



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1047 OF 2013

DEBORAH ACHIENG ADUDA.....1ST PLAINTIFF/APPLICANT

RENE JOHNY DIERKK.....2ND PLAINTIFF/APPLICANT

VERSUS

FLORENCE SEYANOI KIBERA A.K.A.

DOROTHY SEYANO MOSCHION.....DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 29th August 2013 in which the Plaintiffs/Applicants seek for orders of an injunction restraining the Defendant from selling, leasing, licensing, occupying, taking possession of, developing, accessing or in any manner dealing with the parcel of land described as Sub-plot B measuring 1 acre hived off from Land Reference Number 5892/22 situated in Karen (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiffs/Applicants also seek for an order of mandatory injunction compelling the Defendant to grant the Plaintiffs possession of the suit property pending the hearing and determination of this suit and an order of inhibition inhibiting the registration of any dealings with the suit property.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Deborah Achieng Aduda, sworn on 29th August 2013 in which she averred that by a Sale Agreement dated 16th February 2012, the Defendant agreed to sell and the Plaintiffs who are husband and wife agreed to purchase the suit property for the sum of Kshs. 28,000,000/-. She confirmed that they paid the Defendant a deposit of Kshs. 10,000,000/- and that the balance was payable in equal monthly installments of US\$ 1,750 until payment in full. She further stated that it was an express term of the Sale Agreement that the property was sold free from encumbrances and that they would take exclusive possession thereof from the date of execution of the Sale Agreement. She stated that after paying the deposit to the Defendant, the Defendant refused to give them possession of the suit property. She further stated that the Defendant also went ahead to enter into a Lease Agreement with a Mr. Constantine George Sphikas in which the Defendant leased to him the whole of Land Reference No. 5892/22 including the suit property for a period of 10 years for a consideration of Kshs. 300,000/- per month. She also added that the Defendant also went ahead to enter into yet another Lease Agreement with one Fredrick Okiki Amayo leasing the said parcel of land to him for a period of 10 years. She confirmed

that she reported the matter to the police and lodged a complaint with the Land Fraud Section of the Criminal Investigation Department upon which the Defendant was arrested and charged with the offence of obtaining the sum of Kshs. 10 million from them under false pretenses in **Nairobi Chief Magistrates Court Criminal Case No. 1134 of 2012**. She further averred that the Defendant's actions were clearly unlawful and fraudulent since the Defendant did not intend to transfer to and or grant them possession of the suit property at all. She added that all their efforts to have the Defendant refund the deposit of Kshs. 10 million paid to her have been futile since the Defendant has refused to make the refund. She also stated that they are extremely apprehensive that should the Defendant transfer, lease and or in any manner alienate, dispose of or deal with the entire Land Reference No. 5892/22 before transferring to them the suit property, they stand to suffer irreparable loss and damage hence this Application.

The Application is contested. The Defendant, Florence Seyanoi Kibera, filed her Replying Affidavit filed on 29th October 2013 in which she averred that the Sale Agreement dated 16th February 2012 no longer subsists having been rescinded on 2nd August 2012. She further averred that the suit property does not exist and that its identity, location and character is not known, identifiable or ascertained and as such the court cannot issue orders which are in vain. She also averred that the Plaintiffs did not have money to purchase the suit property having failed to pay even one installment as agreed. She added that after failing to pay the installments, the Plaintiffs requested to be refunded their deposit. She further averred that the Plaintiffs sought relief through the criminal charges leveled against her and that this suit is a mere afterthought. She further asserted that as the legal and rightful owner of the land, she has both constitutional and statutory right to deal with her land as she deems fit and that the Plaintiffs cannot dictate how she should deal with her land. She further averred that she never refused to give the Plaintiffs vacant possession but that the Plaintiffs failed to fulfill their part of the bargain and breached the Sale Agreement leading to its rescission. She added that the Plaintiffs refused to receive a refund of their deposit. She also added that the Plaintiffs' remedy if any lies in damages.

The Plaintiffs have requested for an order of temporary injunction, mandatory injunction and an order of inhibition to be issued in respect of the suit property.

In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

It is an undisputed fact that the suit property is registered in the name of the Defendant and is part of a larger parcel of land identified as Land Reference Number 5892/22 situated in Karen. The Plaintiffs lay claim to the suit property, a 1 acre parcel of land, on the strength of a Sale Agreement dated 16th February 2012 entered between them and the Defendant. The Defendant acknowledges that she received a deposit of Kshs. 10 million from the Plaintiffs for the suit property but contends that she rescinded the said Sale Agreement on the basis that the Plaintiffs failed to make the monthly installments agreed upon. It is the Defendant's contention therefore that the Plaintiffs have no valid claim over the suit property as the said Sale Agreement is no longer in force. At this interlocutory stage of these proceedings, I will avoid to

make a definitive finding as to whether the Plaintiffs have any valid claim at all over the suit property. However, even at this interlocutory stage, I am inclined to believe the position taken by the Defendant that indeed the said Sale Agreement was rescinded and the Plaintiffs have no claim over the suit property. To that extent therefore, I find that the Plaintiffs have not succeeded to show that they have a prima facie case with high chances of success at the main trial. Since the Plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

The Plaintiffs/Applicants also sought for a mandatory injunction compelling the Defendant to grant them possession over the suit property. I decline to issue that order for the reasons cited above. Even an order of inhibition shall not issue for the same reasons.

Arising from the foregoing, I hereby dismiss the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 13TH

DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE