



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO. 650 OF 2014

SAIMA JEPKEMBOI ONDIMU..... PLAINTIFF

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS

HOUSING & URBAN DEVELOPMENT.....1ST DEFENDANT

ATTORNEY GENERAL..... 2ND DEFENDANT

CHRISTOPHER MUGA CHIKA.....3RD DEFENDANT

RULING

I have before me two (2) applications, one by the Plaintiff dated 22nd May 2014 and the other by the 3rd Defendant dated 22nd April, 2015. In her application, the Plaintiff has sought an injunction to restrain the Defendants from evicting or in any manner whatsoever interfering with the Plaintiff's quiet possession, use and enjoyment of House Number HG/580 A located at Kileleshwa Nairobi (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. In the second application, the 3rd Defendant has sought several prohibitory and mandatory injunctive reliefs against the Plaintiff in relation to the suit property. The two applications were brought on the grounds set out on the faces thereof and on the supporting affidavits of the Plaintiff and the 3rd Defendant.

The parties' respective cases as brought out on the grounds set out on the two applications, the supporting affidavits and written submissions can be summarized as follows; starting with the Plaintiff's case. The Plaintiff has contended that she was at all material times a civil servant. On account of her employment with the government, she was allocated the suit property which was a government house as her residence. On or about 18th August, 2004, the 1st Defendant's predecessor, Ministry of Lands and Housing(hereinafter referred to only as "**the 1st defendant**") issued a circular (hereinafter referred to as "**the first circular**") through which it offered to sell government houses to civil servants on terms and conditions which were contained in the said circular. Under the terms of the said circular, priority was to be given to civil servants who were occupying the houses they were interested to purchase and who were up to date in their rent payments. Those who were interested in the offer were to submit an application together with 10% deposit on or before 31st October 2004. Since 31st October 2004 fell on a Sunday, the Plaintiff submitted her application to purchase the suit property and 10% deposit to the 1st Defendant on 2nd November 2004 having relied on the representation made by the 1st Defendant that the said application and deposit would be accepted unconditionally. Contrary to the assurance that the 1st Defendant had given to the Plaintiff, the 1st Defendant rejected the Plaintiff's application together with

the 10% deposit. On 26th November 2004, the 1st Defendant sent out another circular of the same date (hereinafter “**the second circular**”) once again offering to sell government houses to civil servants. The Plaintiff who had appealed against the refusal of the 1st Defendant to accept her application and 10% deposit under the first circular made afresh application to purchase the suit property following this second circular. The plaintiff learnt later that the suit property had been sold to the 3rd Defendant who was also a civil servant although the Plaintiff was the most qualified to purchase the property.

On 27th May 2005, a notice was issued to the Plaintiff to vacate the suit property. The Plaintiff has contended that she was entitled to have the suit property sold to her. The plaintiff has contended further that having been in occupation of the suit property and having already paid the 10% deposit within the time that was provided in the second circular, she should have been given priority to purchase the suit property. The Plaintiff has contended that she had legitimate expectation that the suit property would be sold to her.

The Plaintiff was aggrieved with the sale of the suit property to the 3rd defendant and decided to challenge the same through an application for judicial review namely, **Nairobi High Court, Misc. Application No. 648 of 2005, Republic vs. The Permanent Secretary Ministry of Lands and Housing, Ex-parte Saima Jepkemboi Ondimu** (hereinafter referred to as “**the judicial review application**”). The 3rd Defendant was joined in the application as an interested party.

The Plaintiff has contended that the judicial review application was heard and determined on 14th February 2014 and that the court stated in its ruling that the Plaintiff’s claim was not within the purview of judicial review. The Plaintiff has contended that following the determination of the said judicial review application, there were threats to arbitrarily and unjustifiably evict her from the suit property and this is what brought about these proceedings and the present application.

On his part, the 3rd Defendant has contended that he is the lawful owner of the suit property. The 3rd Defendant has contended that he purchased the suit property from the government through the 1st defendant after the second circular; the Plaintiff having failed in her bid to purchase the suit property under the first circular. The 3rd defendant has contended that the Plaintiff’s continued occupation of the suit property is illegal and that the Plaintiff is a trespasser on the said property and should be compelled to handover the same to the 3rd Defendant. The 3rd defendant has contended that the Plaintiff’s application for judicial review was dismissed on merit after a period of more than ten (10) years during which period the Plaintiff remained in occupation of the suit property without any right to do so. The 3rd Defendant has contended that the Plaintiff is seeking through her present application to remain in occupation of the suit property without any legitimate entitlement thereto. The 3rd Defendant has termed the present suit and application as abuse of the court process.

On their part, the 1st and 2nd Defendants have contended that Plaintiff’s suit is time barred as against the 1st and 2nd Defendants and that the Plaintiff’s application does not satisfy the conditions for grant of interlocutory injunction.

On 29th January 2015, the court directed that the Plaintiff’s application be heard by way of written submissions. The Plaintiff, the 1st and 2nd Defendants and the 3rd Defendant filed their submissions on 19th March 2015, 29th May 2015 and 26th May 2015 respectively. The submissions by the Plaintiff and the 1st and 2nd Defendants were restricted to the Plaintiff’s application dated 22nd May 2014 while the 3rd Defendant’s submissions also touched on his application dated 22nd April, 2015. I took over this file from another judge. It is not clear to me from the record whether the Plaintiff’s and the 3rd Defendant’s applications were consolidated for hearing together. I have not seen any response from the Plaintiff to the 3rd Defendant’s application. It is not clear whether the Plaintiff filed an affidavit and submissions in response to the said application. I am of the view that owing to the state of this file, it would not be safe to consider the two applications together. In the circumstances, this ruling will be limited to the Plaintiff’s

application dated 24th May 2014 in respect of which clear directions had been given. The parties will have to take directions on the disposal of the 3rd Defendant's application.

What is before me is an application for interlocutory injunction. The principles upon which this court exercises its discretion in applications of this nature are now well settled. In the case of **Giella vs. Cassman Brown and Co. Ltd. (1973) E.A 358** which was cited by the Plaintiff in support of her submissions, it was held that an applicant for a temporary injunction must establish:-

- (i) A prima facie case with a probability of success
- (ii) That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- (iii) If in doubt, the court shall determine the application on a balance of convenience.

In the of **Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125**, the court defined a prima facie case 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 as to call for an explanation or rebuttal from the latter.”

In the case of **Nguruman Limited vs. Jan Bonde Nielsen No. 77 of 2012**, the court stated that;-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

The court went further to state that;

“.....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the 3rd Defendant's affidavit sworn on 22nd April 2015 in support of the 3rd Defendant's application dated 22nd April 2015 which was also used to oppose the Plaintiff's application herein. Finally, I have considered the 1st and 2nd Defendants' grounds of opposition and the parties' respective submissions and the authorities which were cited in support thereof. On the material before me, I am not satisfied that the Plaintiff has established a prima facie case against the Defendants with a probability of success. I am of the view that the Plaintiff cannot run away from the judicial review application which she had instituted against the 1st Defendant herein in which the 3rd Defendant was an interested party. In the said application, the Plaintiff had sought; an order of certiorari to quash the decision of the 1st Defendant herein to offer the suit property for sale to the 3rd Defendant, an order of prohibition prohibiting the 1st defendant from alienating the suit property to the 3rd Defendant or anyone else and an order compelling the 1st Defendant to enter into an agreement for sale with the Plaintiff in respect of the suit property and to accept the balance of the purchase price for the same. The Plaintiff's application for judicial review was opposed by the 1st and 3rd Defendants herein on among other grounds that the remedies of judicial review were not available to the Plaintiff. The Plaintiff's judicial review application was heard by Majanja J. who dismissed the same on 14th February 2014 having found it to had no merit. In his Judgment Majanja J. stated among others as follows:

“14. It is not in dispute that the House belonged to the Government and was offered for sale through the circulars whose contents I have outlined above. The First Circular was directed at Civil servants occupying Government houses. The applicant conceded that she did not meet the terms thereof. As she did not do so, she is not entitled to the House and a court cannot assist her in that respect. The only other term upon which she could acquire the House was to apply under the second circular which she did not. As a result there is no basis upon which the court can grant the orders to enforce what would amount to a contract in the absence of compliance with the terms thereof(emphasis mine).”

15. On the other hand the interested party has demonstrated that he complied with the terms of the sale set out in the second circular. Under the terms of that circular, offers were called from Civil Servants who were not in occupation of the houses presumably after the exercise under the First Circular has been completed. He has entered into a binding contract with the respondent and is entitled to take possession of the House. There is no basis upon which the court can deprive him of his contractually accrued rights in these proceedings(emphasis mine).”

19. In my view, the applicant’s case is misguided as the terms of acquisition of the House were clearly spelt out in the circulars..... Once the applicant failed to meet the terms of the First Circular, no contract could be concluded and that was the end of the matter.

21. As I have dealt the substance of the Applicant’s claim, it is not necessary for me to deal with the technical objections to the motion raised by the interested party.”(emphasis mine).

The forgoing findings by Majanja J. are binding upon the Plaintiff. This court and the High Court have concurrent jurisdiction. This Court would not be able to overturn the above findings which were made by Majanja J. on the same material which has been presented once again before this court. In his judgment, Majanja J. concluded that the Plaintiff did not meet the terms under which the suit property was offered for sale by the government through the 1st Defendant and as such the Plaintiff is not entitled to the suit property and cannot be assisted by the court to obtain the same.

Majanja J. also made a finding that the 3rd Defendant herein had complied with the terms that were set out in the second circular by the 1st Defendant and had entered into a binding contract with the 1st Defendant. He made a finding that the 3rd Defendant was entitled to possession of the suit property and that there is no basis upon which the court can deprive him of the same. I am of the view that the reliefs sought by the Plaintiff herein are intended to achieve what the Plaintiff was deprived of in the judicial review application. The parties herein are to a large extent the same as the parties to the judicial review application, the issues which have been put forward for determination are the same and the material relied on are the same. I am not persuaded that this court has power to re-open the issues which were raised by the parties herein before Majanja J. and in respect of which a determination had been made. In view of the findings that were made by Majanja J. in the judicial review application, I am not satisfied that the Plaintiff has established a prima facie case against the defendants. I have independently also considered the material before me and I am not persuaded that the Plaintiff has established a right over the suit property which is threatened with violation by the Defendant and in respect of which the Plaintiff deserves protection of this court.

Having reached the conclusion that the Plaintiff has failed to establish a prima facie case with a probability of success, it is not necessary for me to consider whether the Plaintiff would suffer irreparable injury if the orders sought are not granted or the balance of convenience. If I was to consider whether the Plaintiff would suffer irreparable injury if the orders sought herein are not granted, I would have held against the Plaintiff on the issue. I am of the view that the Plaintiff can be paid damages by the 1st and 2nd Defendants if the court finds at the trial that the Plaintiff and not the 3rd Defendant was entitled to the suit property.

For the foregoing reasons, I find no merit in the Notice of Motion dated 22nd May 2014. The same is

accordingly dismissed with costs to the Defendants.

Dated and Delivered at Nairobi this 2nd Day of August, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Wilson h/b for Munge **for the Plaintiff**

N/A **for the 1st and 2nd Defendants**

N/A **for the 3rd Defendant**

John **Court Assistant**