



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1092 OF 2016

LUCY WANGARI NGUGI.....PLAINTIFF

VERSUS

ELIZABETH ATIENO WANYANGA.....1ST DEFENDANT

TELEPOSTA PENSION SCHEME TRUSTEES REGISTERED....2ND DEFENDANT

RULING

What is before the court is the Plaintiff's Notice of Motion dated 8th September 2016 seeking a temporary injunction to restrain the 2nd Defendant from selling, alienating, wasting away, disposing, transferring to a third party, claiming or distressing for rent, evicting and/or interfering in any manner with the Plaintiff's quiet and peaceful enjoyment and possession of all that property known as House No. 4 (hereinafter referred to as "the suit property") situated at City Park, Nairobi on LR No. 209/870/36 and an order that the Defendants do forthwith deposit in court all relevant completion documents, including but not limited to the duly executed transfer in favour of the Plaintiff, consent to transfer, rates and rent clearance certificates, duly executed valuation form, original titles in respect to the suit property.

The application is supported by two affidavits sworn by the Plaintiff on 8th September 2016 and 7th October 2016 respectively. The Plaintiff's case are against the Defendants as set out in the two supporting affidavits is as follows. On 27th October 2008, the 1st Defendant and 2nd defendant entered into an agreement for sale under which the 2nd Defendant agreed to sell to the 1st Defendant the suit property at a consideration of Kshs. 7,100,000/= on the terms and conditions which were set out in the said agreement for sale. After the said agreement between the Defendants, the Plaintiff and the 1st Defendant entered into an agreement for sale dated 7th November 2008 under which the 1st Defendant with the consent of the 2nd Defendant assigned all her interest in the suit property to the Plaintiff at a consideration of Kshs. 9,137,760/=. The completion date of the agreement between the Plaintiff and the 1st Defendant was 30th November 2008 when the Defendants were to provide her with the completion documents in exchange with the balance of the purchase price. The Plaintiff complied with her part of the agreement with the 1st Defendant and took possession of the suit property. The 2nd defendant was at all material times aware of the agreement that Plaintiff had entered into with the 1st Defendant. The completion of the agreement between the Plaintiff and the 1st Defendant was dependent on the readiness and willingness of the 2nd Defendant to provide the relevant completion documents to the 1st Defendant for the completion of the agreement between the Defendants.

The Plaintiff made all the payments which were provided for under the agreement between the Plaintiff and the 1st Defendant save for the balance of the purchase price in the sum of Kshs. 6,390,000/= which

she was to pay on the completion date. The Plaintiff has always been willing and ready to pay the said amount which was due under the agreement between the Defendants. The Plaintiff has been unable to make the payment because the 1st Defendant has been unable to complete the agreement between them to due to the 2nd Defendant's failure to deliver to the 1st Defendant the requisite completion documents set out in clause 6.2 of the agreement between the Plaintiff and the 1st Defendant. The 2nd Defendant has always acknowledged the agreement between the Plaintiff and the 1st Defendant and has indefinitely extended the completion date by demanding and receiving rent from the Plaintiff for her occupation of the suit property pending completion. The 2nd Defendant has failed to honour many promises it had made to deliver the original documents of title to facilitate completion of the agreements the parties had entered into or to give a definite date of completion.

The 2nd Defendant has continued dishonestly without any intention of completing the agreements aforesaid to demand and collect rent from the Plaintiff at the rate of Kshs.35,000/= per month. Between 30th November 2008 and 31st August 2016 the 2nd Defendant demanded and received from the Plaintiff rent totaling Kshs. 3,364,330/= pending completion of the agreements aforesaid. The 2nd Defendant has failed to avail the completion documents but has continued to unjustly, maliciously and dishonestly enrich itself by claiming and collecting rent from the Plaintiff. On 28th July 2016, the 2nd Defendant unlawfully and without just cause purported to levy distress against the Plaintiff to recover alleged rent arrears of Kshs. 1,035,000/= which it claimed to be due and owing by the 1st defendant. As at the date of the proclamation, the Plaintiff had overpaid rent to the 2nd Defendant for the suit property to the tune of Kshs. 1,312,330/=. The distress was carried out with the intention of exploiting the Plaintiff and causing him irreparable loss and damage. The Defendants owe the Plaintiff fiduciary and contractual duty to complete their obligations under the two agreements which the parties had entered into within reasonable time. The rent being demanded by the 2nd Defendant over and above the rent that was agreed to be payable under the agreement between the Defendants after the failure by the 2nd Defendant to complete the said agreement amounts to unjust enrichment, breach of trust and contract. The distress against the Plaintiff was illegal because the Plaintiff was not the 2nd Defendant's tenant.

The Defendants filed replying affidavits in opposition to the Plaintiff's application. The 1st Defendant admitted in her affidavit sworn on 7th October 2016 that she entered into the agreement for sale dated 27th October, 2008 with the 2nd Defendant and subsequently the agreement for sale dated 7th November 2008 with the Plaintiff. The 1st Defendant stated that she sold her interest in the suit property to the Plaintiff because of her inability to raise the purchase price. The 1st Defendant stated that the Plaintiff was not ready willing and able to complete the agreement she had entered into with the Plaintiff because she was unable to raise the balance of the purchase price. The 1st Defendant contended that the Plaintiff had a duty to continue paying rent to the 2nd Defendant until the payment of the balance of the purchase price. The 1st Defendant denied that the Defendants had extended the completion date indefinitely and/or refused to complete the said agreements for sale. The 1st Defendant denied that the Plaintiff had paid rent over and above what was provided for in the agreement for sale. The 1st Defendant stated that the Plaintiff had failed to perform her part of the agreement between them. The 1st Defendant contended that the payment of the balance of the purchase price was not dependent on the 2nd Defendant delivering original documents of title to the Plaintiff. The 1st Defendant stated that her efforts to complete the agreement were frustrated by the Plaintiff's failure to pay the balance of the purchase price to the 2nd Defendant.

The 2nd Defendant responded to the application through a replying affidavit of Peter Rotich sworn on 8th November, 2016. In the affidavit, the 2nd Defendant admitted that it had entered into an agreement with the 1st Defendant on 27th October 2008 for the sale of the suit property. The 2nd Defendant denied any knowledge of the agreement for sale dated 7th November 2008 between the Plaintiff and the 1st Defendant and contended that it owed no duty to the Plaintiff. The 2nd Defendant contended that it was not aware that the 1st Defendant who had remained in occupation of the suit property had parted with

possession to the Plaintiff. The 2nd Defendant denied that the Plaintiff was its tenant. The 2nd Defendant denied having received any rent from the Plaintiff. The 2nd Defendant insisted that the 1st Defendant was still its tenant and that she was irregular in her payment of rent and was in rent arrears to the tune of Kshs. 985,000/= as at 31st July 2015. The 2nd Defendant contended that it levied distress against the 1st Defendant to recover this amount. The 2nd Defendant stated that it had not sold the suit property to any third party after rescinding the agreement with the 1st Defendant. The 2nd Defendant contended that the Plaintiff had no cause to action against it.

The application was argued on 24th November 2016 when Mr. Litoro appeared for the Plaintiff, Ms. Kasina for the 1st Defendant and Ms. Mbaabu for the 2nd Defendant. I have considered the Plaintiff's application together with the affidavits which were filed in support thereof. I have also considered the affidavits by the Defendants in opposition to the application and the submissions by the parties' respective advocates. The principles upon which this court exercises its discretion in application of this nature were enunciated in the case of Giellavs.Cassman Brown & Co. Ltd. (1973) E. A. 358. In that case, it was held that 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 as to the above, it will determine the application on a balance of convenience. On the material before me, I am satisfied that the Plaintiff has established a prima facie case against the Defendants with a probability of success. The Plaintiff has demonstrated that the 1st Defendant had entered into an agreement for sale with the 2nd Defendant dated 27th October 2008 in respect of the suit property. The firm of Kale Maina&Bundotich Advocates acted for both Defendants in the transaction. The Plaintiff has also shown that after about two weeks from the date of the agreement between the Defendants, the Plaintiff entered into an agreement with the 1st Defendant on 7th November 2008 under which the 1st Defendant assigned her interest in the suit property under the agreement she had entered into with the 2nd Defendant to the Plaintiff. Again, the firm of Kale Maina&BundotichAdvocates acted for the Plaintiff and the 1st Defendant in the transaction. The Plaintiff has demonstrated that the 2nd Defendant was aware of the assignment by the 1st Defendant of her interest in the suit property to the Plaintiff. The Plaintiff has exhibited a letter dated 3rd June 2009 by Kale Maina&BundotichAdvocates who were acting for the Plaintiff and the Defendants in the sale of the suit property confirming that the 2nd Defendant had no objection to the transaction between the Plaintiff and the 1st Defendant. I am of the view that the 2nd Defendant having represented through the said firm of Kale Maina&Bundotich Advocates that it had approved the assignment of the 1st Defendant's interest in the suit property to the Plaintiff and the Plaintiff having acted on that representation by paying to the 1st Defendant substantial sums of money, the 2nd Defendant is estopped from claiming that it owed no obligation to the Plaintiff.

As I have stated above, it was not disputed that the firm of Kale Maina&BundotichAdvocates acted for the 2nd Defendant in the sale of the suit property. It follows therefore that the said firm of advocates is presumed to have had ostensible authority to bind the 2nd Defendant in that transaction unless proved otherwise. There is no evidence placed before court that the firm of Kale Maina&Bundotich Advocates acted without instructions when it wrote a letter confirming that the 2nd Defendant had no objection to the sale agreement between the Plaintiff and the 1st Defendant. Until it is proved that the said firm of advocates acted without instructions, the 2nd Defendant is bound by the representations which the said firm made on its behalf.

I am of the view that the 2nd Defendant having approved the assignment of the 1st Defendant's interest in the suit property to the Plaintiff, the 2nd Defendant owed a duty to the Plaintiff to facilitate the completion of the agreement dated 7th November 2008 between the Plaintiff and the 1st Defendant. The Plaintiff has contended that it has always been ready, willing and able to complete the agreement it entered into with the 1st Defendant but the 1st Defendant has been unable to complete the said agreement due to the 2nd Defendant's failure to make available to the 1st Defendant the completion documents under the agreement dated 27th October 2008 between the 1st Defendant and the 2nd Defendant. The Plaintiff has contended

that the 2nd Defendant after refusing to complete the agreement it entered with the 1st Defendant has continued to levy rent against the Plaintiff an act which the plaintiff has claimed to be unjust, dishonest and amounts to self-enrichment. I am in agreement with the Plaintiff that rent was only payable pending completion of the agreements between the Defendants and between the Plaintiff and the 1st Defendant. I am also in agreement with the Plaintiff that if the 2nd Defendant has refused to complete the agreement between the 2nd Defendant and the 1st Defendant and to facilitate the completion of the agreement between the Plaintiff and the 1st Defendant, the 2nd Defendant cannot continue to claim rent from the Plaintiff for indefinite period. The 2nd Defendant had contended that it rescinded the agreement for sale it entered into with the 1st Defendant for failure on the part of the 1st Defendant to complete the agreement. I have noted from the purported letter of rescission dated 20th July 2009 that the same was copied to the Plaintiff although the 2nd Defendant has claimed to be a stranger to the Plaintiff. It is not clear how this letter was sent to the 1st Defendant and the Plaintiff. Whether or not the notice was served can only be determined at the trial. I am satisfied that the Plaintiff has a genuine grievance against the Defendants which should be investigated at the trial. For the foregoing reason, I am satisfied that the Plaintiff has made out a case for a temporary injunction against the Defendants. I am also satisfied that the Plaintiff would suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted. The Plaintiff had also sought a mandatory injunction. I am not satisfied that the plaintiff has made out a case warranting a mandatory injunction.

The upshot of the foregoing is that the Plaintiff's application succeeds in part and is allowed on the following terms:

(1) Pending the hearing and determination of this suit or further orders by the court, the 2nd Defendant is restrained from selling, charging, alienating, transferring, evicting or interfering with the Plaintiffs quiet and peaceful occupation of all that property known as House No. 4 situated at City Park Nairobi on LR No. 209/870/36.

(2) Pending the hearing and determination of this suit, the Plaintiff shall with effect from 1st August 2017 and on the 1st day of each succeeding month pay rent which was payable to the 2nd Defendant under the agreement for sale dated 7th November 2008 between the Plaintiff and the 1st Defendant into a bank account in the joint names of the advocates for the Plaintiff and the advocates for the 2nd Defendant.

(3) The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 27th Day of June, 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

Mr. Mugo h/b for Litoro for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Kajuju Court Assistant