pay the amount of **Kshs.980,000/=** per paragraph 2(a) and there was therefore no guarantee that the Defendant would pay the balance of the purchase price upon successful transfer of the property. She reiterated that the Defendant/Respondent has only paid **Kshs.240,000/=** and she further stated that she was not aware of **ELC.No.493 of 2017** at **Thika**. She also reiterated that she had made several requests to the Defendant to vacate or pay the balance of the purchase price but he

has failed and/or neglected to do so. To her, the suit herein is meritorious and it is only the Defendant who has stolen a march against her as he is yet to pay the balance of the purchase price and he is in possession of the property. She urged the Court to come to her aid.

This application was canvassed by way of written submissions. The Plaintiff/Applicant through the **Law Firm of Mereka & Co. Advocates** filed her submissions on **18th October 2017**, and relied on various decided cases. Among the cases relied on is the case of **Benson Owenga Anjere...Vs...Kivati Nduto & Another, Civil Suit O.2452 of 1982**, which referred to **Pao On...Vs...Liau Long (1980), AC 614**, where it was held that:-

“In determining whether there was a coercion of will, such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest, whether at time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not”.

The Plaintiff/Applicant urged the Court to allow her application.

On his part, the Defendant's/Respondent's submissions were filed on **7th February 2018**, through **Norman Otieno & Co. Advocates** and relied on the case of **Hassan Zubedi...Vs...Patrick Mwangangi Kibaiya & Another, Civil Case NO.79 of 2014**, where the Court held that:-

“Whereas it is not the duty of courts to rewrite contracts for parties, the court has the power and jurisdiction to infer, interpret and enforce intentions of the parties”.

The Respondent submitted that the Applicant has not met the threshold for grant of the orders sought and he urged the Court to dismiss the instant application with costs as it lacks merit.

The Court has now carefully considered the instant application and the pleadings in general. The Court has also considered the annexures thereto, the written submissions, the cited authorities and the relevant provisions of law and the Court makes the following findings:-

There is no doubt that the suit property **LR.No.18136, IR 59651 in Juja, Kiambu County** is registered in the name of the Plaintiff/Applicant, **Margaret Wambui Gathiga**. The said suit property was transferred and registered to her name on **26th July 1993**. There is no doubt that the Defendant herein is the one now in occupation of the said premises. It was alleged by the Plaintiff/Applicant that the Defendant/Respondent entered into the suit property on **16th February 2017**. The Defendant has also admitted that he entered into the suit premises in **February 2017** but with the consent of the Plaintiff herein. However, the Plaintiff has alleged that the Defendant entered into the said premises without her consent.

There is also no doubt that the Plaintiff/Applicant had expressed her wish to sell the suit premises herein to the Defendant for a consideration of **Kshs.12,000,000/=** and the Defendant had expressed a wish to buy the same. In pursuit of the above expressions, the parties herein did execute a **Sale Agreement** dated **16th February 2017** allegedly before **Mbiyu Kamau Advocates**, who purportedly acted for both the vendor and the purchaser. The Plaintiff has alleged that the said **Mbiyu Kamau Advocate** has denied that the said sale agreement was executed in his presence. It is this sale agreement that is in contention.

The above are the undisputed facts. The Applicant has sought for mandatory injunctory orders. The issue now for determination is whether the Applicant is deserving of the mandatory orders of injunction sought herein.

The instant application herein is brought under Sections 1A & 1B of the Civil Procedure Act which deals with the overriding objective of the Act and which Sections behove the Court to facilitate the attainment of the overriding objective in its day to day dealing of the matters in Court. **Section 1A** of the **Civil Procedure Act** provides as follows:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

Further, the Application is anchored under Section 3A of the same Act which donates inherent power to court to issue any such orders that are necessary in ensuring that the end of justice is met and to prevent abuse of the court process.

The Applicant herein has sought for mandatory injunction which is granted under the inherent jurisdiction of the court and not necessarily under Order 40. See the case of **Belle Manson Ltd....Vs....Yaya Tower Ltd, Nairobi High Court, Civil Case No.2225 of 1992**, where the Court held that:-

“Mandatory injunction can be granted under the inherent jurisdiction and not under Order 39 of the Civil Procedure Rules and

a person entitled to mandatory injunction must not be compelled to have damages”.

As the Court determines this application, it will take into account that it is trite that mandatory injunctions are granted in very exceptional circumstances and the Courts are very cautious in grant of mandatory injunction. However, the said mandatory injunction can be granted but the court must feel a high degree of assurance that at the trial, it will appear that the injunction was rightly granted. See the case of Locaball International Finance Ltd ..vs.. Agro Export & Ano.(1986)/ALL ER 901, where the court held that;

“A mandatory injunction ought not to be granted or an interlocutory application in the absence of special circumstances and then only in clear case either 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, the court had to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted, that being a different and higher standard than was required for a prohibiting injunction”

In deciding whether to allow the instant application or not, the Court will be guided by the principles laid down in the case of Kenya Breweries Ltd & Ano...Vs...Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109, where the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.

Further, the Court will take into account that the grant of any injunction is an exercise of judicial discretion but which discretion has to be exercised judicially. See the case of Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Further, injunction being an equitable remedy, the applicant must come to court with clean hands and must deserve the said equitable relief. See the case of David Kamau Gakuru...Vs...National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001, where the Court held that:-

“An injunction being an equitable remedy cannot be granted to a party who had demonstrated openly by his conduct that he is undeserving of the equitable relief”.

The Court will now evaluate the available evidence and juxtapose it with the principles for grant of mandatory injunction to determine whether the Applicant is deserving of the orders sought.

The Applicant needed to establish existence of special circumstances to warrant grant of mandatory orders. It is not in doubt that the Plaintiff/Applicant herein is the registered owner of the suit property. She intended to sell the suit property for **Kshs.12 million** to the Defendant herein. She has alleged that the Defendant/Respondent has only paid **Kshs.240,000/=** and is in possession of the suit property. The Defendant has admitted being in possession of the suit property and having paid about **Kshs.620,000/=** towards settlement of the purchase price. That is far below even the **10%** deposit of the purchase price. The Defendant has alleged that he took immediate possession of the suit property as per the terms of the sale agreement in issue. However the Plaintiff has denied having given her consent to the Defendant to occupy the suit property.

On whether the sale agreement herein is enforceable or not is not a matter for determination at this interlocutory stage. That would require calling of evidence and testing the same in cross-examination at the full trial. The Court therefore finds that the Plaintiff/Applicant as the registered owner of the suit property has only been paid less than the **10%** of the alleged purchase price and the Defendant is in occupation of the suit property. This is a peculiar scenario and therefore special circumstances that would prompt the court to issue mandatory injunction. The law on the sale of property or on Contract for purchase of property is very clear that there must be an **offer, acceptance** and **consideration**. The Defendant has taken up occupation of the suit property without having paid the full consideration. It is trite that mandatory injunction ought and must be invoked to aid the law. See Belle Mansion Ltd...Vs...Yaya Towers Ltd (supra).

The Defendant has alleged that he has renovated the suit property and that is where he lives with his family and therefore he has no intention of moving out or vacating the same. However, the Plaintiff/Applicant who is the registered owner has not received the full purchase price or substantial amount of it and is not even receiving any monthly rent. The Defendant is in a position of advantage and that state of affairs should not be allowed to persist. See the case of Kamau Mucuha...Vs...Ripples Ltd, Civil Appl. No.186 of 1992 (1993) KLR 35;-

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act”.

Further a mandatory injunction can be granted if the case is clear and one which the court thinks it ought to be decided at once. From the available evidence, it is clear that the Defendant/Respondent has not paid the full purchase price but he is in occupation of the Plaintiff’s suit

property and has even started to carry out major renovations of the suit property. The sale agreement has not been fully satisfied and the Plaintiff has alleged that it was even drawn to her disadvantage but to the advantage of the Defendant. On whether the sale agreement is enforceable or not, that is an issue to be determined after the full trial. However, the suit property is registered in the name of the Plaintiff and she is deemed to be the absolute and indefeasible owner. Before the issue of the sale agreement is determined and without payment of the purchase price, the Defendant cannot deny the Plaintiff access to her property. This is therefore a clear case and which the Court thinks it ought to be decided at once.

Further, the Court has to determine whether the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.

Indeed the act of the Defendant moving into the Plaintiff's suit property is a simple one which can be easily remedied by ordering him to vacate the suit premises. The fact that the Defendant has moved into the said suit premises without paying the full purchase price has started renovating it and is alleging that he cannot vacate because that is where he resides with his family is an attempt to steal a march on the Plaintiff/Applicant. The Court finds that it is prudent to issue mandatory injunction to remedy the situation.

The Court will also take into account that the purpose of mandatory injunction is to preserve the *status quo* and the *status quo* to be preserved is the one that existed before the wrongful act. The wrongful act herein is the Defendant taking possession and occupation of the suit property. See the case of *Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence and the annexures thereto, the ***Court finds that the Plaintiff/Applicant is deserving of the mandatory injunction sought and her instant application dated 28th June 2017 is allowed entirely in terms of prayers No.2, 3 and 4. The Applicant is also entitled to costs of this application.***

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Mwiti holding brief for Mr. Mereka for Plaintiff/Applicant

No appearance Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocate.

L. GACHERU

JUDGE

16/4/2018