



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 236 OF 2013

PAUL NG'ANG'A NYAGA.....PLAINTIFF

VERSUS

DIPTI BHATT *also known as* DIPTI FERNAN.....DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 14th February 2013 in which the Plaintiff/Applicant is seeking for orders that a temporary injunction be issued restraining the Defendant from disposing of or in any other manner interfering with the Plaintiff's quiet possession of the parcel of land known as L.R. No. 14870/520 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application and suit together with the costs of the Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Paul Ng'ang'a Nyaga, sworn on 14th February 2013 in which he averred that he entered into a Sale Agreement dated 14th May 2010 with the Defendant for the purchase of the Suit Property at an agreed purchase price of Kshs. 1,700,000/-. He further averred that as stipulated in that Sale Agreement, he paid a deposit of Kshs. 255,000/- and a further Kshs. 170,000/- to the Defendant and also took possession of the Suit Property as agreed. He further averred that in the Sale Agreement, they did not specifically set down a time for completion as the Defendant had lost her original title deed to the Suit Property and she was to obtain a Provisional Certificate of Title, a process which took a year. He further pointed out that they agreed that he would pay the balance of the purchase price upon registration of the transfer. He further averred that upon receiving the Provisional Certificate of Title, the Defendant declined to submit it to her lawyers for purposes of effecting the transfer but proceeded to instruct new lawyers. He further indicated that the Defendant's new lawyers began to demand that he pay up the balance of the purchase price which he declined to pay before the transfer into his name. He stated that lately some individuals have been visiting the Suit Property and he is apprehensive that the Defendant may sell it off. He emphasized that he has already developed the Suit Property and has always been ready to complete the transaction.

The Application is contested. The Defendant, Dipti Bhatt Fernandes, filed her Replying Affidavit sworn on 25th February 2013 in which she stated that it is true she entered into a Sale Agreement for the sale of the Suit Property to the Plaintiff. She further confirmed subsequently changing her lawyers who wrote to

the Plaintiff's lawyers requesting for the balance of the purchase price to facilitate completion of the sale. She further stated that the Plaintiff's lawyers replied through their letter of 23rd August 2011 stating that they had no problems releasing the balance of the purchase price and requested for her advocate's bank details. She further stated that her advocates by their letter dated 26th October 2011 furnished the Plaintiff's advocates with their bank details. She further averred that her advocates obtained all but one of the completion documents, namely the consent to transfer which could not be issued as the land file could not be traced. She further stated that as a result, the payment of the balance of the purchase price was held in abeyance and that for the better part of 2011 and 2012, the land file could not be traced at the Lands Office. She further stated that the file was finally traced in October 2012, when her advocates applied for and obtained the Consent from the Commissioner of Lands. She then stated that her advocates thereafter tried in vain to reach the Plaintiff to arrange for completion but the Plaintiff could not be traced forcing her advocates to issue a completion notice to the Plaintiff and to his advocates. She further indicated that the 21 days given in the completion notice lapsed on 14th December 2012 without any response from the Plaintiff or his advocates. She indicated further that on 4th February 2013, her advocates received a letter from Nganga Nyaga & Co. Advocates but since the sale had been rescinded, she instructed her advocates to refund the purchase price less 10% which had been forfeited. She stated further that it is not true that the Plaintiff was ready to complete at all times and that it is not the Plaintiff who was to obtain the completion documents. She further indicated that it would not have been possible to release the completion documents to the Plaintiff before paying the balance of the purchase price or giving an acceptable professional undertaking. She further averred that the Plaintiff breached the Sale Agreement when he failed to pay the balance of the purchase price, or failed to provide an acceptable professional undertaking or respond to the completion notice. She further disclosed that she had the intention of completing the sale and that it is not true that she wanted more money for the Suit Property. She also disclosed that the Suit Property is vacant and undeveloped contrary to the allegations by the Plaintiff that he has developed the same. She also confirmed that the balance of the purchase price less 10% had been refunded to the Plaintiff.

In response thereto, the Plaintiff filed his Further Affidavit sworn on 15th March 2013 in which he stated that the Sale Agreement was clear that at no time was he required to pay the balance of the purchase price for the Suit Property prior to registration. He further stated that the completion notice sent to him did not lie as it was express that the balance of the purchase price was payable upon registration and to date the Suit Property has not been registered in his name. He further stated that he left the law firm J. M. Njenga Advocates where he had been a partner and set up his own practice, a fact which was within the knowledge of the Defendant with whom he stated he stayed in touch with. He confirmed that he received a refund of the purchase price on a without prejudice basis.

In further response thereto, the Defendant filed her Supplementary Affidavit sworn on 10th April 2013 in which she stated that the completion notice was served on J. M. Njenga Advocates property as they were at all material times the advocates on record for the Plaintiff and that neither she nor her advocates were served with any communication to the effect that

J. M. Njenga Advocates had ceased to be the Plaintiff's advocates. She further stated that the question whether or not the Plaintiff was a partner in J. M. Njenga Advocates is immaterial in ascertaining the advocates on record for the Plaintiff. She also stated that the allegation that the Plaintiff was sick is an afterthought meant to hoodwink the court as the same was never communicated to her advocates or herself.

Both the Plaintiff and the Defendant filed their written submissions which have been considered for purposes of this ruling.

In deciding whether to grant the sought after temporary injunction, 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 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.”

There is the danger of being drawn into determining the merits of this case at this interlocutory stage of these proceedings. All that I am required to do at this stage is to establish whether the Plaintiff has established a genuine and arguable case warranting him protection as we await the final determination of the main suit. In this suit, there is no dispute as to who the registered proprietor of the Suit Property is. Both parties have agreed that the Defendant is the holder of the title deed for the Suit Property. The Plaintiff seeks an injunction on the strength of a Sale Agreement entered between him and the Plaintiff for the purchase of the Suit Property. The Plaintiff’s argument is that that Sale Agreement confers upon him the right to complete the purchase of the Suit Property from the Defendant. It is the Defendant’s contention that the Sale Agreement is no longer in existence owing to the lapse of the completion notice she issued to the Plaintiff which the Plaintiff failed to respond to. Without making my final determination on this issue, I am convinced that on a prima facie basis, the Defendant was willing and ready to perform her obligation to transfer the Suit Property to the Plaintiff in accordance with the Sale Agreement but that this was made impossible by the lack of response from the Plaintiff. I therefore find that the Plaintiff has not succeeded to establish a prima facie case with a probability of success at the main trial. Having made this finding, I see no need in further interrogating whether the other two conditions in the ***Giella*** case have been met. I therefore dismiss this application. Costs shall be in the cause.

SIGNED AND DELIVERED IN NAIROBI THE 14TH DAY OF
 FEBRUARY 2014

MARY M. GITUMBI

JUDGE