



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A. CASE NO. 151 OF 2017

SELENEA WAWIRA NTHIA.....PLAINTIFF

VERSUS

NICERATA WANJUE NAMU.....DEFENDANT

RULING

1. By a notice of motion dated and filed on 4th October 2017 brought under the provisions of Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff sought the following orders;

a. That this application be certified as the most urgent and be heard ex-parte in the 1st instance.

b. That this honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondent herself, her agents, servants and/or anyone claiming under them from entering, leasing, and/or interfering with the land parcel No. Evurore/Kathera/306 pending the hearing and final determination of this suit.

c. That the OCS Siakago Police Station be ordered to enforce compliance with the order.

d. That costs of the application be provided for.

2. The said application was based upon the grounds shown on the face thereof and supported by an affidavit sworn by the Plaintiff on 4th October 2017, together with the annexures thereto. The Plaintiff averred that by a sale agreement dated 2nd July 2015 between the parties the Defendant agreed to sell to her 4 acres of *Title No. Evurore/Kathera/306* (hereinafter called the "suit property") at an agreed price of Kshs 70,000/- per acre. According to the Plaintiff, the Defendant was to put her in possession upon payment of the 2nd deposit of Kshs 50,000/- but the latter defaulted in doing so.

3. It was the Plaintiff's case that due to the Defendant's failure to do the needful, she (the Plaintiff) changed her mind on the acreage from 4 acres to 3 acres with the consequence that she was left with an outstanding balance of Kshs 10,000/- which was to be paid upon conclusion of certain succession proceedings. The Plaintiff, therefore, wanted to have the 3 acres transferred to her or a refund of the purchase price of Kshs 200,000 already paid to the Defendant.

4. The Defendant filed a replying affidavit sworn on 30th November 2017 in opposition to the said application. She conceded the existence of the sale agreement alluded to hereinbefore. She confirmed that the Plaintiff had changed her mind on the acreage from 4 to 3 acres. She further stated that sometime in January 2017, the Plaintiff informed her on phone that she was no longer interested in the transaction and that she wanted a refund of Ksh 200,000/- she had paid. The Defendant thereafter entered into a sale agreement with a third party for the sale of the entire suit property measuring about 5 acres to enable her refund the sum of Kshs 200,000 to the Plaintiff.

5. The Defendant further stated that later on she learnt that the Plaintiff had restricted the suit property and filed the instant suit against her. She, therefore, wanted the court to order removal of the restriction to enable her sell the suit property so that she may refund the Plaintiff Kshs 200,000/-.

6. The said application was canvassed orally by the parties in person on 7th December 2017. The Plaintiff reiterated the contents of her application and supporting affidavit whereas the Defendant relied on the contents of her replying affidavit.

7. The facts of the case are largely uncontested. The existence of the sale agreement is not disputed. The amount of the purchase price paid is not disputed. The Plaintiff wants to have either the land or the deposit of the Kshs 200,000/- already paid. The Defendant is ready and willing to refund the said amount once she sells the suit property to a third party.

8. The only aspects of the case disputed are whether the Plaintiff was in breach of the sale agreement by reducing the acreage from 4 acres and whether the Defendant was in breach by failing to put the Plaintiff in possession of the subject matter of sale upon payment of the 2nd deposit or instalment of Kshs 50,000/-. In my view, this court need not determine those two issues at this interim stage. Those are matters which belong to the province of the trial court. Any comments thereon at this stage may prejudice the fair trial of the action.

9. The court has considered the Plaintiff's said application, the Defendant's affidavit in opposition thereto as well as the oral submissions of the parties. The main question for consideration is whether or not the Plaintiff has satisfied the requirements for the grant of an injunction as set out in the case of **Giella Vs Casman Brown & Co Ltd [1973] E.A 358**. The court has noted that the existence of the sale agreement is not disputed. Part payment is also not disputed. Clause 5 of the sale agreement provided that the Plaintiff shall be put in possession upon payment of the second deposit. The payment of the second deposit was not disputed.

10. In the circumstances, the court has no hesitation in finding that the Plaintiff has demonstrated a *prima facie* case with a probability of success as enunciated in the case of **Giella Vs Cassman Brown & Co Ltd [1973] E.A 358**.

11. The second principle to be considered is whether the Plaintiff might otherwise suffer irreparable loss or damage unless the orders sought are granted. Ordinarily, a party to a contract for sale of land may be compensated by an award of damages unless there are special characteristics or sentimental value attached to the land. A party may also suffer irreparable damage if the Defendant may not otherwise meet an award of damages.

12. The court has considered the circumstances of this case. The Defendant concedes having received part payment of Kshs 200,000/-. She is now unable to refund the said amount. She wants to be allowed to sell the suit property to a third party to enable her raise the money. It is thus clear to me that the Defendant is a person of straw. She is unlikely to meet an award of compensatory damages in future. I, therefore, find that the Plaintiff has met the 2nd requirement for an award of a temporary injunction.

13. The court has noted from the pleadings and affidavits on record that the Plaintiff was not granted vacant possession. She cannot, therefore, be heard to claim that the Defendant is in forceful occupation of the suit property. She cannot legitimately seek to exclude the Defendant from occupying, cultivating or utilizing the suit property. She cannot, therefore, seek to injunct the Defendant from "entering" the suit property. She can, however, obtain orders necessary for preservation of the subject matter of the litigation pending the hearing and determination of the suit.

14. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 4th October 2017 and allows it in the following terms only;

a. A temporary injunction be and is hereby issued restraining the Defendant from leasing, charging, alienating or otherwise dealing with *Title No. Evurore/Kathera/306* pending the hearing and determination of the suit.

b. The Defendant shall be at liberty to apply for variation or discharge of the order at any time upon refunding the Plaintiff the sum of Kshs 200,000/- paid as deposit and Ksh 17,000/- paid as survey fees.

c. Costs of the application shall be in the cause.

15. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **31st** day of **MAY, 2018**.

In the presence of the Plaintiff and the Defendant.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

31.05.18