



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1323 OF 2016

NANCY WANJIRU WANGAI.....1ST PLAINTIFF

JOSEPH KAMAU NDEGWA.....2ND PLAINTIFF

=VERSUS=

CHARLES GITAHU GITHINJI.....1ST DEFENDANT

MOFFAT MOGUNDU GITHINJI.....2ND DEFENDANT

RULING

1. By a plaint dated 26th October 2016 the plaintiff sued the defendant for specific performance of the agreement plus costs of the suit and interest.

2. Together with the plaint, they filed a notice of motion dated 26th October 2016 seeking to restrain the defendants/respondents from interfering with the possession of the 1st plaintiff's/applicant's property being LR No. 209/10481/106.

In the alternative, the defendants/respondents be ordered to maintain the status quo until further orders of the court. They also sought costs of the application. This application was placed before Honourable Lady Justice Lucy Gacheru who granted interim orders on 27th October 2016. Upon being served the defendants/respondents entered appearance and sought time to file a response to the notice of motion dated 26th October 2018.

3. However, on 7th February 2017, the defendants/respondent filed and presented the notice of motion dated 19th December 2016 seeking to set aside the orders issued on 27th October 2016.

4. On the 2nd March 2017, the court directed that the two applications be heard together on 25th April 2017. The interim orders were also extended. On 25th April 2017 the court further directed that the two applications be canvassed by way of written submissions.

5. The plaintiff's notice of motion dated 26th October 2016 is brought under Order 40 rule 1, 3 and 10 of the Civil Procedure rules.

6. It seeks orders:-

i. That the defendants/respondents be restrained from interfering with the possession of the 1st plaintiff's property, that is LR No. 209/10481/106, until this matter is heard.

ii. In the alternative the defendants/respondents be ordered to maintain the status quo until further orders of the court.

iii. Costs.

7. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

The application is supported by the affidavit of Nancy Wanjiru Wangai, the 1st plaintiff/applicant sworn on the 26th October 2016 and a further affidavit sworn on the 6th June 2017.

The application is opposed. There is a replying affidavit sworn by Charles Gitahi Githinji the 1st defendant/respondent sworn on the 28th February 2017.

8. It is the plaintiffs'/applicants' submissions that they entered into a sale agreement with the defendants/respondents for purchase of the suit property. The said agreement was drawn by M/s Ochieng Omollo Advocates and the same was signed on the 3rd October 2012. Further that the defendants/respondents claimed the original title deed was lost and a report had been made to the police. The said police abstract was given to the 1st plaintiff/applicant who was convinced that the original title was indeed lost. The 1st plaintiff/applicant is in possession of the suit property as she has a tenant residing therein. They urge the court to allow the application.

9. The defendants/respondents on their part submit that the suit property belong to the Estate of Lawrence Githinji Magundu, the defendant's late father. The defendants/respondents were granted a certificate of confirmation of grant. There was no sale of the suit property to the 1st plaintiff/applicant and that no money exchanged hands. They have relied in the cases of **Giella vs Cassman Brown Co. Ltd [1973] EA 358**; **Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR** and **American Cyanamid vs Ethicon Limited [1975] AC 396**.

10. Further that the sale agreement dated 3rd October 2012 is fraudulent, as they never appeared before the said advocate. That the 2nd plaintiff/applicant used to receive rent from a tenant who was residing on the suit property as he was an agent and had been granted a general power of attorney by the defendants/respondents. The 1st plaintiff/applicant has not been in possession of the suit premises. She has not established a prima facie case with a probability of success at the trial. They pray that the application be dismissed.

11. I have considered the notice of motion dated 26th October 2016, the affidavits in support and the annexures. I have considered the replying affidavit, and the annexures. I have also considered the written submissions of counsel and the authorities cited. The issues for determination are:-

i. Whether the plaintiffs'/applicants' application meets the threshold for grant of temporary injunctions.

ii. Who should bear costs?

12. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case.

I am guided by the above authorities.

13. The plaintiffs/applicants rely in the sale agreement dated 3rd October 2012 between them and the defendants. The said agreement for sale was drawn by M/S Ochieng, Omollo Advocates. It is marked as annexure "NWW2". It is upon this agreement that the 1st plaintiff/applicant was let into possession. She states that she has a tenant in the said premises.

14. The defendants/respondents on the other hand state that there was no sale between them and the plaintiffs/applicants. In fact they allege that the sale agreement is a result of fraud as they never appeared before the said advocate. These are issues which will be determined at the hearing where evidence will be adduced.

15. I have considered the rival submissions. In the case of **Njenga vs Njenga [1991] KLR 401**, Borire J (as he then was) held that:

“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

I am persuaded by the facts presented by the plaintiffs/applicants that there is need to preserve the suit property pending the hearing and determination of the suit.

16. In the case of **Kenleb Cons Limited vs New Gatitu Service Station Limited & Another [1990] KLR 557** Bosire J (as he then was) held that:

“To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction”.

I am satisfied that the plaintiffs/applicants deserve this kind of protection. I find that they have established a prima facie case with a probability of success at the trial.

17. I also find that the 1st plaintiff/applicant have demonstrated that she will suffer irreparable loss which cannot be compensated by an award of damages if these orders are not granted. The defendants/respondents are in possession of the original title deed may dispose the suit property to third party. I am guided by the case of **Ooko vs Barclays Bank of Kenya Limited [2002] KLR 394**.

18. I am also of the view that the balance of convenience tilts in favour of the plaintiffs/applicants. I find that it is necessary to preserve the suit property pending the hearing and determination of the suit herein. I find the application to be merited and it is allowed.

19. Let me now turn to the defendants/applicants notice of motion dated 19th December 2016. The same is brought under Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. Order 40 Rule 4, 5 and 7 and Order 51 rule 1 of the Civil Procedure rules 2010.

It seeks:-

1. Spent

2. Spent

3. That the exparte interim orders granted on the 27th October 2016 by Honourable Justice Gacheru affecting the suit property known as LR NO. 209/10481/106 be discharged or varied and/or set aside.

4. That this Honourable court issue such further orders and or directions as it may deem just and fit.

5. That the costs of this application be provided for.

20. The grounds are on the face of the application and are set out in paragraphs 1 to 10. The application is supported by the affidavit of Charles Gitahi Githinji, the 1st defendant/applicant sworn on the 19th December 2016.

Paragraph 9 of the supporting affidavit of Charles Gitahi Githinji, 1st plaintiff/applicant provides that:-

“Further we are in physical possession of the suit property and the issue of prayer No. 2 is a conflict of the orders of the court”.

This appears to be the basis of the notice of motion dated 19th December 2016.

21. I have perused the court record. The orders sought by the plaintiffs/applicants vide the notice of motion dated 26th October 2016 and which were granted were :-

“1. That the notice of motion dated 26th October 2016 is considered and certified urgent.

2. That for (14) days only, the defendants/respondents are hereby restrained from interfering with the possession of the 1st plaintiff’s property. That is LR No. 209/10481/106.

3. That for (14) days only the defendants/respondents be and are hereby ordered to maintain the status quo until further orders of the court.

4. That the applicants to serve the respondents for interpartes hearing on 10th November 2016 before any ELC judge.”

The notice of motion dated 26th October 2016 had sought order No. 3 in the alternative. Furthermore, I believe the court having gone through the application was satisfied that the 1st plaintiff/applicant was in possession of the suit premises. No evidence has been presented by the defendants/applicants to the contrary. As stated all those issues will come to light at the hearing of the main suit.

22. Order 40 rule 4(7) of the Civil Procedure Rules provides that:-

“Any order for an injunction may be discharged or varied or set aside by the court on an application made thereto by any party dissatisfied with such order”.

It is within the court’s discretion to set aside ex parte orders upon sufficient grounds being given by the dissatisfied party. I find that the defendants/applicants herein have not put forward any evidence to demonstrate that the plaintiffs/applicants are guilty of material non disclosure of facts. I rely on the case of **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1995] eKLR.**

I am not convinced that there are sufficient reasons presented to warrant this court interfere with orders of Hon. Justice L. Gacheru issued on 27th October 2016.

23. The upshot of the matters is that I find no merit in the notice of motion dated 19th December 2016. The same is dismissed. The costs to abide the outcome of the main suit.

24. In conclusion, I find merit in the notice of motion dated 26th October 2016 and I grant the orders sought namely:-

i. That an order of temporary injunction be and is hereby issued restraining the defendants/respondents from interfering with the possession of the 1st plaintiff’s/applicant’s suit property that is LR NO. 209/10481/106 pending the hearing and determination of this suit.

ii. That costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18TH day of DECEMBER 2018.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant

.....Court Assistant