



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. NO. 599 OF 2015 (FORMELY CIVIL SUIT NO. 60 OF 2011)

JOSEPH KIBERA MBUGUA.....1ST PLAINTIFF/APPLICANT

KAMAU MBUGUA.....2ND PLAINTIFF/APPLICANT

VERSUS

HANNAH MUMBI MBUGUA.....1ST DEFENDANT/RESPONDENT

GORDON NGUONO OLANDO.....1ST DEFENDANT/RESPONDENT

RULING

1. The 2nd Plaintiff filed the notice of motion dated 15th August 2014 seeking for summary judgment in terms of the plaint to be entered against the Defendants, and for the Executive Officer of the court to sign all transfer, consent and discharge documents in respect of Kisumu/Fortenan/332 in his favour. The application is based on the four grounds marked (i) to (iv) and supported by the affidavit shown by Kamau Mbugua on the 15th August 2014. The 2nd Plaintiff among others deponed that he had refunded the purchase price to the 2nd Defendant through depositing the money to his account at Cooperative Bank. That the 2nd Defendant had charged the suit land with Cooperative Bank contrary the injunctive orders and that he has refused to have the Bank discharge the tile though he had no loan arrears. The Defendants have no defence and summary judgment should be entered against them with costs.

2. The application was heard on 5th May 2015 when counsel for the 2nd Plaintiff gave her submissions. The learned counsel among others submitted that the 2nd Defenanat had refused to return the land even after the Plaintiffs refunded the purchase price as ordered in the earlier injunctive order.

3. The following are the issues for determination by the court;

- a) **Whether the statement of defence filed by the Defendants raises triable issues to the Plaintiff's claim.**
- b) **Alternatively, whether the deposit made by the 2nd Plaintiff to the 2nd Defendant Cooperative Bank account had the effect of the Defendants admitting the Plaintiffs' claim.**
- c) **Who pays the costs of the application.**

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the learned counsel's submission, the pleadings filed, the record and come to the following conclusions;

a) That after the Plaintiffs commenced their claim against the Defendants through their plaint dated 27th April 2011, the 1st and 2nd Defendant filed their statement of defence dated 7th June 2011 and 9th May 2011 respectively. That a perusal of the pleadings filed by both sides shows that the defence raises triable issues to the Plaintiffs claim that should go to trial unless of course the parties are able to have an out of court settlement as proposed by the court on the 23rd June 2011.

b) That court's ruling of 20th November 2012 on the Plaintiffs application for injunctive orders dated 27th April 2011, states that the application was allowed **"...on condition that the Plaintiffs do refund the 2nd Defendant the sums of Kshs. 1,301,690 within the next 30 days from the date herein."** The court further ordered that should the Plaintiffs fail to refund the amount within the 30 days as ordered, **"..the 2nd Defendant be at liberty to utilize the land as he deems fit and appropriate provided that he does not sell, charge or in any way part with the same pending the determination of this suit..."**

c) That the 30 days within which the Plaintiffs were to comply with the conditions in the ruling of 20th November 2012 lasted up to

about 20th December 2012. The deposit voucher annexed to the supporting affidavit carries the date of 14th December 2012 which therefore shows that the condition was complied within the 30 days as ordered.

d) That upon the condition being certified with as in (c) above, the 2nd Defendant, by himself or those claiming under him was “... **restrained by way of temporary injunction from entering, occupying, using, cultivating, grazing, developing, leasing, mortgaging, transferring, evicting the Plaintiffs/applicants and/or in any way dealing with All THAT piece or parcel of Land known as KISUMU/FORTERNAN/332 until the hearing and determination of this suit**”, in accordance of prayer 2 of the notice of motion dated 27th April, 2011. That the ruling of 20th November 2012 had not in any way suggested that the 2nd Defendant was to have the title discharged and transferred to the Plaintiffs or for that matter the 2nd Plaintiff, upon the purchase price being refunded. The refund was to pave way for the 2nd Defendant to be kept out of the land in terms of prayer 2 of the notice of motion dated 27th April 2011 pending the hearing and determination of the suit.

e) That the copy of the green card for Kisumu/Fortenan/332 attached to the 2nd Plaintiff’s supporting affidavit shows at entry number 7 dated 15th March 2012 that the title had been charged. That at “Part C- Encumbrances Section” the details of the charge of 15th March 2012 is shown to be Kshs. 500,000/= to Co-operative Bank of Kenya Ltd. That there is a further charge of Kshs 450,000/= to the same bank dated 24th October 2012. That the charge and further charge were registered against the title before the injunction order of 20th November 2012. That as there is no evidence of any further charge after the date of the ruling of 20th November 2012, and as there is no contempt proceedings against the 2nd Defendant, the 2nd Plaintiff’s notice of motion dated 15th August 2014 is without merit.

5. The court finds the 2nd Plaintiff’s notice of motion dated 15th August 2014 is without merit and is hereby dismissed with no orders as to costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26th DAY OF September 2018

In the presence of:

Plaintiffs 2nd Plaintiff present

Defendants Absent

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE