



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 91 OF 2017

VICTORIA NAIYONOI KIMINTA.....PLAINTIFF

=VERSUS=

GLADYS KIMINTA PRINSLOO.....DEFENDANT

RULING

1. Pursuant to a Lease registered as Title Number IR 88908/1, the parties to this suit are joint owners (referred to in legal and statutory parlance as joint tenants) of Apartment Number A3 situated in Block A on Land Reference Number 4857/25. The Plaintiff, through a Complaint lodged in court on 7/2/17, alleges that the joint tenants unequivocally agreed to let out the Apartment and share the accruing rental income. The Plaintiff alleges that the Defendant has reneged on this arrangement. The Plaintiff further contends that the Defendant has threatened to unilaterally dispose the suit property. Consequently, the Plaintiff seeks against the Defendant a permanent injunction restraining the Defendant against disposing the suit property. She also seeks a share of the rental income accruing from the suit property since the year 2002 when the suit property was jointly acquired. Together with the Complaint, the Plaintiff lodged a Notice of Motion Application dated 7/2/2017 seeking conservatory orders in respect of the suit property and the rental income accruing from the suit property. That Notice of Motion is the subject of this Ruling.

2. It is not in dispute that the parties to this suit jointly own the suit property and are registered as joint tenants. The Defendant, however, contends that she solely purchased the suit property and caused it to be registered in their joint names. She further contends that the Plaintiff is not entitled to a share of the rental income accruing from the suit property because she is merely a trustee of the Defendant. The Defendant has in her Replying Affidavit renounced the Plaintiff's joint title to the suit property. She has, however, annexed to her Replying Affidavit sworn on 23/2/2017 an agreement for sale which, wittingly or unwittingly, confirms that the Plaintiff was a co-purchaser of the suit property.

3. The issue to be determined in this Ruling is whether the Plaintiff's Application dated 7/2/2017 satisfies the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**. In summary, a party seeking an interlocutory injunction must establish that he has a prima facie case with a probability of success and that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted. Lastly, if the court is in doubt, the application is to be decided on a balance of convenience.

4. The basis of the Applicant's suit and Application is that she is a registered co-owner of the suit property and she is entitled to the rights, privileges and benefits flowing from the Title. In determining whether a prima facie case with a probability of success has been established by the Applicant, this court is required to answer the question as to what legal rights flow from registration as proprietor of an interest in land. The court is also invited to pronounce itself on the place of equity viz-avis the statute in the context of our current land law regime and constitutional framework. Lastly the court is called upon to

make a preliminary pronouncement on whether the Defendant's allegation of existence of a trust has been evidentially supported.

5. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

“ a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

6. A close scrutiny of Sections 25 and 28 of the Land Registration Act does reveal that this statute did preserve elements of equity in so far as they relate to trusts. Trusts are expressly recognized as overriding interests under Section 28 of the Act. To this extent, a party invoking equity to challenge the right of a registered title holder would be entitled to do so provided he is able to back his equitable claim with proper evidence of existence of a fiduciary relationship between himself and the registered proprietor.

7. Under Section 24(b) of the Land Registration Act, the registration of a person as a proprietor of a lease vests in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant to the title. Under Section 25(1) the rights of a proprietor are indefeasible except as provided in the Act and are held by the proprietor, together with all privileges and appurtenances belonging the title, free from all other interests and claims whatsoever but subject only to the encumbrances and overriding interests specified in Section 25(1) (a) and Section 28 of the Land Registration Act and to the duty and obligations of the proprietor holding title as a trustee.

8. Article 40 of the Constitution of Kenya protects the right to acquire property either individually or in association with others. It also provides a broad framework of principles ring-fencing the right to enjoy the benefits and privileges accruing from ownership of property.

9. In resisting the Plaintiff's Application, the Defendant contends that the Plaintiff as a joint tenant is merely her trustee. There is, however, absolutely no material placed before the court to support the alleged existence of a trust relationship between the parties herein. Without going into the merits of the parties' respective cases, a joint tenant alleging existence of a trust and seeking to deprive the other co-owner the right to enjoy the rights, privileges and benefits accruing from the joint title is obligated to put forth evidence of existence of a trust. In the absence of any such evidence, the presumption is that the property belongs to the registered joint tenants. Indeed Section 26(1) of the Land Registration Act provides as follows:-

“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title to that proprietor shall not be subject to challenge, except:

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

10. Taking into account the provisions of Article 40 of the Constitution, Sections 24, 25 and 26 of the Land Registration Act, and having considered the material presented to the court by the parties' and having evaluated the able submissions by counsel for the parties herein, I am satisfied that the Applicant

has established a prima facie case with a probability of success. As a joint tenant, the Applicant is entitled to the protection contemplated under Article 40 of the Constitution and the rights, privileges and appurtenances safeguarded by Sections 24, 25 and 26 of the Land Registration Act. I am also satisfied that damages are not an adequate remedy for an ongoing and continuing abrogation of constitutional rights and statutory privileges and appurtenances by one joint tenant against the other.

11. In view of the fact that the Defendant is relatively old and might immediately require her share of rental income accruing from the suit property, it would be inappropriate to keep the money in court for long. Consequently, I make the following orders in disposing the Plaintiff's Notice of Motion dated 7/2/2017.

(a) Pending the hearing and final determination of this suit, the suit property, Flat Number A3 Block A situate on L R No. 4857/25 Kileleshwa shall remain rented and all rental income from the Flat shall be deposited in this court.

(b) Either party shall be at liberty to move the court at a reasonable interval for apportionment of the rental income at 50%:50% and the court shall release to each party her respective share pending the hearing and final determination of this suit.

(c) Pending the hearing and final determination of this suit, the Defendant is hereby restrained against unilaterally selling, transferring or charging the suit property.

Dated, signed and delivered at Nairobi on this 10th day of May 2017.

B M EBOSO

J U D G E

In the presence of:-

E. Munya Advocate for the Plaintiff

No appearance - Advocate for the Defendants

Kevin - Court clerk