



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 640 OF 2015

SHELLMITH W. KAMUNYA (Suing as the Administrator of the Estate of

PETER DAVID KAMUNYA KIBOI (Deceased).....PLAINTIFF

VERSUS

REV. CHRISTOPHER GICHUHI.....DEFENDANT

RULING

I have before me two (2) applications, one by the plaintiff and the other by the defendant. The plaintiff's application was brought by way of Notice of Motion dated 6th July, 2015 seeking a temporary injunction to restrain the defendant from selling, charging, entering or remaining on all that parcel of land measuring 3 ½ acres also known as sub-plots D, E and F comprised in Land Reference No. 7583/55 (hereinafter referred to as "the suit property") and/or from destroying or otherwise injuring the hedge or fence on the boundaries thereof or from erecting any structure thereon whether temporary or permanent or from interfering with the plaintiff's peaceful possession and enjoyment of the property pending the hearing and determination of this suit.

The application was supported by the affidavit of the plaintiff sworn on 6th July, 2015. The application was brought on the following grounds. The plaintiff is the administrator of the estate of Peter David Kamunya Kiboi (deceased) (hereinafter referred to only as "the deceased"). On 27th July, 1998 and 19th August, 1988, the deceased entered into agreements with the defendant under which the deceased purchased the suit property from the defendant at a consideration which was partly paid in cash and partly through exchange with the deceased's parcels of land known as Ngong/Ngong/7722, 7723, 7724, 7725 and 7726 (hereinafter referred to as "the deceased's properties"). Pursuant to the said agreements, the defendant pointed out the suit property to the deceased and gave the deceased possession thereof. The deceased occupied the suit property until his demise in 1999 and the plaintiff has continued in possession. After taking possession of the suit property, the deceased fenced the same and carried out various development activities thereon. On 19th May, 2015 the defendant purported to rescind the said agreements which he entered into with the deceased and purported to refund to the plaintiff a sum of Kshs.200,000/=that was paid to him as part of the purchase price. The plaintiff rejected the purported rescission and returned to the defendant the said sum of kshs.200,000/=. On 22nd June, 2015, the defendant wrote to the plaintiff again purporting to rescind the said agreements and demanding that she vacates the suit property. The plaintiff averred that she was reasonably apprehensive that unless the orders sought are granted, the defendant would continue to threaten and harass her and that the said orders were necessary to protect and preserve her rights in the property.

The application was opposed by the defendant through a replying affidavit sworn by the defendant on 20th July, 2015. In his response to the application, the defendant denied ever entering into any agreement with the deceased in respect of the suit property. The defendant contended that if there was such agreement, the same was not enforceable as it had been frustrated by the plaintiff. The defendant accused the plaintiff of fraud and non-disclosure of material facts. The defendant averred that the plaintiff had approached the court with unclean hands and as such was not deserving of the orders sought.

The defendant's application was brought by way of Notice of Motion dated 28th February, 2016. In the application, the defendant sought the following orders:

1. That the plaintiff be ordered to produce her five (5) titles to L.R Nos. 7722, 7723, 7724, 7725 and 7726 in court for scrutiny and thereafter give the defendant certified copies thereof to enable the defendant carry out a search and due diligence on the same.
2. That the honourable court be pleased to stay the hearing and or proceedings relating to the plaintiff's application dated 6th July, 2015 pending the production of the said titles by the plaintiff.
3. That the honourable court does declare that the plaintiff's suit was filed prematurely and in bad faith.

4. That the plaintiff has by reason of fraud and fraudulent misrepresentation violated the exchange/sale agreement dated 27th July, 1988.

5. That the plaintiff is not entitled to the equitable orders that she is seeking.

6. That the costs of the application be provided for.

The defendant's application was brought on the grounds that the plaintiff had denied the defendant the right to carry out a search and due diligence on the deceased's properties before passing of title to each other and that by her conduct the plaintiff had breached and frustrated the agreement the deceased had entered into with the defendant in respect of land measuring 2 ½ acres. The defendant averred that the plaintiff was guilty of fraud, misrepresentation and forgery. The defendant contended that the plaintiff had made fraudulent attempts using forged documents to excise 3 ½ acres from the defendant's parcel of land without the defendant's knowledge.

The defendant's application was opposed by the plaintiff through a replying affidavit sworn on 21st October, 2016 and grounds of objection of the same date. The plaintiff contended that the defendant's application was incompetent and lacked any basis. The plaintiff denied all the allegations of forgery and misrepresentation that were levelled against her by the defendant. The two applications were heard by way of written submissions.

I have considered the applications together with the affidavits that were filed in support of and in opposition thereto. I have also considered the submissions on record. I will determine the plaintiff's application first as it was first in time. As I have mentioned at the beginning of this ruling, the plaintiff's application sought orders of injunction. The principles upon which this court exercises its discretion in applications for a temporary injunction are well settled. As was held in the case of Giella v Cassman Brown & Co. Ltd. (1973) E.A 358, an applicant for a temporary injunction must establish a prima facie case with a probability of success and must also demonstrate that he will suffer irreparable harm if the order is not granted. If the court is in doubt, the application would be considered on a balance of convenience. I am satisfied from the evidence on record that the plaintiff has established a prima facie case with a probability of success against the defendant. The plaintiff has shown that the deceased and the defendant entered into two (2) agreements in the year 1988 under which the defendant was to transfer to the deceased the suit properties at a consideration which was partly to be paid in cash and partly through exchange with the deceased's five (5) parcels of land in Ngong. The agreements between the parties provided that the parties would give each other possession of the parcels of land which were exchanged pending the processing of titles in respect thereof. The evidence on record shows that the defendant gave the deceased possession of the suit property. The defendant did not dispute the fact that the deceased developed the suit property and that he was in occupation of the property from 1988 until the time of his demise in 1999. The defendant did not also dispute the fact that the plaintiff continued in possession of the property after the demise of the deceased and that he had not fulfilled his part of the agreement with the deceased. The defendant did not also dispute the plaintiff's contention that he had attempted to rescind the said agreements with the deceased and to evict the plaintiff from the suit property. The defendant has not convinced me that he had lawful reasons for attempting to evict the plaintiff from the suit property which she has occupied since 1988. The defendant has made general allegations of fraud and forgery against the plaintiff which he has not substantiated.

On whether the plaintiff would suffer irreparable harm unless the orders sought are granted, the plaintiff has demonstrated that she is in possession of the suit property and that she has been threatened with eviction from the property. In the event that the defendant succeeds in his eviction attempts, he may dispose of the suit property to third parties thereby putting the property beyond the reach of the plaintiff. In the circumstances, I am satisfied that the plaintiff stands to suffer irreparable injury if the orders sought are not granted. For the foregoing reasons, it is my finding that the plaintiff has satisfied the conditions for granting a temporary injunction.

With regard to the defendant's application dated 28th February, 2016, I find no merit in the same. The application was brought principally under Order 3 Rule 3(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. Order 3 Rule 2(d) of the Civil Procedure Rules provides that a suit shall be accompanied by copies of documents to be relied on at the trial. I have noted from the record that on 6th July, 2015, the plaintiff filed a list and bundle of documents in compliance with Order 3 Rule 2 of the Civil Procedure Rules. Even if the plaintiff had not complied, I doubt if the rule gives the defendant a right to seek an order compelling the plaintiff to produce before the court for scrutiny any particular document which the defendant feels is relevant to the suit. I am of the view that the suit belongs to the plaintiff and the onus is on her to prove it. The court cannot direct the plaintiff on the evidence she should bring before the court. If the plaintiff thinks that the documents which she has placed before the court are sufficient for her case, the court cannot force her to produce more and neither Order 3 Rule 2(d) of the Civil Procedure Rules nor Section 1A, 1B and 3A of the Civil Procedure Act empowers the court to make such order.

The defendant had also sought a declaration that the plaintiff's suit was brought prematurely and that the plaintiff had breached the agreement dated 27th July, 1988 between the defendant and the deceased. These in my view are final orders which can only be given after the hearing of the main case. The defendant's prayer for stay of the plaintiff's application dated 6th July, 2015 has been overtaken by events. The same applies to his prayer for a declaration that the plaintiff is not entitled to the equitable relief she is seeking in the application.

The upshot of the foregoing is that the plaintiff's application dated 6th July, 2015 succeeds and the same is allowed in terms of prayer 3 thereof. On the other hand, the defendant's application dated 28th February, 2016 fails and the same is dismissed. The plaintiff shall have the costs of the two applications.

Delivered and Dated at Nairobi this 11th day of October, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Mukasa h/b for Mrs. Mc Asila for the Plaintiff

Mr. Ajulu h/b for Mr. Nabutete for the Defendant

Catherine Court Assistant