



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 211 OF 2014

SABINE TANJA KUSSHAUER PLAINTIFF

VERSUS

NIMROD NJUEH MATE.....1ST DEFENDANT

MARY KARIMI NJUE.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 18th February 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from transferring, charging, disposing of or interfering in any manner with the parcel of land known as Nairobi/ Block 97/1675 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and that pending the hearing and determination of this suit a receiver be appointed to manage the suit property.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Sabine Tanja Kussbauer, sworn on 18th February 2014 in which she averred that on 1st July 2013, she and the Defendants entered into a sale agreement in which the Defendants agreed to sell to her the suit property at a purchase price of Kshs. 15 million. She annexed a copy of the sale agreement. She further averred that according to clause 2(a) of the said sale agreement, she was required to pay a deposit of Kshs. 1,500,000/- to the Defendants’ advocates which she did on 10th July 2013. She further averred that according to clause 2(d) of the sale agreement, the balance of Kshs. 13,500,000/- was payable to the Defendants’ advocates upon due registration of the transfer of the suit property in her favour. She further intimated that according to clause 3 of the sale agreement, the completion date was agreed to be 30 days from the date of the sale agreement but added that the Defendants had failed to complete the transfer within that period. She then stated that on 27th September 2013, the Defendants executed a transfer which her advocates rejected because the advocate attesting the transfer on the part of the 2nd Defendant did not have a valid practicing certificate at the time of the attestation of the transfer. She added that her advocate’s disapproval was communicated to the Defendants’ advocates by a letter dated 29th October 2013. She stated further that since then, her advocates have made numerous requests to the Defendants’ advocates for a valid transfer but the Defendants have failed to deliver the same. She then stated that she was apprehensive that the Defendants may deal with the suit property in a manner meant to defeat her right of having the suit property

transferred to her.

The Application is contested. The Defendants/Respondents filed their Grounds of Opposition dated 12th March 2014 stating that the Plaintiff is the one who constrained the Defendants to rescind the sale agreement after serving upon her 21 days' notice as required in the sale agreement. They further stated that in spite of being supplied with all the completion documents, the Plaintiff failed to complete the sale transaction and that it is the Plaintiff who frustrated the sale transaction. Further, they stated that the Plaintiff can be adequately compensated by way of damages if her suit succeeds so she is not entitled to the temporary injunction. Further, they stated that the suit property is not under danger of being sold, charged or interfered with having in mind that the Plaintiff had lodged a caution over the suit property at the Lands Office blocking any further dealings. The 1st Defendant, Nimrod Njueh Mate, also filed his Replying Affidavit sworn on 12th March 2014 making similar averments as contained in the Grounds of Opposition.

Both the Plaintiff and the Defendants filed their written submissions herein.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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.”

Has the Plaintiff/Applicant 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.”

Has the Plaintiff/Applicant made out a prima facie case? In determining whether the Plaintiff/Applicant has established a prima facie case, I must consider whether she has demonstrated, on a prima facie basis, that she has a right to specific performance. This would depend on whether she can demonstrate that she was ready, able and willing to complete the transaction. The remedy of specific performance was dealt with by the Court of Appeal in **Civil Appeal No. 165 of 1996 Gurdev Singh Birdi v. Marinder Singh Ghatora and Abubakar Hadhbuti**, in which Gicheru, JA (as he then was) expressed himself thus:

“when the appellants sought the relief of specific performance of sale of the respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement... which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement ...”

In this particular suit, the question begging an answer is whether the Plaintiff was entitled to reject the transfer documents on the grounds that they were attested to by an incompetent person. **Section 3(3)** of the **Law of Contract Act** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. The said Act did not stipulate that the party attesting the contract must be a qualified advocate with a valid practicing certificate. In the case of **Sammy Some Kosgei vs Grace Jelet Boit [2013] e KLR** on the question of attestation of the document, the court held that:

“.....I do not know of any law that provides that a person has to be an advocate with a practicing certificate to draw an agreement. There are many homemade agreements and I do not think it is in the contemplation of the law to have all of them disregarded because they were never drawn by advocates....Section 3(3) of the Law of Contract Act does not stipulate that the agreement must be attested by an advocate. The statute only mentions a witness. This witness in my view does not have to be an advocate.”

In light of the foregoing, I find that the transfer signed by the 2nd defendant was a valid transfer and the Plaintiff’s advocates had no good reason whatsoever to reject it. On a prima facie basis, I find that the Plaintiff has failed to establish that she is entitled to the right of specific performance for this reason. She has therefore failed to show that she has a prima facie case with high chances of success at the main trial.

Since the Plaintiff has 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...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 12TH OF MAY 2015.

MARY M. GITUMBI

JUDGE