



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CASE NO. 83 OF 2011

JOYCE IRENE ATIENO AKEYO.....PLAINTIFF

VERSUS

MICHAEL GEORGE OKEYO..... 1ST DEFENDANT

THOMAS JOSEPH OKEYO.....2ND DEFENDANT

MARGARET AWUOR ORIARO.....3RD DEFENDANT

CHIEF LANDS REGISTRAR.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Through amended plaint dated 1st April 2011, the Plaintiff brought this suit against the defendants seeking among others; a permanent injunction to restrain the 1st and 2nd defendants from selling, advertising for sale, transferring and/or dealing in any manner with all that parcel of land known as L.R. No. Nairobi/Block 72/700 Onyonka Langata, the cancellation of the name of the 3rd defendant from the register of the said parcel of land as the owner thereof and the replacement thereof with the name of the plaintiff and, general damages. In the amended plaint, the plaintiff averred that at all material times she was the wife of the 1st defendant. The 1st defendant had however inherited another wife. The 1st defendant lived with his inherited wife at Kileleshwa in Nairobi while the plaintiff lived alone at Onyonka Estate, Langata, Nairobi on house No. A122 which is situated on L.R. No. 72/700 (hereinafter referred to as “**the suit property**”). The suit property was at all material times registered in the name of the 1st defendant. The plaintiff averred that without her knowledge or consent, the 1st defendant transferred the suit property fraudulently to the 2nd defendant who in turn transferred the same to the 3rd defendant so as to conceal the fraud and to put the property out of reach of the plaintiff.

The plaintiff averred that the suit property is her matrimonial home a fact which the 3rd defendant knew or ought to have known and desisted from being used by the 1st and 2nd Defendants in their fraudulent scheme. The plaintiff averred that the suit property was transferred to the 2nd defendant by the 1st defendant and subsequently by the 2nd defendant to the 3rd defendant while she was in occupation thereof. The plaintiff averred that the transfer of the suit property by the 1st defendant to the 2nd defendant and subsequently to the 3rd defendant was carried out fraudulently and in bad faith with a view to deny her, her rights over the suit property and to render her homeless. It is on account of the foregoing that the plaintiff sought the reliefs set out above.

All the defendants entered appearance but only the 3rd defendant filed a statement of defence and counter-claim. The 1st, 2nd, 4th and 5th defendants did not file a defence to the plaintiff's claim. In her defence, the 3rd defendant averred that she is the absolute registered owner of the suit property and that the plaintiff's occupation of the suit property is illegal. The 3rd defendant denied that she was the 2nd wife of the 1st defendant and contended that she purchased the suit property in good faith for valuable consideration from the 2nd defendant. The 3rd defendant denied that she was a party to any fraud or collusion in relation to the sale of suit property. The 3rd defendant averred that as the registered owner of the suit property, she is entitled to enjoy all rights associated with such ownership.

In her counter-claim, the 3rd defendant averred that she purchased the suit property from the 2nd defendant at a consideration of Kshs.8,500,000/= part of which she obtained from Barclays Bank of Kenya Ltd. as a loan. The 3rd defendant averred that after paying the purchase price, the suit property was transferred to her on 19th January 2011 after all consents necessary for such transfer had been obtained and she was issued with a certificate of lease on the same date. The 3rd defendant averred that as at the time she purchased the suit property from the 2nd defendant, there was no encumbrance registered against the title of the property. The 3rd defendant averred that the plaintiff is a trespasser on the suit property with no proprietary interest thereon of any nature. The 3rd defendant averred that the plaintiff's continued occupation of the suit property has subjected her to loss of rental income from the suit property at the rate of Kshs.54,000/= per month. In her counter-claim, the 3rd defendant has sought judgment against the plaintiff for; a declaration that the 3rd defendant is the sole owner of the suit property, vacant possession of the suit property, a permanent injunction restraining the plaintiff from entering the suit property, mesne profits at the rate of Kshs.54,000/= per month from January 2011 until vacant possession is given to the plaintiff, special damages in the sum of Kshs.200,000/= and general damages.

On 9th July 2012, the 3rd Defendant filed an application by way of Notice of Motion dated 6th July 2012 seeking among others an order for the eviction of the plaintiff from the suit property, a temporary injunction restraining the plaintiff from entering the suit property until the hearing and determination of this suit, a sum of Kshs.972,000/= as rent arrears upto June, 2012 and further rent from July, 2012 at the rate of Kshs.54,000/= until the hearing and determination of the suit. In the alternative, the defendant sought an order for security in the sum of Kshs.8,500,000/= to be deposited by the Plaintiff in an interest earning account to be held in the joint names of the plaintiffs and the 3rd defendant's advocates and an order that the plaintiff do account for the rental income earned from the servant quarter on the suit property and to pay the income found due to the 3rd defendants to her. The 3rd defendant's application was heard before Nyamweya J. In her submissions before Nyamweya J. the 3rd defendant only pursued the prayers that related to the payment of rental income and the alternative prayer for security for costs.

In her ruling dated 23rd October, 2013, Nyamweya J. ordered the plaintiff to deposit a sum of Kshs.1,000,000/= as security for costs in default of which the 3rd defendant was at liberty to apply for her eviction from the suit property. The plaintiff did not deposit the security that was ordered by the court. What is now before me is the 3rd defendants application by way of Notice of Motion dated 2nd July, 2014 in which the 3rd defendant has sought the following orders:-

1. That summary judgment be entered against the plaintiff as prayed in the 3rd defendant's amended Defence and counter-claim dated 19th November, 2012.
2. That the Plaintiff be evicted from the suit property.
3. That the plaintiff be compelled by way of a mandatory injunction to give vacant possession of the suit property to the 3rd defendant.
4. That a permanent injunction be issued restraining the plaintiff from interfering or in any way dealing with the suit property.
5. That the O.C.S Langata Police Station be directed to enforce the orders issued herein.
6. That the costs of this application and the entire suit be awarded to the defendant.

The 3rd defendant's application was brought on the following grounds; the 3rd defendant is the registered owner of the suit property having purchased the same from the 2nd defendant at a consideration of Kshs.8,500,000/-, the 3rd defendant has not taken possession of the suit property because the plaintiff who is in occupation thereof has refused to vacate the same and that, the plaintiff's occupation of the suit property is without any lawful justification. The application was supported by the 3rd defendant's affidavit to which she annexed copies of her certificate of lease for the suit property dated 19th January, 2011 and an agreement for sale dated 22nd November, 2010 between her and the 2nd defendant in respect of the suit property as evidence of her ownership of the said property.

The plaintiff filed neither a replying affidavit nor grounds of opposition in response to the 3rd defendant's application dated 2nd July, 2014. When the application came up for hearing on 14th October, 2014, the plaintiff's advocates did not appear and the court directed the 3rd defendant's advocates to file and serve upon them written submissions in respect of the said application dated 2nd July, 2014. When the application came up for mention on 21st April, 2015, the 3rd defendant advocates had filed their written submissions while the plaintiff's advocates had not done so. On that day, the plaintiff's advocates informed the court that they no longer had instructions to act for the plaintiff. The court directed the said advocates to file an application to cease acting for the plaintiff within 14 days from that date.

When the application came up for mention before me on 29th July, 2015 about 3 months later, the plaintiff's advocates had neither filed an application to cease acting for the plaintiff nor submissions and the 3rd defendant's advocates urged the court to proceed and make a ruling on the 3rd defendant's application dated 2nd July, 2014 which at that time had been pending for a year. I have considered the 3rd defendant's application together with the affidavit filed in support hereof. I have also considered the written submissions by the 3rd defendant's advocates and the case law cited in support thereof. In her application, the 3rd defendant has sought essentially summary judgment against the plaintiff and a mandatory injunction. It is not clear whether the latter relief is sought in the alternative or not. I will consider the two prayers one after the other. The second prayer would however be considered only if the first prayer for summary judgment fails. The principles upon which the court exercises its discretion in applications for summary judgment are well settled. The law is that if the defence put forward by the defendant raises even only one triable issue, the defendant is entitled to defend the suit and summary judgment would not be entered. See, **Hasmani vs. Banque du Congo Belge (1938) 5 E.A.C.A 89**, **Kundanlal Restaurant vs. Devshi & Company [1952] 19 E.A 77** and **Postal Corporation of Kenya vs. Inamdar & 2 others [2004] 1 KLR 359**. The common thread running through these cases is that, if the defendant shows a bonafide triable issue, he must be allowed to defend the suit unconditionally. The 3rd defendant's case against the plaintiff is that she is the absolute proprietor of the suit property which she acquired from the 2nd defendant for valuable consideration. The 3rd defendant has contended that the plaintiff is a trespasser on the suit property who has no right of whatsoever nature to occupy the said property. The 3rd defendant has annexed to her affidavit in support of the application herein, a copy of the agreement for sale which the 3rd defendant entered into with the 2nd defendant in respect of the suit property. The purchase price is given in the said agreement for sale as Kshs.8,500,000/=. The 3rd defendant has averred that after paying the said purchase price, the suit property was transferred to her on 19th January, 2011 on which date she was also issued with a certificate of lease. The 3rd defendant has annexed to her affidavit in support of the application a copy to the said certificate of lease dated 19th January 2011. The 3rd defendant has contended that when she purchased the suit property, the same was registered in the name of the 2nd defendant, and there was no encumbrance of whatsoever nature on the title thereof. The 3rd defendant was contended that she was not privy to the relationship if any that existed between the plaintiff, the 1st defendant and the 2nd defendant neither was she a party to the alleged fraud in the transfer of the suit property by the 1st defendant to the 2nd defendant before the same was sold to her.

I have not seen a copy of the reply to defence and defence to counter-claim in the court file. It appears as

if the plaintiff did not file one. This means that the 3rd defendant's counter-claim against the plaintiff is not controverted. As I have mentioned above, the plaintiff did not also file grounds of opposition or replying affidavit in response to the present application. In the circumstances, there is no indication as to the defence if any which the plaintiff has to the defendant's counter-claim. As things stand, there is no defence to the counter-claim. Where no defence is shown or established, the court has no discretion when considering an application for summary judgment. Due to the foregoing, I am satisfied that the 3rd defendant's application for summary judgment is well founded. Consequently I hereby enter summary judgment for the 3rd defendant against the plaintiff in terms of prayers (a), (b) and (c) in the 3rd defendant's amended defence and counter-claim dated 19th November, 2012. The plaintiff shall vacate and hand over possession of the suit property to the 3rd defendant within sixty (60) days from the date of service upon her of a copy of the decree extracted from this judgment failure to which the 3rd defendant shall be at liberty to apply for her forcefully eviction from the property. The 3rd defendant shall set down the counter-claim for formal proof with respect to prayers (d), (e) and (f) thereof. The costs of the counter-claim shall await the determination of the said prayers.

Delivered, Dated and Signed at Nairobi this 29th day of January, 2016

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

N/A for the Defendants