



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 1626 OF 2016

AFYARES ENTERPRISES COMPANY LIMITED.....PLAINTIFF

=VERSUS=

GIDEON KIREMAH MUGAMBI.....1ST DEFENDANT

MAX GAS AND LOGISTICS LIMITED.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR, NAIROBI.....3RD DEFENDANT

GLADYS KALUYU MUGAMBI.....INTERESTED PARTY

R U L I N G

1. This suit relates to Land Reference Number 36/VII/403 (**the suit property**) situated in Eastleigh, Nairobi. The suit property is currently registered in the name of the 2nd defendant. The plaintiff brought the suit seeking, *inter alia*, an order nullifying and cancelling the sale and transfer of the suit property made in favour of the 2nd defendant in 2014.

2. On 23/12/2016, the plaintiff brought a notice of motion dated 22/12/16 seeking the following injunctive orders:-

a) That the Honourable Court be pleased to grant an order of injunction restraining the defendants/respondents by themselves, their servants, agents, heirs employees and all claiming through them from undertaking any development and/or construction, and/or bringing down and/or making any improvements to the building, transferring and/or registering any dealing in favour of any party whatsoever and from dealing in any and all other manners whatsoever with Parcel of Land Number Nairobi 36/VII/403 (Original Number 36/8) together with the developments therein pending the hearing and determination of this suit.

b) That the honourable court be pleased to order the defendants/respondents to meet the costs of this application.

3. The notice of motion is supported by an affidavit sworn by Hassan Abdi Warsame on 22/12/2016. The application is opposed by the 1st and 2nd defendants. It is also opposed by the interested party, Gladys Kaluyu Mugambi. The said application is the subject of this ruling.

4. The case of the applicant is that on 1/9/2014, the 1st defendant entered into a sale agreement pursuant to which he agreed to sale the suit property to the plaintiff at a price of Kshs 112,000,000. In pursuance of the agreement, the plaintiff paid the 1st defendant Kshs 5,600,000. The balance was to be paid within 90 days. He contends that after execution of the said agreement, he got to learn that there was a matrimonial property dispute in the High Court, to wit, Nairobi High Court Civil Case Number 9 of 2005 (OS) in which the 1st defendant was a respondent and in which orders for sale of the suit property to the 2nd defendant had been made by consent of the parties. He further contends that he was enjoined in the said matrimonial property cause as an interested party.

5. The plaintiff states that the 1st defendant has caused the suit property to be transferred to the 2nd defendant in blatant breach of the sale agreement dated 1/9/2014 executed between it and the 1st defendant. It contends that it has a registrable interest in the suit property by virtue of the sale agreement dated 1/9/2014. Consequently, it seeks the above interim injunctive order.

6. The case of the 1st defendant is that, save for the 3rd defendant, all parties in this suit are parties in the matrimonial property cause, Milimani HCCC No 9 of 2005 (OS) in which a preservative order was issued way back on 6/7/2006 barring any transaction relating to the suit property. He further contends that prior to executing the sale agreement dated 1/9/2014, the plaintiff was fully aware of the said preservative order as it had conducted a search. He adds that on 21/10/2014, the High Court (Family Division) decreed sale of the suit property to the 2nd defendant and on 22/3/2017 the sum of Kshs 10,400,000 was refunded to the plaintiff through his advocate. He argues

that the High Court enjoys concurrent jurisdiction with this court hence this Court has no jurisdiction to vary the orders issued by the High Court. He urges the court to dismiss the application.

7. The case of the 2nd defendant is that it is the registered proprietor of the suit property, having purchased it from the 1st defendant and the interested party through a sale agreement dated 24/9/2014. It contends that the sale was sanctioned by the High Court and it paid the full purchase price of Kshs 95,000,000 which was distributed by the High Court to the beneficiaries named in Milimani HCCC No 9 of 2005(OS). It further contends that through a consent dated 9/3/2017, the plaintiff was refunded the deposit of Kshs 9,400,000 plus a further sum of Kshs1,000,000 as costs. It adds that it would suffer irreparable damage if the orders sought are granted.

8. The case of the interested party is that she was married to the 1st defendant, and the suit property was their matrimonial property. Their marriage was dissolved in 2015. Prior to the dissolution of the marriage, she filed Milimani HCCC No 9 of 2005 (OS) seeking division of their matrimonial property. She states that in 2006 the High Court issued a conservatory order prohibiting dealings in the suit property. The interested party further contends that the plaintiff was enjoined as a party in Milimani HCCC No 9 of 2005 (OS) on allegation that he had signed an agreement with the 1st defendant. She states that the plaintiff was duly notified that the 1st defendant would not complete the agreement dated 1/9/2014 due to inability to obtain spousal consent to sell the matrimonial property to the plaintiff. The interested party further contends that the plaintiff was enjoined in Milimani HCCC No 9 of 2015 (OS) after the consent to sell the suit property to the 2nd defendant had already been reached and recorded in court. She adds that an injunction will unjustly prejudice the 2nd respondent who is an innocent purchaser for value. Lastly, she contends that the plaintiff has no legitimate interest in the suit property because there was no spousal consent to sell the suit property to the plaintiff.

9. I have considered the tenor and import of the plaintiff's application for an injunctive order. I have also considered the parties' rival affidavits, submissions, authorities and the applicable jurisprudential principles.

10. The broad issue for determination in this application is whether the applicant has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella v Cassman Brown & Co. Ltd (1973) E A 358**. In summary, the applicant had a duty to establish that it has a prima facie case with a probability of success; that it will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and lastly, if the court were to be in doubt, the application is to be decided on a balance of convenience.

11. Without much say, at this point what emerges in the present application is that the suit property was a matrimonial property within the meaning of the Matrimonial Property Act 2013. At the time the plaintiff entered into a purchase agreement with the 1st defendant, the suit property was the subject matter of a matrimonial property dispute in the High Court, to wit, **Milimani HCCC No 9 of 2005 (OS)**. Secondly, at the time the said purchase agreement was signed, there existed an encumbrance against the title in the form of a court order issued in the matrimonial property case, restricting dealings in the suit property. Indeed, Clause 3 of the agreement for sale which the plaintiff relies on alluded to the above encumbrance. It is therefore clear from the materials presented before this court at this point that, the plaintiff was at the time of executing the agreement aware that the suit property was the subject matter of a matrimonial property dispute and there existed a court order restricting dealings in the suit property.

12. Secondly, the suit property being a matrimonial property, no sale contract would go through without the concurrence of both spouses. At this point, there is no evidence that the interested party consented to the agreement between the plaintiff and the 1st defendant. The interested party contends that her consent was not sought. Under Section 12 of the Matrimonial Property Act 2013, failure to procure spousal consent renders a contract void. Besides, until recently, Section 93 of the Land Act and Section 28 of the Land Registration Act similarly obligated parties to land sale contracts to obtain spousal consents whenever entering into land contracts relating to matrimonial property. At this point, there is no evidence that the then mandatory legal requirements were satisfied.

13. Thirdly, and most important, the interest which the 2nd defendant holds in the suit property crystalized pursuant to a court order which to date has not been vacated. It is not clear why the applicant has not moved the High Court to vacate that order. In my view, it would be utterly irregular for this court, which is a court of equal status with the high court, to issue an order whose tenor and import is to vacate the order of the High Court.

14. Fourth, Clause G of the material agreement for sale provides for monetary remedy in the event that the vendor fails to discharge his obligations under the contract. In this regard, it has been contended without denial from the applicant that the material agreement was terminated and a sum of Kshs 10,400,000 was refunded to the plaintiff through its advocate. Under those circumstances, grant of an injunctive order would, in my view, be unjustified.

15. In light of the foregoing, the court comes to the finding that the applicant has failed to satisfy the criteria for grant of an interim injunctive order as laid down in **Giella v Cassman Brown & Company Limited (1973) EA 358**. The net result is that the plaintiff's Notice of Motion dated 22/12/2016 is dismissed. The plaintiff shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF MAY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Sumba Advocate for the Plaintiff

Mr Gichuru Advocate for the 1st Defendant

Bulle for the 2nd Defendant

Mrs Judg Thongori for the Interested party

Ms Halima - Court clerk