



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1019 OF 2013

VIRGINIA NJERI MURIMAH..... PLAINTIFF

VERSUS

MBO-I KAMITI FARMERS CO. LTD.....DEFENDANT

RULING

The Plaintiff in a Notice of Motion dated 22nd August 2013 is seeking orders for a temporary injunction restraining the Defendant from interfering with her quiet possession of Plot No. L.R 96/1 Loresho & Kiora Plaintantion (hereinafter referred to as the suit property), or in anyway selling or transferring the said property pending the hearing and determination of this suit. Further, that the OCS Kiambu Police Station assist in enforcing this orders. The Notice of Motion is supported by an affidavit and further affidavit sworn by the Plaintiff on 22nd August 2013 and 15th October 2013 respectively, as well as submissions filed by her counsel dated 1st November 2013.

The Plaintiff is a co-administrator of the estate of James Ngamau Machua (hereinafter “the Deceased) who died on the 5th January, 2011. The Deceased had prior to his death entered into a sale agreement for the purchase of the suit property, and had paid a deposit of Kshs.1,000,000/=. The Plaintiff claims that after the death of the Deceased she made several attempts to settle the balance of the purchase price, which was Kenya Shillings Four Million Five Hundred (Kshs.4,500,000/=), but that the Defendant declined to receive the balance. The Plaintiff on the other hand also claims that the Defendant had offered her an alternative plot in exchange for the suit property, and that they had agreed that she would value the suit property, which she did. The Plaintiff yet again claimed that the Directors of the Defendant had assured her that the balance of the purchase price of the suit property would be deducted from the Deceased’s dues. This was because the Deceased worked as a treasurer for the Defendant before his death.

The Plaintiff further stated that on 20th August, 2013, she was given backdated notices to complete the sale agreement and one cancelling the said agreement and purporting to forfeit the amount paid by the Deceased. She claimed that the sale agreement provided for a completion period of 90 days, and that the Deceased died before the completion period. She attached copies of the sale agreement entered into between the Deceased and Defendant, the valuation reports of the property, photographs of the said property and the aforesaid notices.

The Plaintiff in her submissions argued that she would suffer irreparable loss and damage if the Defendant is not restrained as the Deceased had heavily invested in the said land, and was also killed on the same land and as such she has a sentimental attachment to the same. Further, that the Defendant also needs to first account for the Deceased dues, and had only recently served her with notice in August 2013 which contravened the sale agreement.

The Defendants opposed the said Notice of Motion in a replying affidavit sworn on 4th September 2013 by Stephen Kimani Mihiu, a director and secretary of the Defendant. The Defendant's counsel also filed submissions dated 8th November 2013. The Defendant stated that the Plaintiff has never approached the Defendant with the intention of finalizing the purchase of the suit property as alleged or at all, and also that she has never at any time met with the Defendant's board of directors concerning the sale/transfer of the suit property herein as alleged. Further, that the Defendant did not inform the Plaintiff that the deceased's dues would be deducted and paid for the suit property, and the Plaintiff was paid all dues that were to be paid to her deceased husband.

The Defendant averred that the Plaintiff only reacted upon realizing that the sale transaction has been nullified, and that it was categorical in the sale agreement that on default of payment of the entire consideration on or before the 30th January 2011, the vendor would immediately cancel the transaction with no notice, and that the purchaser was to forfeit the amount paid. Further, that the suit property's value is now triple or more since 2010, hence the Plaintiff cannot allege that she is ready to pay only Kshs 4,500,000/=. The Defendant also claimed that it had already subdivided the suit property before this suit was filed, and the orders sought cannot therefore be executed.

The Defendant's counsel in their submissions argued that the Plaintiff has not disputed the fact that there is a default in payment as agreed in the sale agreement, which also provided that the Defendant was not to issue any notice upon default. Further, that the Plaintiff has no right in the suit property, and the only claim if any the Plaintiff has is for damages.

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of the sale agreement entered into between the Deceased and the Defendant dated 1st November 2010 for the purchase of the suit property for Kshs 5,500,000/=. The agreement states that the Defendant had received Kshs 1,000,000/= as deposit, and the balance of Kshs 4,500,000/= was to be paid within 90 days. In addition clause 6 of the said agreement provided for the consequences of default and states as follows :

“In default of payment of the entire consideration on or before the 30th day of January 2011, the Vendor shall immediately cancel the transaction with no notice and the Purchaser to forfeit the amount paid.”

Unfortunately the Deceased died on 5th January 2011 before the completion date, and it is apparent that the balance of the purchase price remains unpaid. The Plaintiff has not brought any evidence of the further agreements with the Defendant on the alternative plot that she was to be given, or that the balance of the purchase price would be paid out of the Deceased's dues. As these agreements were transactions affecting land, and varying an earlier agreement already entered into with respect to the suit property, they required to be in writing.

I also note from the Plaintiff filed herein dated 22nd August 2013 that the Plaintiff is seeking a permanent injunction against the Defendant and that the said Defendant issues her with a title to the suit property. In light of the lack of evidence of the non-payment of the balance of the purchase price, and the provisions of the default clause in the sale agreement entered into between the Deceased and Defendant, I find that the Plaintiff has not established a *prima facie* case.

The Plaintiff's Notice of Motion dated 22nd August 2013 is accordingly denied, and the costs of the said motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 27th day of January, 2014.

P. NYAMWEYA

JUDGE